

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

KRISTIN E QUACKENBUSH

Claimant

APPEAL 18A-UI-10336-H2T

**ADMINISTRATIVE LAW JUDGE
DECISION**

CASEY'S MARKETING COMPANY

Employer

OC: 09/09/18

Claimant: Respondent (2)

Iowa Code § 96.5(2)a – Discharge/Misconduct
Iowa Code § 96.3(7) - Recovery of Benefit Overpayment
871 IAC 24.10 – Employer Participation in the fact-finding Interview

STATEMENT OF THE CASE:

The employer filed an appeal from the October 5, 2018, (reference 02) decision that allowed benefits. The parties were properly notified about the hearing. A telephone hearing was held on October 30, 2018. Claimant did not participate. Employer participated through Tonya Young, Store Manager and Zontel McCann of Talx/Equifax participated regarding the employer's participation in the fact-finding interview. Official notice was taken of agency records. Employer's Exhibit 1 was admitted into the record.

ISSUE:

Was the claimant discharged due to job connected misconduct?

Has the claimant been overpaid any unemployment insurance benefits, and if so, can the repayment of those benefits to the agency be waived?

Can any charges to the employer's account be waived?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was hired to work full time as a cashier/kitchen helper beginning on March 17, 2018 through September 7, 2018, when she was discharged.

The claimant was given a copy of the employer's handbook and policies and knew that she was obligated to comply with them. The employer's policies require that employees act with integrity and honesty. Even a perceived impropriety can result in corrective action up to and including termination.

The claimant was disciplined on August 28 when she rung up a pizza she was purchasing as eleven dollars cheaper than its actual price. This amounted to theft from the company. She was given a written warning which put her on notice that further violation of the company policies could lead to discharge.

There is a manager's office in each location where employees may store their personal belongings while working. A rack is provided for coats and purses. On September 5 the claimant was in the manager's (Tonya Young) office working at the desk entering data into the computer. Ms. Young had left her purse sitting on a chair in her office. When Ms. Young entered the office she thought she saw the claimant going through her purse that she had left on the chair. The claimant acted as though she was putting paper in the printer. As soon as Ms. Young left the office, the claimant slid the office chair she was sitting on right back over to where Ms. Young's purse was sitting and tried to straighten up the purse she had been going through.

After the claimant left the office, Ms. Young watched surveillance video taken inside the office. The video showed the claimant digging through Ms. Young's purse for thirty seconds to one minute. The claimant only stopped going through the purse when Ms. Young entered the office. The video then showed after Ms. Young left the office the claimant again going back over to Ms. Young's purse. The claimant had no authority or reason for being in Ms. Young's purse.

Ms. Young contacted area supervisor Blake Homewood who made arrangements to meet with the claimant and with Ms. Young when the claimant next worked on September 7. Mr. Homewood watched the surveillance video of the claimant going through Ms. Young's purse prior to the meeting. When the claimant was brought into the meeting Mr. Homewood had a TV set up for the claimant to watch the surveillance video. As Mr. Homewood prepared to start the video he told the claimant that he needed her to explain what she was doing. The claimant interrupted him to ask if this was about the purse. When she was told it was, the only explanation the claimant offered was that she was irresistibly curious about what was in Ms. Young's purse. At no time did the claimant tell Ms. Young and Mr. Homewood that she had mistakenly confused Ms. Young's purse for her own. The first time the claimant brought forth that explanation was at the fact-finding interview.

The claimant was discharged for going through another employee's purse, after having been given a final prior warning for dishonesty when she undercharged herself for a pizza.

The claimant has received unemployment benefits after the separation on a claim with an effective date of September 9, 2018.

The employer did participate personally in the fact-finding interview through a Talx/Equifax representative.

REASONING AND CONCLUSIONS OF LAW:

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

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 claimant had been warned once about dishonest conduct when she undercharged herself for a pizza she was taking from the store. The claimant had every opportunity at the time of the September 7 meeting with Mr. Homewood and Ms. Young to explain that she had mistakenly thought Ms. Young's purse was her own. The claimant did not offer that explanation until the fact-finding interview. The employer needs to be able to trust employees who deal with cash and have access to other employee's belongings. The claimant's explanation that she was irresistibly curious is simply not credible nor does it give her any right to go through another employee's purse. The claimant's explanation at the fact-finding is similarly not credible as it was not offered only two days after the incident when she was interviewed. The gap in time leads the administrative law judge to conclude the claimant's explanation at the fact-finding was designed to provide an excuse for what she should have known was improper behavior. The employer could no longer trust the claimant due to her own dishonest actions. The claimant's was discharged due to job-connected misconduct sufficient to disqualify her from receipt of unemployment insurance benefits. Benefits are denied.

