

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

68-0157 (9-06) - 3091078 - EI

JEANINE B CHRISTIAN
Claimant

APPEAL NO. 19A-UI-00618-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

CASEY'S MARKETING COMPANY
Employer

OC: 12/16/18
Claimant: Respondent (2)

Iowa Code Section 96.5(2)(a) – Discharge for Misconduct
Iowa Code Section 96.3(7) - Overpayment

STATEMENT OF THE CASE:

The employer filed a timely appeal from the January 11, 2019, reference 01, decision that held the claimant was eligible for benefits provided she met all other eligibility requirements and that the employer's account could be charged, based on the deputy's conclusion that the claimant's discharge on December 17, 2018 was not based on a current act of misconduct. After due notice was issued, a hearing was held on February 5, 2019. Claimant Jeanine Christian participated. Cynthia Craig represented the employer and presented additional testimony through Jennifer Miller and Zontel McCann. The administrative law judge took official notice of the Agency's record of benefits disbursed to the claimant and received Exhibits 1 through 6, 8, 9 and 10 into evidence. The administrative law judge took official notice of the fact-finding materials for the limited purpose of determining whether the employer participated in the fact-finding interview and, if not, whether the claimant engaged in fraud or intentional misrepresentation in connection with the fact-finding interview.

ISSUES:

Whether the claimant was discharged for misconduct in connection with the employment that disqualifies the claimant for unemployment insurance benefits.

Whether the claimant was overpaid benefits.

Whether the claimant must repay overpaid benefits.

Whether the employer's account may be charged.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Jeanine Christian was employed by Casey's Marketing Company as a full-time kitchen clerk at a Casey's store in Webster City until December 17, 2018, when the employer discharged her from the employment for violating the Honesty and Integrity policy. Ms. Christian's employment began in 2013 and became full-time in 2016. At the start of the employment, the employer had

Ms. Christian sign to acknowledge her access to and obligation to read and understand the employee handbook. Ms. Christian had access to the handbook at all relevant times and had read the employee handbook, including the Honesty and Integrity policy. The Honesty and Integrity policy provides, in relevant part, as follows:

Behavior which is illegal may be reported to the proper authorities, including law enforcement. Any violation to this policy, including perceived impropriety, will result in corrective action up to and including dismissal.

- A. HONESTY. The Company hires each employee with the fact in mind that honesty and integrity are of the highest levels.
- B. TRUST. At times, the employee may be entrusted with the handling of money or other items, or with confidential information, where the opportunity for dishonesty may present itself. ...
- C. STEALING. Employees are not to remove any Company property, equipment, merchandise, or supplies from the Company premises without permission. It is the employee's responsibility to report unauthorized removal of Company property to management, regardless of the party removing the property. ...

On November 23, 2018, Ms. Christian had just finished her shift and changed out of her uniform when she observed a \$20.00 bill in the cash dispenser of the ATM machine located inside the Casey's store. Ms. Christian took the \$20.00 bill into her possession. There was no manager on duty at the time. Ms. Christian asked the other clerks whether anyone was missing money. When no one spoke up, Ms. Christian used the windfall \$20.00 to purchase lottery tickets. Ms. Christian actions were in keeping with a practice a prior supervisor had put in place that made money found on the customer side of the cash register counter fair game for employees. The practice did not comply Casey's policies.

The employer learned about the incident on December 17, 2018, when another employee spoke to Ms. Craig and Area Supervisor Jennifer Miller about the incident. Ms. Craig and Ms. Miller then reviewed surveillance video records and located the incident in the surveillance record. Ms. Craig reported the matter up the chain of command and received a directive to discharge Ms. Christian from the employment. Later that day, Ms. Craig and Ms. Miller spoke to Ms. Christian regarding the incident. Ms. Christian explained her actions. The employer had Ms. Christian review the surveillance video. Ms. Craig notified Ms. Christian that she was being discharged from the employment.

Ms. Christian established an original claim for benefits that was effective December 16, 2018 and received \$1,854.00 in benefits for the seven weeks between December 23, 2018 and February 9, 2019. Casey's is the sole base period employer in connection with the claim.

