

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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

GINA M WILLARD

Claimant

APPEAL NO. 19A-UI-04419-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

CASEY'S MARKETING COMPANY

Employer

OC: 04/28/19

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 May 20, 2019, reference 01, decision that allowed benefits to the claimant provided she met all other eligibility requirements and that held the employer's account could be charged for benefits, based on the deputy's conclusion that the claimant was discharged on April 24, 2019 for no disqualifying reason. After due notice was issued, a hearing was held on June 25, 2019. Claimant Gina Willard participated. Crystal Hines represented the employer. The administrative law judge took official notice of the Agency's record of benefits disbursed to the claimant and received Exhibits 1 through 4 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 Ms. Willard voluntarily quit without good cause attributable to the employer.

Whether the claimant was overpaid benefits.

Whether the claimant is required to 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: Gina Willard began her employment with Casey's Marketing Company 2017 at a Casey's store in Evansdale. In June 2018, Ms. Willard transferred to a Casey's store located at the north end of Independence. Ms. Willard has at all relevant times resided on Waterloo. Ms. Willard started at

the Independence store as a regular store employee. In November 2018, Ms. Willard was promoted to Second Assistant Manager. Shortly thereafter, Ms. Willard was promoted to First Assistant Manager. Ms. Willard's management positions were full-time and involved working a variety of shifts. Ms. Willard's duties included covering shifts for absent employees. Crystal Hines became Store Manager at the Independence store in August 2017 and was Ms. Willard's supervisor throughout Ms. Willard's employment at the Independence store.

Ms. Hines and Ms. Willard are at odds over whether Ms. Willard voluntarily quit or was discharged from the employment. Ms. Hines asserts that Ms. Willard abandoned the employment. Ms. Willard asserts that Ms. Hines discharged her from the employment. The parties are in agreement that Ms. Willard last performed work for Casey's on April 17, 2019, from 4:00 p.m. to midnight. During that shift, Ms. Willard converted Casey's merchandise to her personal use. At 3:54 p.m., Ms. Hines removed from the sales floor a new cell phone charger that was on display for customers to purchase. Ms. Willard took the cell phone charger to the managers' office, where she plugged the charger into her personal cell phone. Ms. Willard used the charger over the course of several hours to charge her personal cell phone. At 10:42 p.m., Ms. Willard disconnected her phone from the charger. Ms. Willard then placed the charger in her purse and closed her purse. Ms. Willard had not paid for the charger. Ms. Willard had not asked permission to use the charger. No one had authorized Ms. Willard to convert the charger to personal use. Ms. Willard left work with the cell phone charger in her purse.

When Ms. Hines reported for work the next morning, she noted that work duties that were supposed to have been performed during the April 17 evening shift were left undone. Ms. Hines wondered whether the shift had been especially busy with customers or whether something else had happened. Ms. Hines reviewed surveillance video from the April 17 evening shift. Through that review of the surveillance video, Ms. Hines discovered Ms. Willard's unauthorized conversion of the cell phone charger to personal use and removal of the merchandise from the employer's property without prior payment or authorization. The employer has a written policy that prohibits use or removal of merchandise without prior payment and proof of prior payment. Ms. Willard was aware of the policy and, as an assistant manager, was responsible for enforcing the policy.

The April 17, 2019 incident was not the first time Ms. Willard had violated the employer's policy that required her to pay for merchandise prior to consuming it or removing it from the employer's property. In February 2018, while Ms. Willard was employed at the Evansdale store, she consumed Casey's food without prior payment. In response to that incident, the Store Manager issued a reprimand to Ms. Willard that included restatement of the employer's policy requiring prior payment for merchandise to be consumed or removed from the store. Ms. Willard signed the reprimand.

After Ms. Willard completed her shift on April 17, 2019, she thought she was next scheduled to work on April 20, 2019. However, Ms. Hines had scheduled Ms. Willard to work on April 19, 2019 from 10:00 a.m. to 5:00 p.m. Ms. Hines had prepared a Corrective Action Statement for the purpose of discharging Ms. Willard on April 19, 2019. When Ms. Willard did not appear for work on April 19, Ms. Hines sent a text message to Ms. Willard asking whether Ms. Willard was coming to work. Ms. Hines added, "Good luck finding a new job." Ms. Willard replied that she was scheduled off that day. Ms. Hines replied they were supposed to have a meeting that day, that she had Ms. Willard's shift covered, and that she needed Ms. Willard to return her keys. Ms. Willard understood the request for her keys to mean that she was discharged from the employment. Ms. Willard returned the safe key and the door key in the days that followed.

