

**IN THE IOWA ADMINISTRATIVE HEARINGS DIVISION
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

LACHELLE ELLIS
Claimant

HY-VEE INC
Employer

APPEAL 23A-UI-08724-CS-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 07/23/23
Claimant: Respondent (1)

Iowa Code §96.5(2)a-Discharge/Misconduct
Iowa Code § 96.3(7) – Recovery of Benefit Overpayment
Iowa Admin. Code r. 871-24.10 – Employer/Representative Participation Fact-finding Interview

STATEMENT OF THE CASE:

On September 12, 2023, the employer/appellant filed an appeal from the September 7, 2023, (reference 01) unemployment insurance decision that allowed benefits based on claimant being discharged on July 24, 2023. The Iowa Workforce Development representative determined there was no evidence of willful or deliberate misconduct. A telephone hearing was scheduled to be held on September 28, 2023, however the employer requested the hearing be rescheduled due to the unavailability of their witness. The hearing was rescheduled for October 16, 2023. The hearing was postponed due to the claimant not receiving the employer's exhibits and the number of employer's witnesses and the unlikelihood of completing the testimony during the one hour allotment. After proper notice the hearing was held November 2, 2023. Claimant participated. Employer participated through hearing representative Kii Elliott. Stacey Mitchell, Phil Hammermeister, Marcus Leah, Dennis Bachman, and Stacy Hoard testified on behalf of the employer. Shelly Jeffrey was present as a witness for the employer but was not called to testify. Employer's exhibits 1, 2, 4, 5, 8, 9, 10, 12, 13, 14, and 15 were admitted into the record. The pre-marked exhibit 3 was combined with exhibit 2. Exhibit 6 was not admitted due to being illegible. Exhibit 7 was not admitted due to being illegible and a duplicate Exhibit 14. Exhibit 11 was not admitted due to being illegible and a duplicate to Exhibit 12. Claimant submitted a proposed document but it was not marked or admitted into evidence because claimant did not provide a copy to the employer or it being relative to the issues in this matter. Administrative notice was taken of claimant's unemployment insurance benefits including DBRO.

ISSUES:

- I. Was the separation a layoff, discharge for misconduct, or voluntary quit without good cause?
- II. Should claimant repay benefits?
- III. Should the employer be charged due to employer participation in fact finding?
- IV. Is the claimant overpaid benefits?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant began working for employer on September 28, 2021. Claimant last worked as a full-time assistant manager of e-commerce.

On July 15, 2023, an employee (hereinafter employee A) took a break in the employer's dining room where customers also dine. Employee A left the area and when he returned to the table he discovered his phone was gone.

Claimant was in the back of the store putting up food in the frozen food area when she was approached by employee A informing her his phone was taken by a customer. Employee A asked claimant to assist him in locating the customer. Claimant went with employee A and looked for the customer. A demonstrator at the front of the store informed claimant and employee A the customer had just left the store.

Claimant, employee A, and employee B left the store together. (Exhibit 15, part 2). Claimant was shoulder to shoulder with employee A and was slightly in front of employee A when opening the first set of doors that opened to another set of door that went outside. (Exhibit 15, part 2). Employee A led the group of three outside into the parking lot. (Exhibit 14, part 4). The three people stood on the sidewalk in front of the store and looked around for the customer outside. Claimant started walking to the exterior corner of the store and the other two employees followed so they could look around the corner. (Exhibit 15, part 5). When the group got to the corner of the store Employee A took off running and claimant took off running after him. (Exhibit 15, part 3 and Exhibit 15, part 6). None of the video contained audio of the incident.

Assistance Manager of Perishables, Mr. Leach, returned to the store from a delivery, upon his return he saw the parties disperse from behind the store. Mr. Leach reported what he observed to Human Resources Manager, Mr. Bauchman. Mr. Bauchman and Mr. Leach reviewed the video of the incident. Mr. Bachman observed Employee A yell at the customer, take off his shirt and throw it to the side, and physically strike the customer twice. Claimant was seen at the corner of the store approximately twenty feet from the altercation.

Claimant did not get in the middle of the altercation between the two men. Claimant did not participate in the altercation. Claimant verbally tried to get employee A to stop but he did not stop. Claimant had her phone in her hand but she did not call the police. Immediately after the altercation, the customer involved in the altercation reported the incident and the police arrived shortly after the incident.

During the employer's investigation, claimant initially stated that she did not see anything. The claimant's story was inconsistent where she admitted that by the time she got there she heard a smack or a hit and employee A already had his shirt off and she just observed yelling. Claimant's story again changed when she stated she turned away from the altercation and heard a smacking sound and turned back around to the altercation. The video of the actual incident was not provided as evidence.

