

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

THERESE M BURRIS
Claimant

HY-VEE INC
Employer

APPEAL 17A-UI-07275-CL

**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 06/04/17
Claimant: Appellant (1)

Iowa Code § 96.6(2) – Timeliness of Appeal
Iowa Code § 96.5(2)a – Discharge for Misconduct

STATEMENT OF THE CASE:

The claimant filed an appeal from the June 23, 2017, (reference 01) unemployment insurance decision that denied benefits based upon a discharge for misconduct. The parties were properly notified about the hearing. A hearing was held in Des Moines, Iowa, on August 4, 2017. Claimant participated. Employer participated through store director, Abbie Olson and assistant manager of perishables, Ben Wolfe. Employer was represented by Pamela Kiel with Corporate Cost Control via telephone. Claimant's Exhibit A was received. Employer's Exhibit 1 was received.

ISSUES:

Is the appeal timely?
Was the claimant discharged for disqualifying job-related misconduct?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: A disqualification unemployment insurance decision was mailed to the claimant's last known address of record on June 23, 2017. Claimant received the decision July 18, 2017. The decision contained a warning that an appeal must be postmarked or received by the Appeals Bureau by July 3, 2017. The appeal was not filed until July 20, 2017, which is after the date noticed on the unemployment insurance decision.

Claimant began working for employer on October 11, 2014. Claimant last worked as a part-time salad bar clerk. Claimant was separated from employment on May 31, 2017, when she was terminated.

Employer has a policy stating that employees working more than four hour shifts are entitled to breaks in increasing increments depending on the length of the shift. The policy states that employees must remain inside of the store during break as they are being paid for break time. The policy states that if an employee clocks out for lunch he or she may leave the premises, but must be clocked out for a minimum of 30 minutes. Claimant was aware of the policy.

Effective April 2017, employees were instructed to notify the employee in charge of accounting, their supervisor, or the store director if they had a time clock issue. Every Monday, the accounting employee runs payroll. After running payroll, the employee posts a list of all hours worked by all employees next to the time clock. Employees are instructed to review the hours and to notify the accounting department of any inaccuracies.

On Saturday, May 27, 2017, claimant was working. During her shift, claimant left the premises from 8:34 p.m. until 9:03 p.m. Claimant did not clock out during that time. Claimant's supervisor was on vacation, but store director Abbie Olson was working. Claimant did not notify Olson or any other supervisor that she failed to clock out during break.

On Monday, May 29, 2017, the hours worked by employees during the previous week, which included May 27, were posted next to the time clock.

On Tuesday, May 30, 2017, claimant worked. Claimant did not notify anyone that her listed work hours for May 27, 2017, were inaccurate. At 1:04 p.m. claimant left the premises for break, but did not clock out. Store director Olson was working, but claimant did not inform Olson or any other supervisor of her failure to clock out for break.

On May 30, 2017, another employee reported to Olson several instances where claimant had been paged, but did not return the page calls and no one could find claimant. Olson asked assistant manager of perishables Ben Wolfe to review surveillance footage to find where claimant was located while being paged. Wolfe discovered claimant failed to clock out when she left the premises on May 27 and May 30.

On May 31, 2017, Olson terminated claimant's employment.

Claimant had never been previously warned for similar conduct.

REASONING AND CONCLUSIONS OF LAW:

The first issue to be considered in this appeal is whether the appellant's appeal is timely. The administrative law judge determines it is.

Iowa Code § 96.6(2) provides, in pertinent part:

The representative shall promptly examine the claim and any protest, take the initiative to ascertain relevant information concerning the claim, and, on the basis of the facts found by the representative, shall determine whether or not the claim is valid, the week with respect to which benefits shall commence, the weekly benefit amount payable and its maximum duration, and whether any disqualification shall be imposed. . . . Unless the claimant or other interested party, after notification or within ten calendar days after notification was mailed to the claimant's last known address, files an appeal from the decision, the decision is final and benefits shall be paid or denied in accordance with the decision.