Iowa Code section 96.3(7)a-b, as amended in 2008, provides:

7. Recovery of overpayment of benefits.

a. 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.

b. (1) (a) 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. The employer shall not be relieved of charges if benefits are paid because the employer or an agent of

the employer failed to respond timely or adequately to the department's request for information relating to the payment of benefits. This prohibition against relief of charges shall apply to both contributory and reimbursable employers.

(b) However, provided the benefits were not received as the result of fraud or willful misrepresentation by the individual, benefits shall not be recovered from an individual if the employer did not participate in the initial determination to award benefits pursuant to section 96.6, subsection 2, and an overpayment occurred because of a subsequent reversal on appeal regarding the issue of the individual's separation from employment.

(2) An accounting firm, agent, unemployment insurance accounting firm, or other entity that represents an employer in unemployment claim matters and demonstrates a continuous pattern of failing to participate in the initial determinations to award benefits, as determined and defined by rule by the department, shall be denied permission by the department to represent any employers in unemployment insurance matters. This subparagraph does not apply to attorneys or counselors admitted to practice in the courts of this state pursuant to section 602.10101.

Iowa Admin. Code r. 871-24.10 provides:

Employer and employer representative participation in fact-finding interviews.

(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.

(2) "A continuous pattern of nonparticipation in the initial determination to award benefits," pursuant to Iowa Code section 96.6, subsection 2, as the term is used for an entity representing employers, means on 25 or more occasions in a calendar quarter beginning with the first calendar quarter of 2009, the entity files appeals after failing to participate. Appeals filed but withdrawn before the day of the contested case hearing will not be considered in determining if a continuous pattern of nonparticipation exists. The division administrator shall notify the employer's representative in writing after each such appeal.

(3) If the division administrator finds that an entity representing employers as defined in Iowa Code section 96.6, subsection 2, has engaged in a continuous pattern of

nonparticipation, the division administrator shall suspend said representative for a period of up to six months on the first occasion, up to one year on the second occasion and up to ten years on the third or subsequent occasion. Suspension by the division administrator constitutes final agency action and may be appealed pursuant to Iowa Code section 17A.19.

(4) "Fraud or willful misrepresentation by the individual," as the term is used for claimants in the context of the initial determination to award benefits pursuant to Iowa Code section 96.6, subsection 2, means providing knowingly false statements or knowingly false denials of material facts for the purpose of obtaining unemployment insurance benefits. Statements or denials may be either oral or written by the claimant. Inadvertent misstatements or mistakes made in good faith are not considered fraud or willful misrepresentation.

This rule is intended to implement Iowa Code section 96.3(7)"b" as amended by 2008 Iowa Acts, Senate File 2160.

Because the claimant's separation was disqualifying, benefits were paid to which the claimant was not entitled. The unemployment insurance law provides that benefits must be recovered from a claimant who receives benefits and is later determined to be ineligible for benefits, even though the claimant acted in good faith and was not otherwise at fault. However, the overpayment will not be recovered when it is based on a reversal on appeal of an initial determination to award benefits on an issue regarding the claimant's employment separation if: (1) the benefits were not received due to any fraud or willful misrepresentation by the claimant and (2) the employer did not participate in the initial proceeding to award benefits. The employer will not be charged for benefits if it is determined that they did participate in the fact-finding interview. Iowa Code § 96.3(7). In this case, the claimant has received benefits but was not eligible for those benefits. Since the employer participated in the fact-finding interview the claimant is obligated to repay the benefits she received to the agency and the employer's account shall not be charged.

DECISION:

The October 5, 2018, (reference 02) decision is reversed. 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. The claimant has been overpaid unemployment insurance benefits in the amount of \$2,520.00 and she is obligated to repay the agency those benefits. The employer did participate in the fact-finding interview and their account shall not be charged.

Teresa K. Hillary
Administrative Law Judge

Decision Dated and Mailed

tkh/rvs