Claimant was discharged from employment on July 17, 2023, due to violating the employer's policy of conduct unbecoming of an employee. The employer reference the following policies as the reason for claimant's discharge:

"The fundamental of Hy-Vee are: honesty, integrity, friendliness, caring, sincerity, respect, ethics, morals, dedication, sharing, fairness, dignity and ownership. Keeping these fundamentals in mind helps all employees provide the outstanding service our customers have grown to expect. Linger, horseplay, fighting, disorderly conduct or soliciting are not allowed... using physical or verbal abuse or profanity, removing company property without authorization, or defacing, destroying or the theft of property is not acceptable conduct." (Exhibit 12, pg. E12).

"Shoplifting and robbery are very dangerous situations. If you are confronted with such an incident, your only responsibility is to stay calm and cooperate. Nothing is more important than the safety of our employees and customers. Do not attempt any acts of heroism, including engaging in a chase of the suspect flees the store. To do so could place innocent people in danger including you. Instead, take a good look at the suspect so that you can provide as accurate a description as possible to the police when they arrive." (Exhibit 12, pg. E17).

Claimant was aware of these policies and signed an acknowledgement of these policies on September 28, 2021. (Exhibit 14).

On September 22, 2022, a memorandum was sent to the store managers that provided guidelines for handling shoplifters. The memorandum states:

"The safety of our employees is our top priority. It is imperative that we do not, under any circumstances, pursue a shoplifter outside the store. Any employee who is not a Retail Security Officer and is attempting to stop a shoplifting suspect outside of the store faces disciplinary action, up to and including termination. No questions asked...the guidelines that every employee needs to follow, should they suspect a shoplifter inside the store:

1. Notice the location of the item concealed on the individual.
2. Do not let the person leave your sight.
3. The person must pass all points of sale before they are questioned.
4. Always have two employees involved when questioning a person. Never stop alone.
 1. If possible, make sure a Retail Security Officer is involved and leads the conversation.
1. Be respectful when talking to the person. State "I would like to talk with you about items that many not have been paid for..."
2. Name the item that was concealed.
3. If the person is cooperative, take them to an area away from customers and have them produce the item.
4. Do not rough the person.
5. Call the police and handle all necessary paperwork, including trespass notices.
6. If the person is aggressive or funs, do not touch them or attempt to stop/hold them. Do not chase. Do not leave the store. Let them go
 1. Contact the police and let them handle the situation. (Exhibit 8).

Claimant did not have any prior verbal or written warnings for violating these policies.

Claimant filed for benefits with an effective date of July 23, 2023. Claimant's gross weekly benefit amount is \$508.00. (DBRO). Claimant first began receiving benefits August 6, 2023, and has received them through October 28, 2023. (DBRO). Claimant has received twelve weeks of unemployment benefits worth a gross total of \$6,096.00.

The employer received the notice of fact-finding interview. The hearing representative informed Iowa Workforce Development (IWD) they should call Phil Hammermeister for the interview. (Exhibit 1). IWD did not call Mr. Hammermeister but instead called the third-party representative. The third-party representative forwarded IWD's message to Mr. Hammermeister. Mr. Hammermeister called the deputy's number multiple times but did not receive a response.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes claimant was discharged from employment for no disqualifying reason.

Iowa Code section 96.5(2)a and d provide:

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 disqualification shall continue 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.

d. For the purposes of this subsection, "*misconduct*" means a deliberate act or omission by an employee that constitutes a material breach of the duties and obligations arising out of the employee's contract of employment. Misconduct is 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. Misconduct by an individual includes but is not limited to all of the following:

(1) Material falsification of the individual's employment application.

(2) Knowing violation of a reasonable and uniformly enforced rule of an employer.

(3) Intentional damage of an employer's property.

(4) Consumption of alcohol, illegal or nonprescribed prescription drugs, or an impairing substance in a manner not directed by the manufacturer or a combination of such substances, on the employer's premises in violation of the employer's employment policies.

(5) Reporting to work under the influence of alcohol, illegal or nonprescribed prescription drugs, or an impairing substance in an off-label manner, or a combination of such substances, on the employer's premises in violation of the employer's employment policies, unless the individual is compelled to work by the employer outside of scheduled or on-call working hours.

(6) Conduct that substantially and unjustifiably endangers the personal safety of coworkers or the general public.

(7) Incarceration for an act for which one could reasonably expect to be incarcerated that result in missing work.

