

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds that: The claimant was employed as a part-time cashier/service desk associate from June 5, 2002 through September 9, 2005. She was discharged for admitted theft of a customer's property. On approximately August 21, 2005, a customer left a ring at one of the checkout counters and the cashier turned it into the employer's lost and found box located at the service desk. Doty, a co-employee, placed the ring in the box, although both she and the claimant looked at the ring before doing so. The next day, the customer returned to the store to retrieve her ring. Doty was working and went to get the ring but it was not in the box.

The employer began an investigation and involved the district loss prevention supervisor, who had to research the missing ring. He reviewed and watched numerous surveillance tapes to find the time when the ring was turned in to the service desk. That tape was found and it shows Doty leaving the area after she put the ring in the box. The tape then shows the claimant walk directly to the lost and found box and she removed something. The item she removed could not be seen and the claimant walked out of the camera's view at that point.

The loss prevention supervisor called the claimant into the office to question her about the ring on September 7, 2005. The claimant denied seeing or even knowing about a customer's missing ring. The employer went back and reviewed additional tape to make sure nothing was missed. The claimant was called into the office again on September 9, 2005. She was sitting closest to the door and the employer advised her she could leave at any time. The claimant eventually admitted taking the ring and said that it was at her home. The customer only wanted the ring back so the employer allowed the claimant to go retrieve the ring but the claimant never returned.

The claimant now contends she was held against her will and interrogated at length on two occasions. She acknowledges she admitted to theft of the ring but claims she only said that so she could leave and because that was what the loss prevention manager wanted to hear. The customer reported the claimant's theft to the police and the claimant was subsequently arrested. Criminal litigation is currently pending.

The claimant filed a claim for unemployment insurance benefits effective September 28, 2005 and has received benefits after the separation from employment in the amount of \$656.00.

REASONING AND CONCLUSIONS OF LAW:

The issue is whether the employer discharged the claimant for work-connected misconduct. A claimant is not qualified to receive unemployment insurance benefits if an employer has discharged the claimant for reasons constituting work-connected misconduct. Iowa Code § 96.5-2-a.

Iowa Code Section 96.5-2-a provides:

An individual shall be disqualified for benefits:

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.

871 IAC 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 Department of Job Service, 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 Department of Job Service, 321 N.W.2d 6 (Iowa 1982). The claimant was discharged for theft of customer property. The employer has surveillance video showing the claimant removing something from the lost and found box shortly after the ring was placed within it. The claimant did admit to the employer that she took the ring but now contends she was not telling the truth earlier but is telling the truth now. The administrative law judge does not find the claimant's explanation credible. The fact that the claimant was subsequently arrested and charged with criminal theft tends to further establish her guilt since arrests must at least have a basis in probable cause.

The discharge occurred three weeks after the theft. While past acts and warnings can be used to determine the magnitude of a current act of misconduct, a discharge for misconduct cannot be based on such past act or acts. The termination of employment must be based on a current act. 871 IAC 24.32(8). The facts demonstrate the employer acted promptly in initiating an investigation and had an excessive amount of surveillance tape to review. When considering this, a three-week delay is not unreasonable and the claimant was not discharged for a past act.

The claimant's theft of a customer's property was a willful and material breach of the duties and obligations to the employer and a substantial disregard of the standards of behavior the employer had the right to expect of the claimant. Work-connected misconduct as defined by the unemployment insurance law has been established by a preponderance of the evidence and benefits are denied.

Iowa Code Section 96.3-7 provides:

7. Recovery of overpayment of benefits. If an individual receives benefits for which the individual is subsequently determined to be ineligible, even though the individual acts in good faith and is not otherwise at fault, the benefits shall be recovered. The department in its discretion may recover the overpayment of benefits either by having a sum equal to the overpayment deducted from any future benefits payable to the individual or by having the individual pay to the department a sum equal to the overpayment.

If the department determines that an overpayment has been made, the charge for the overpayment against the employer's account shall be removed and the account shall be credited with an amount equal to the overpayment from the unemployment compensation trust fund and this credit shall include both contributory and reimbursable employers, notwithstanding section 96.8, subsection 5.

Because the claimant's separation was disqualifying, benefits were paid to which the claimant was not entitled. Those benefits must be recovered in accordance with the provisions of Iowa law.

DECISION:

The unemployment insurance decision dated September 28, 2005, reference 01, is reversed. The claimant is not eligible to receive unemployment insurance benefits because she was discharged from work for misconduct. Benefits are withheld until she has worked in and been paid wages for insured work equal to ten times her weekly benefit amount, provided she is otherwise eligible. The claimant is overpaid benefits in the amount of \$656.00.

sdb/s