The appellant did not have an opportunity to appeal the unemployment insurance decision because the decision was not received in a timely fashion. Without timely notice of a disqualification, no meaningful opportunity for appeal exists. See *Smith v. Iowa Emp't Sec. Comm'n*, 212 N.W.2d 471, 472 (Iowa 1973). The appellant filed the appeal within two days of receipt. Therefore, the appeal shall be accepted as timely.

The next issue is whether claimant was discharged for a disqualifying reason. The administrative law judge concludes she was.

Iowa Code § 96.5(2)a provides:

An individual shall be disqualified for benefits, regardless of the source of the individual's wage credits:

2. Discharge for misconduct. If the department finds that the individual has been discharged for misconduct in connection with the individual's employment:

a. The individual shall be disqualified for benefits until the individual has worked in and has been paid wages for insured work equal to ten times the individual's weekly benefit amount, provided the individual is otherwise eligible.

Iowa Admin. Code r. 871-24.32(1)a provides:

Discharge for misconduct.

(1) Definition.

a. "Misconduct" is defined as a deliberate act or omission by a worker which constitutes a material breach of the duties and obligations arising out of such worker's contract of employment. Misconduct as the term is used in the disqualification provision as being limited to conduct evincing such willful or wanton disregard of an employer's interest as is found in deliberate violation or disregard of standards of behavior which the employer has the right to expect of employees, or in carelessness or negligence of such degree of recurrence as to manifest equal culpability, wrongful intent or evil design, or to show an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to the employer. On the other hand mere inefficiency, unsatisfactory conduct, failure in good performance as the result of inability or incapacity, inadvertencies or ordinary negligence in isolated instances, or good faith errors in judgment or discretion are not to be deemed misconduct within the meaning of the statute.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. *Huntoon v. Iowa Dep't of Job Serv.*, 275 N.W.2d 445, 448 (Iowa 1979).

The employer has the burden to prove the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law. *Cosper v. Iowa Dep't of Job Serv.*, 321 N.W.2d 6 (Iowa 1982). The issue is not whether the employer made a correct decision in separating claimant, but whether the claimant is entitled to unemployment insurance benefits. *Infante v. Iowa Dep't of Job Serv.*, 364 N.W.2d 262 (Iowa Ct. App. 1984). What constitutes misconduct justifying termination of an employee and what misconduct warrants denial of unemployment insurance benefits are two separate decisions. *Pierce v. Iowa Dep't of Job Serv.*, 425 N.W.2d 679 (Iowa Ct. App. 1988). The law limits disqualifying misconduct to substantial and willful wrongdoing or repeated carelessness or negligence that equals willful misconduct in culpability. *Lee v. Emp't Appeal Bd.*, 616 N.W.2d 661 (Iowa 2000).

Misconduct must be "substantial" to warrant a denial of job insurance benefits. *Newman v. Iowa Dep't of Job Serv.*, 351 N.W.2d 806 (Iowa Ct. App. 1984). When based on carelessness, the carelessness must actually indicate a "wrongful intent" to be disqualifying in nature. *Id.* Negligence does not constitute misconduct unless recurrent in nature; a single act is not

disqualifying unless indicative of a deliberate disregard of the employer's interests. *Henry v. Iowa Dep't of Job Serv.*, 391 N.W.2d 731 (Iowa Ct. App. 1986). Poor work performance is not misconduct in the absence of evidence of intent. *Miller v. Emp't Appeal Bd.*, 423 N.W.2d 211 (Iowa Ct. App. 1988).

In this case, claimant failed to clock out for breaks in violation of employer's policy. The conduct was intentional and amounts to theft from the company. This is misconduct even without prior warning.

DECISION:

The June 23, 2017, (reference 01) unemployment insurance decision is affirmed. The appeal is timely. The claimant was discharged from employment due to job-related misconduct. Benefits are withheld until such time as she has worked in and been paid wages for insured work equal to ten times her weekly benefit amount, provided she is otherwise eligible.

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Decision Dated and Mailed

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