(8) Incarceration as a result of a misdemeanor or felony conviction by a court of competent jurisdiction.

(9) Excessive unexcused tardiness or absenteeism.

(10) Falsification of any work-related report, task, or job that could expose the employer or coworkers to legal liability or sanction for violation of health or safety laws.

(11) Failure to maintain any licenses, registration, or certification that is reasonably required by the employer or by law, or that is a functional requirement to perform the individual's regular job duties, unless the failure is not within the control of the individual.

(12) Conduct that is libelous or slanderous toward an employer or an employee of the employer if such conduct is not protected under state or federal law.

(13) Theft of an employer or coworker's funds or property.

(14) Intentional misrepresentation of time worked or work carried out that results in the individual receiving unearned wages or unearned benefits.

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 of proof in establishing disqualifying job misconduct. *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). 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). "Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of benefits." *Lee v. Employment Appeal Bd.*, 616 N.W.2d 661, 665 (Iowa 2000).

In an at-will employment environment an employer may discharge an employee for any number of reasons or no reason at all if it is not contrary to public policy. However, if the employer fails to meet its burden of proof to establish job related misconduct as the reason for the separation it incurs potential liability for unemployment insurance benefits related to that separation. A determination as to whether an employee's act is misconduct does not rest solely on the interpretation or application of the employer's policy or rule. A violation is not necessarily disqualifying misconduct even if the employer was fully within its rights to impose discipline up to or including discharge for the incident under its policy.

The decision in this case rests, at least in part, on the credibility of the witnesses. It is the duty of the administrative law judge as the trier of fact in this case, to determine the credibility of witnesses, weigh the evidence and decide the facts in issue. *Arndt v. City of LeClaire*, 728 N.W.2d 389, 394-395 (Iowa 2007). The administrative law judge may believe all, part or none of any witness's testimony. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996). In assessing the credibility of witnesses, the administrative law judge should consider the evidence using his or her own observations, common sense and experience. *Id.* In determining the facts, and deciding what testimony to believe, the fact finder may consider the following factors: whether the testimony is reasonable and consistent with other believable evidence; whether a witness has made inconsistent statements; the witness's appearance, conduct, age, intelligence, memory and knowledge of the facts; and the witness's interest in the trial, their motive, candor, bias and prejudice. *Id.*

Furthermore, the Iowa Supreme Court has ruled that if a party has the power to produce more explicit and direct evidence than it chooses to present, the administrative law judge may infer that evidence not presented would reveal deficiencies in the party's case. *Crosser v. Iowa Dep't of Pub. Safety*, 240 N.W.2d 682 (Iowa 1976). The employer provided portions of the incident but chose not to include video of the actual incident that would show claimant's actual participation in the incident.

After assessing the credibility of the witnesses who testified during the hearing, reviewing the exhibits submitted by the parties, considering the applicable factors listed above, and using her own common sense and experience, the findings of fact demonstrate how the administrative law judge resolved the factual disputes. In this situation the claimant was approached by employee A after his personal phone was taken after he accidentally left it on a table. Employee A asked for claimant's help in locating the customer. Claimant assisted the employee in finding the customer. Just because claimant went outside to see if she could find the customer does not mean that she intended to confront the customer or for an altercation to occur. There was no evidence presented that claimant constructed a plan with employee A to harm the customer or to approach the customer. Claimant did not participate in the altercation between employee A and the customer other than she observed it. It was poor judgment in failing to contact the police immediately, but this incident appeared to take place in a very short window of time. Furthermore, the employer's policies are of no guidance in this situation. This is not a situation of shoplifting items that belong to the store, or an issue of the store being robbed.

The conduct for which claimant was discharged was merely an isolated incident of poor judgment. The employer has only shown that claimant was negligent. "[M]ere negligence is not enough to constitute misconduct." *Lee v. Employment Appeal Board*, 616 N.W.2d 661, 666 (Iowa 2000). When looking at an alleged pattern of negligence, previous incidents are considered when

deciding whether a “degree of recurrence” indicates culpability. Claimant did not have any previous warnings violating the employer’s policies. As a result, a claimant will not be disqualified if the employer shows only “inadvertencies or ordinary negligence in isolated instances.” 871 IAC 24.32(1)(a). Because the employer has failed to establish disqualifying misconduct, benefits are allowed, provided claimant is otherwise eligible. The employer’s account is subject to charge.

The issues of whether claimant has been overpaid benefits and whether the employer participated in the fact-finding interview are moot since the claimant is eligible for benefits.

DECISION:

The September 7, 2023, (reference 01) unemployment insurance decision is AFFIRMED. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided she is otherwise eligible.