On January 10, 2019, an Iowa Workforce Development Benefits Bureau deputy held a fact-finding interview that addressed Ms. Christian's separation from the employment. Ms. Christian participated in the fact-finding interview and provided a statement that did not include statements intended to mislead the deputy. No one from Casey's and no one with personal knowledge of the event in question participated in the fact-finding interview. Zontel McCann, an Unemployment Insurance Consultant with Talx/Equifax, provided a verbal statement to the deputy. Ms. McCann had no personal knowledge of the matter in question and did not having anyone with personal knowledge standing by to participate in the fact-finding interview. Ms. McCann's verbal statement indicated a discharge that was not based on a current act and, therefore, not based on misconduct in connection with the employment. Ms. McCann told the deputy that Store Manager Cynthia Craig discharged Ms. Christian on December 17, 2018 for

violating the employer's honesty and integrity policy. Ms. McCann told the deputy that on November 23, 2018, the employer observed Ms. Christian taking money from an ATM machine that Ms. McCann guessed someone had left behind. Ms. McCann told the deputy that Ms. Christian had shown the money to the other clerks and had used the money to purchase lottery tickets. Ms. McCann told the deputy that Ms. Christian should have turned the money over to management. Ms. McCann told the deputy that she was unsure whether the conduct was grounds for immediate termination under Casey's policy. Ms. McCann told the deputy that she was unsure whether the employer considered the found money to be store property. Ms. McCann told the deputy she was unsure why there was a gap between the date of the conduct and termination of the employment. On January 9, 2019, Equifax submitted an 18-page fax to the Benefits Bureau for consideration in connection with the January 10, 2019 fact-finding interview. The documentation indicated a discharge not based on a current act and included the following statement: "November 23, 2018, Jeanine was seen on video taking cash from the ATM, she showed the money to other employees and placed the money in her coat pocket. And then she proceeded to purchase lottery tickets and paid for these with the money from the money she found from ATM."

REASONING AND CONCLUSIONS OF LAW:

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).

The employer has the burden of proof in this matter. See Iowa Code section 96.6(2). Misconduct must be substantial in order to justify a denial of unemployment benefits. Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of unemployment benefits. See *Lee v. Employment Appeal Board*, 616 N.W.2d 661 (Iowa 2000). The focus is on deliberate, intentional, or culpable acts by the employee. See *Gimbel v. Employment Appeal Board*, 489 N.W.2d 36, 39 (Iowa Ct. App. 1992).

While past acts and warnings can be used to determine the magnitude of the current act of misconduct, a discharge for misconduct cannot be based on such past act(s). The termination of employment must be based on a current act. See 871 IAC 24.32(8). In determining whether the conduct that prompted the discharge constituted a "current act," the administrative law judge considers the date on which the conduct came to the attention of the employer and the date on which the employer notified the claimant that the conduct subjected the claimant to possible discharge. See also *Greene v. EAB*, 426 N.W.2d 659, 662 (Iowa App. 1988).

Allegations of misconduct or dishonesty without additional evidence shall not be sufficient to result in disqualification. If the employer is unwilling to furnish available evidence to corroborate the allegation, misconduct cannot be established. See 871 IAC 24.32(4).

The weight of the evidence in the record establishes a discharge based on misconduct in connection with the employment. At the time Ms. Christian found the money in the ATM dispenser on November 23, 2018, she knew that money had either been erroneously dispensed by the ATM machine or that a customer had erroneously left the money behind following the customer's ATM transaction. If the money was erroneously dispensed by the ATM machine, then the money belonged to the financial institution that owned the ATM. If the money was left behind by a customer, then the money belonged to the customer. Ms. Christian knew at the time of the incident that the money did not belong to her. Ms. Christian elected to take a windfall benefit from someone else's misfortune. The fact that the conduct occurred in Ms. Christian's workplace as she was coming off her shift is enough to make it conduct in connection with the employment. But for the employment, Ms. Christian would not have been in that place at that time. A reasonable person in Ms. Christian's position would have readily recognized that Casey's cannot be associated with or tolerate cheating an affiliated financial institution or a customer out of money that belongs to that person or institution. The employer's honesty and integrity policy was sufficient to place Ms. Christian on notice of this expectation and the consequences of deviating from it, regardless of a prior supervisor's poor judgment and/or practices. Ms. Christian elected not to take reasonable steps to return the money to the rightful owner. A quick check with coworkers regarding whether they had lost the money did not constitute reasonable steps to return the money to the rightful owner. The weight of the evidence in the record establishes conduct that demonstrated a willful and wanton disregard of the employer's interests. Because the conduct did not come to the employer's attention until December 17, 2018, and because Ms. Christian was discharged that same day, the evidence establishes a discharge based on a current act within the meaning of the law. Ms. Christian is disqualified for benefits until she has worked in and been paid wages for insured work equal to 10 times her weekly benefit amount. Ms. Christian must meet all other eligibility requirements.

