IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

JENNIFER L MCCARL Claimant **HY-VEE INC** Employer	**APPEAL 15A-UI-13484-JCT** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 11/15/15** **Claimant: Appellant (2)**

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

STATEMENT OF THE CASE:

The claimant filed an appeal from the December 3, 2015, (reference 01) unemployment insurance decision that denied benefits based upon separation. The parties were properly notified about the hearing. A telephone hearing was held on December 31, 2015. The claimant participated personally. The employer participated through Robert Mazza, hearing representative with Corporate Cost Control. Employer witnesses included Tony Baccam and Patty Olson. Claimant Exhibit A, and Employer Exhibits One through Four were admitted into evidence.

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: The claimant was employed part-time as a cashier and was separated from employment on November 14, 2015, when she was discharged for using her personal Fuel Saver Card on customer transactions (Employer Exhibit One).

The employer has a "fuel saver card" program available to customers, which track purchases and rewards customers with discounted gasoline purchases. The claimant as an employee and customer, had her own fuel saver card. The employer has a policy that states "discounts accrued by customer purchases are non-transferrable to employees. (Such as Fuel saver credit, Catalina coupons, etc.) Violation may result in disciplinary action and/or possible termination." (Employer Exhibit Four). The employer also has a policy that prohibits employees from ringing up friends and family members (Employer Exhibit Four). The claimant was made aware of the policies when hired (Employer Exhibit Four)

The final incident occurred when the employer received a report that tracked five transactions on November 6, 2015, were linked to the claimant's Fuel Saver card (Employer Exhibit Two.) The claimant asserted that she did use her personal Fuel Saver card when ringing the transactions, but that they were with the customer's permission, and in two of the five

transactions, were members of the claimant's family. Family members were permitted to share a card. By accruing points from customers' transactions on November 6, 2015, the claimant received a $.15 discount on her fuel up to 20 gallons. The employer deemed the claimant's conduct to be dishonest and fraudulent, and she was subsequently discharged.

The claimant did not deny that she used her personal Fuel Saver card, but rather that with permission of friends and family, she would swipe her card to accrue fuel savings from their purchases. The claimant further asserted that in light of the written policies provided from the employer, that they were not enforced. The claimant cited to an example of weeks prior to her discharge, when the assistant store manager, Katie, (who did not attend the hearing), knowingly and manually keyed in the claimant's Fuel Saver account for the claimant's cousin's purchase, to allow the claimant to collect the fuel points. The claimant also stated that multiple managers, (including Tom, Jacob, and Katie,) observed her ring up family members, despite the employer policy, and that at times she had even introduced her family to the manager, while ringing them up, but was not disciplined.

REASONING AND CONCLUSIONS OF LAW:

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

Iowa Code § 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.

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 propriety of a discharge is not at issue in an unemployment insurance case. An employer may be justified in discharging an employee, but the employee's conduct may not amount to misconduct precluding the payment of unemployment compensation. 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 law limits disqualifying misconduct to substantial and willful wrongdoing or repeated carelessness or negligence that equals willful misconduct in culpability. Lee v. Employment Appeal Board, 616 N.W.2d 661, 665 (Iowa 2000).

For unemployment insurance purposes, misconduct amounts to a deliberate act and a material breach of the duties and obligations arising out of a worker's contract of employment. Misconduct is a deliberate violation or disregard of the standard of behavior the employer has a right to expect from employees or is an intentional and substantial disregard of the employer's

interests or of the employee's duties and obligations to the employer. Inefficiency, unsatisfactory conduct, unsatisfactory performance due to inability or incapacity, inadvertence or ordinary negligence in isolated incidents, or good faith errors in judgment or discretion are not deemed to constitute work-connected misconduct. 871 IAC 24.32(1)(a).

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*. After assessing the credibility of the witnesses who testified during the hearing, considering the applicable factors listed above, and using her own common sense and experience, the administrative law judge finds the employer has not met its burden of proof to establish that the claimant was discharged for misconduct.

The undisputed evidence in this case is that the claimant was aware of a policy against both ringing up family members and friends, as well as using her personal Fuel Saver card on customer transactions. However, the claimant credibly testified that the policy was not enforced, and in fact, that managers knowingly allowed the policies to be broken without consequence or discipline. Most illustrative of the employer's non-enforcement of the policy was when the assistant manager, Katie, manually added the claimant's personal Fuel Saver card to a completed transaction made by the claimant's cousin, for which the claimant explained she sought the associated points. In addition, the claimant had repeatedly rang up friends and family members in front of management members (including Katie, Tom and Jacob) and would introduce them to her management, even though it technically violated policy, but was not counseled or issued discipline.

Cognizant of the fact the claimant's actions resulted in a $.15 per gallon fuel discount she did not earn, since the employer had not previously warned the claimant about its specific expectations about ringing family members or using a personal Fuel Saver card for customer transactions, it has not met the burden of proof to establish that claimant acted deliberately or with recurrent negligence in violation of company policy, procedure, or prior warning. An employee might even reasonably infer employer acquiescence if management is aware of policy violations (and even assisted in at least one instance) without being issued a warning or counseling. An employee is entitled to fair warning that the employer will no longer tolerate certain performance and conduct prior to discharge. Without fair warning, an employee has no reasonable way of knowing that there are changes that need be made in order to preserve the employment. If an employer expects an employee to conform to certain expectations or face discharge, appropriate (preferably written), detailed, and reasonable notice should be given. Training or general notice to staff about a policy is not considered a disciplinary warning.

In light of management awareness of policy violations without consequence, the claimant could not have reasonably anticipated she would be discharged on November 6, 2015, when she used her personal Fuel Saver card for the fuel points of five transactions, including family and friends. While the employer may have been justified in discharging the claimant, work-connected misconduct as defined by the unemployment insurance law has not been established in this case.

Nothing in this decision should be interpreted as a condemnation of the employer's right to terminate the claimant for violating its policies and procedures. The employer had a right to follow its policies and procedures. The analysis of unemployment insurance eligibility, however, does not end there. This ruling simply holds that the employer did not meet its burden of proof to establish the claimant's conduct leading separation was misconduct under Iowa law. Since the employer has not met its burden of proof, benefits are allowed.

DECISION:

The December 3, 2015, (reference 01) unemployment insurance decision is reversed. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided she is otherwise eligible. The benefits claimed and withheld shall be paid, provided she is otherwise eligible.

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Jennifer L. Coe
Administrative Law Judge

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Decision Dated and Mailed

jlc/pjs