The issues of whether claimant has been overpaid benefits and whether the employer participated in the fact-finding interview are moot since the claimant is eligible for benefits.

A handwritten signature in black ink that reads "Carly Smith". The signature is written in a cursive, flowing style. Below the signature, there is a small, faint, illegible stamp or mark.

Carly Smith
Administrative Law Judge

November 3, 2023
Decision Dated and Mailed

CS/jkb

APPEAL RIGHTS. If you disagree with the decision, you or any interested party may:

1. Appeal to the Employment Appeal Board within fifteen (15) days of the date under the judge's signature by submitting a written appeal via mail, fax, or online to:

**Iowa Employment Appeal Board
6200 Park Avenue Suite 100
Des Moines, Iowa 50321
Fax: (515)281-7191
Online: eab.iowa.gov**

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

AN APPEAL TO THE BOARD SHALL STATE CLEARLY:

- 1) The name, address, and social security number of the claimant.
- 2) A reference to the decision from which the appeal is taken.
- 3) That an appeal from such decision is being made and such appeal is signed.
- 4) The grounds upon which such appeal is based.

An Employment Appeal Board decision is final agency action. If a party disagrees with the Employment Appeal Board decision, they may then file a petition for judicial review in district court.

2. If no one files an appeal of the judge's decision with the Employment Appeal Board within fifteen (15) days, the decision becomes final agency action, and you have the option to file a petition for judicial review in District Court within thirty (30) days after the decision becomes final. Additional information on how to file a petition can be found at Iowa Code §17A.19, which is online at <https://www.legis.iowa.gov/docs/code/17A.19.pdf> or by contacting the District Court Clerk of Court <https://www.iowacourts.gov/iowa-courts/court-directory/>.

Note to Parties: YOU MAY REPRESENT yourself in the appeal or obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds.

Note to Claimant: It is important that you file your weekly claim as directed, while this appeal is pending, to protect your continuing right to benefits.

SERVICE INFORMATION:

A true and correct copy of this decision was mailed to each of the parties listed.

DERECHOS DE APELACIÓN. Si no está de acuerdo con la decisión, usted o cualquier parte interesada puede:

1. Apelar a la Junta de Apelaciones de Empleo dentro de los quince (15) días de la fecha bajo la firma del juez presentando una apelación por escrito por correo, fax o en línea a:

**Iowa Employment Appeal Board
6200 Park Avenue Suite 100
Des Moines, Iowa 50321
Fax: (515)281-7191
En línea: eab.iowa.gov**

El período de apelación se extenderá hasta el siguiente día hábil si el último día para apelar cae en fin de semana o día feriado legal.

UNA APELACIÓN A LA JUNTA DEBE ESTABLECER CLARAMENTE:

- 1) El nombre, dirección y número de seguro social del reclamante.
- 2) Una referencia a la decisión de la que se toma la apelación.
- 3) Que se interponga recurso de apelación contra tal decisión y se firme dicho recurso.
- 4) Los fundamentos en que se funda dicho recurso.

Una decisión de la Junta de Apelaciones de Empleo es una acción final de la agencia. Si una de las partes no está de acuerdo con la decisión de la Junta de Apelación de Empleo, puede presentar una petición de revisión judicial en el tribunal de distrito.

2. Si nadie presenta una apelación de la decisión del juez ante la Junta de Apelaciones Laborales dentro de los quince (15) días, la decisión se convierte en acción final de la agencia y usted tiene la opción de presentar una petición de revisión judicial en el Tribunal de Distrito dentro de los treinta (30) días después de que la decisión adquiriera firmeza. Puede encontrar información adicional sobre cómo presentar una petición en el Código de Iowa §17A.19, que se encuentra en línea en <https://www.legis.iowa.gov/docs/code/17A.19.pdf> o comunicándose con el Tribunal de Distrito Secretario del tribunal <https://www.iowacourts.gov/iowa-courts/court-directory/>.

Nota para las partes: USTED PUEDE REPRESENTARSE en la apelación u obtener un abogado u otra parte interesada para que lo haga, siempre que no haya gastos para Workforce Development. Si desea ser representado por un abogado, puede obtener los servicios de un abogado privado o uno cuyos servicios se paguen con fondos públicos.

Nota para el reclamante: es importante que presente su reclamo semanal según las instrucciones, mientras esta apelación está pendiente, para proteger su derecho continuo a los beneficios.

SERVICIO DE INFORMACIÓN:

Se envió por correo una copia fiel y correcta de esta decisión a cada una de las partes enumeradas.