The unemployment insurance law requires benefits be recovered from a claimant who receives benefits and is later denied benefits even if the claimant acted in good faith and was not at fault. However, a claimant will not have to repay an overpayment when an initial decision to award benefits on an employment separation issue is reversed on appeal if two conditions are met:

(1) the claimant did not receive the benefits due to fraud or willful misrepresentation, and (2) the employer failed to participate in the initial proceeding that awarded benefits. In addition, if a claimant is not required to repay an overpayment because the base period employer failed to participate in the initial proceeding, the base period employer's account will be charged for the overpaid benefits. Iowa Code § 96.3(7)(a) and (b).

Iowa Administrative Code rule 817-24.10(1) defines employer participation in fact-finding interviews as follows:

Employer and employer representative participation in fact-finding interviews.
24.10(1) "Participate," as the term is used for employers in the context of the initial determination to award benefits pursuant to Iowa Code section 96.6, subsection 2, means submitting detailed factual information of the quantity and quality that if unrebutted would be sufficient to result in a decision favorable to the employer. The most effective means to participate is to provide live testimony at the interview from a witness with firsthand knowledge of the events leading to the separation. If no live testimony is provided, the employer must provide the name and telephone number of an employee with firsthand information who may be contacted, if necessary, for rebuttal. A party may also participate by providing detailed written statements or documents that provide detailed factual information of the events leading to separation. At a minimum, the information provided by the employer or the employer's representative must identify the dates and particular circumstances of the incident or incidents, including, in the case of discharge, the act or omissions of the claimant or, in the event of a voluntary separation, the stated reason for the quit. The specific rule or policy must be submitted if the claimant was discharged for violating such rule or policy. In the case of discharge for attendance violations, the information must include the circumstances of all incidents the employer or the employer's representative contends meet the definition of unexcused absences as set forth in 871—subrule 24.32(7). On the other hand, written or oral statements or general conclusions without supporting detailed factual information and information submitted after the fact-finding decision has been issued are not considered participation within the meaning of the statute.

Ms. Christian received \$1,854.00 in benefits for the seven weeks between December 23, 2018 and February 9, 2019, but this decision disqualifies her for those benefits. Accordingly, the benefits Ms. Christian received constitute an overpayment of benefits. The Equifax representative's verbal statement to the deputy and the documentation Equifax submitted for the fact-finding interview did not separately or collectively satisfy the fact-finding participation requirement. Neither indicated a discharge based on a current act and therefore neither was sufficient to prove, absent rebuttal, a discharge based on disqualifying misconduct in connection with the employment. Because the employer failed to participate in the fact-finding interview within the meaning of the law and because Ms. Christian did not attempt to mislead the deputy, Ms. Christian is not required to repay the overpaid benefits. The overpaid benefits may be assessed to the employer's account. However, the employer's account will not be charged for benefits for the period beginning February 10, 2019.

DECISION:

The January 11, 2019, reference 01, decision is reversed. The claimant was discharged on December 17, 2018 for misconduct in connection with the employment. The claimant is disqualified for unemployment benefits until she has worked in and been paid wages for insured work equal to 10 times her weekly benefit amount. The claimant must meet all other eligibility requirements. The claimant is overpaid \$1,854.00 in benefits for the seven weeks between December 23, 2018 and February 9, 2019. The claimant is not required to repay the overpaid benefits. The overpaid benefits may be assessed to the employer's account. However, the employer's account will not be charged for benefits for the period beginning February 10, 2019.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/rvs