

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

STEVEN J BAIN
Claimant

HY-VEE INC
Employer

APPEAL 17A-UI-11396-JP-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 10/08/17
Claimant: Appellant (1)

Iowa Code § 96.5(2)a – Discharge for Misconduct

STATEMENT OF THE CASE:

The claimant filed an appeal from the November 1, 2017, (reference 01) unemployment insurance decision that denied benefits. The parties were properly notified about the hearing. A telephone hearing was held on November 28, 2017. Claimant participated. Employer participated through hearing representative Lisa Harroff, human resource manager Linda Pochobradsky, and assistant store director Joe Parrott. Customer care manager Mary Yacavone attended the hearing on behalf of the employer. Employer Exhibit 1 was admitted into the record with no objection. Official notice was taken of the administrative record, including claimant's benefit payment history and claimant's wage history, with no objection.

ISSUE:

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: Claimant was employed part-time as a bottle person/courtesy clerk from October 24, 2015, and was separated from employment on October 7, 2017, when he was discharged.

The employer has a written policy that states: "Removal or consumption of store property, such as, merchandise (good or damaged), equipment, or money is GROUNDS FOR DISMISSAL." Employer Exhibit 1. Claimant was aware of the policy. Employer Exhibit 1. All bottle employees, including claimant, are instructed to take any cans or bottles that cannot be processed in the redemption machines into the store to be counted and processed. Employer Exhibit 1.

On October 7, 2017, during claimant's scheduled shift, Ms. Yacavone observed claimant pushing a cart with a couple cardboard boxes that contained empty bottles. Ms. Yacavone observed claimant place the cardboard boxes into the backseat of claimant's vehicle. The empty bottles were wine and two litter bottles that customers can redeem to receive the \$.05 deposit. Ms. Yacavone then reported what she observed to Mr. Parrott. Mr. Parrott then reviewed the surveillance cameras, including the cameras from the can and bottle redemption

room. Employer Exhibit 1. Mr. Parrott observed claimant take bottles from a bin in the redemption room that stores bottles that cannot be processed by the redemption machines. Employer Exhibit 1. Claimant placed these bottles into a cardboard box. Employer Exhibit 1. Claimant left the redemption room with the box of bottles and placed them into a cart, along with another box of bottles he found on top of a trash can outside the redemption room. Employer Exhibit 1. Claimant then pushed the cart with the boxes of bottles to his vehicle. Employer Exhibit 1. Claimant then placed the boxes containing the bottles into the backseat of his vehicle. Employer Exhibit 1. After reviewing the surveillance video, Mr. Parrott and Ms. Pochobradsky met with claimant. Employer Exhibit 1. The employer asked claimant if he had taken some bottles from the redemption room and off a trash can and placed them into his car. Employer Exhibit 1. Claimant admitted he had taken the bottles and explained he needed money. Employer Exhibit 1. Claimant told the employer it was not very much. The employer explained to claimant that his actions violated store policy and he was discharged. The employer believes the value of the bottles that claimant took was between \$1.50 and \$2.50.

Claimant does not have other full- or part-time employment in the base period and has not requalified for benefits.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes claimant was discharged from employment due to job-related misconduct. Benefits are denied.

Iowa Code section 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 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.

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).

Iowa Code section 96.5(12) provides:

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

12. *Supplemental part-time employment.* If the department finds that an individual is disqualified for benefits under subsection 1 or 2 based on the nature of the individual's separation from supplemental part-time employment, all wages paid by the supplemental part-time employer to that individual in any quarter which are chargeable following a disqualifying separation under subsection 1 or 2 shall not be considered wages credited to the individual until such time as the individual meets the conditions of requalification as provided for in this chapter, or until the period of disqualification provided for in this chapter has elapsed.

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). 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).

It is the duty of an administrative law judge and 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, as the finder of fact, 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. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996). 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 evidence you believe; whether a witness has made inconsistent statements; the witness's conduct, age, intelligence, memory and knowledge of the facts; and the witness's interest in the trial, their motive, candor, bias and prejudice. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996).

This administrative law judge assessed the credibility of the witnesses who testified during the hearing, considering the applicable factors listed above, and used my own common sense and experience. This administrative law judge reviewed the exhibit that was admitted into evidence. While the employer did not present the surveillance video from October 7, 2017, the combination of Ms. Pochobradsky and Mr. Parrott's testimony and Employer Exhibit 1, when compared to claimant's recollection of the event, establish the employer's evidence as credible. This administrative law judge finds the employer's version of events to be more credible than claimant's recollection of those events.

The employer is entitled to establish reasonable work rules and expect employees to abide by them. The employer's rule prohibiting employees from taking its property is reasonable. It is also reasonable for the employer to have its employees bring any cans or bottles that the redemption machine does not process into the store for processing.

The employer has presented substantial and credible evidence that on October 7, 2017, claimant removed bottles from the redemption room and placed them in his vehicle in violation of a known policy. Claimant's argument that the value of the bottles was not very much is not persuasive. Claimant's argument that he should have received a warning is also not persuasive. The employer has a right to protect its property from being taken, even if the value of the property is minimal. "Theft from an employer is generally disqualifying misconduct." *Quintin H Wyatt v. The University Of Iowa*, 15B-UI-08148-EAB, (dated September 17, 2015); *Ringland Johnson Inc. v. Employment Appeal Board*, 585 N.W.2d 269 (Iowa 1998). "Value is . . . not the issue" in determining misconduct and "a single attempted theft [may] be misconduct as a matter of law." *Quintin H Wyatt v. The University Of Iowa*, 15B-UI-08148-EAB, (dated September 17, 2015); *Ringland Johnson Inc. v. Employment Appeal Board*, 585 N.W.2d 269 (Iowa 1998).

The employer presented substantial and credible evidence that claimant's conduct of removing the bottles from the redemption room was a "deliberate violation or disregard of standards of behavior which the employer has the right to expect of employees[.]" Iowa Admin. Code r. 871-24.32(1)a. This is disqualifying misconduct even without prior warning. Benefits are denied. Furthermore, since claimant has not requalified for benefits since the separation and is not otherwise monetarily eligible according to base period wages, benefits are denied until he requalifies and is otherwise eligible for benefits.

DECISION:

The November 1, 2017, (reference 01) unemployment insurance decision is affirmed. Claimant was discharged from employment due to job-related misconduct, has not requalified for benefits, and is not otherwise monetarily eligible. Benefits are withheld until such time as claimant has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible.

Jeremy Peterson
Administrative Law Judge

Decision Dated and Mailed

jp/scn