Ms. Willard established an original claim for benefits that was effective April 28, 2019 and received \$2,310.00 in benefits for five weeks between May 19, 2019 and June 22, 2019. Casey's Marketing Company is the sole base period employer in connection with the claim.

On May 16, 2019, an Iowa Workforce Development Benefits Bureau deputy held a fact-finding interview that addressed Ms. Willard's separation from the employment. Ms. Willard did not participate at the time of the fact-finding interview. The employer's representative of record, Shania Angel of Employers Edge, declined to participate in the fact-finding interview telephone call. Ms. Angel instead provided a cursory written statement she had prepared, which stated as follows:

The claimant voluntarily quit buy job abandonment. Specifically, the claimant stopped reporting to scheduled work and failed to notify management. The claimant did not explore all reasonable options prior to quitting.

REASONING AND CONCLUSIONS OF LAW:

A discharge is a termination of employment initiated by the employer for such reasons as incompetence, violation of rules, dishonesty, laziness, absenteeism, insubordination, or failure to pass a probationary period. Iowa Administrative Code rule 871-24.1(113)(c). A quit is a separation initiated by the employee. Iowa Administrative Code rule 871-24.1(113)(b). In general, a voluntary quit requires evidence of an intention to sever the employment relationship and an overt act carrying out that intention. See *Local Lodge #1426 v. Wilson Trailer*, 289 N.W.2d 698, 612 (Iowa 1980) and *Peck v. EAB*, 492 N.W.2d 438 (Iowa App. 1992). In general, a voluntary quit means discontinuing the employment because the employee no longer desires to remain in the relationship of an employee with the employer. See Iowa Administrative Code rule 871-24.25.

Ms. Willard was discharged on April 19, 2019. Ms. Willard did not voluntarily quit.

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 that Ms. Willard was discharged on April 19, 2019 for misconduct in connection with the employment based on theft from the employer and associated violation of the employer's written policy regarding consumption and removal of property with prior payment. Iowa Code section 714.1 defines the various ways by which a person may commit the criminal offense of theft. Iowa Code section 714.1(1) and (2) state, in relevant part, as follows:

714.1 Theft defined. A person commits theft when the person does any of the following:

1. Takes possession or control of the property of another, or property in the possession of another, with the intent to deprive the other thereof.
2. Misappropriates property which the person has in trust, or property of another which the person has in the person's possession or control, whether such possession or control is lawful or unlawful, by using or disposing of it in a manner which is inconsistent with or a denial of the trust or of the owner's rights in such property, or conceals found property, or appropriates such property to the person's own use, when the owner of such property is known to the person.

Ms. Willard committed theft from the employer by converting merchandise the employer had on offer for sale to customers to her personal use. Ms. Willard had no more right to use the charger for personal use without payment than would a person who wandered in off the street.

Ms. Willard knew the property belonged to the employer and that she had no authority to use the charger without prior payment for the merchandise. The weight of the evidence supports the employer's assertion that Ms. Willard spirited the charger away in her purse and left the workplace with the charger. Ms. Willard provided an alternative, but implausible explanation. Even if Ms. Willard had not taken the item from the workplace, the evidence would still establish an intentional and substantial violation of the employer's interests through violation of the work rule. Even if Ms. Willard had placed the product back on the shelf, her act of using the charger and then putting it back on the shelf would constitute a fraud on an unsuspecting customer who might then purchase the used product under belief that the product was new and unused.

Because Ms. Willard was discharged for misconduct in connection with the employment, she 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. Willard 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 employer failed to participate in the initial proceeding, the employer's account will be charged for the overpaid benefits. Iowa Code § 96.3(7)(a) and (b).

The claimant received \$2,310.00 in benefits for five weeks between May 19, 2019 and June 22, 2019, but has been denied benefits as a result of this decision. The claimant, therefore, was overpaid benefits.

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.

The employer did not participate in the fact-finding interview within the meaning of the law. The employer representative explicitly declined to participate in the fact-finding interview telephone call. The single, cursory document, submitted in lieu of participation did not satisfy the participation requirement. The claimant did not participate in the fact-finding interview as scheduled. Accordingly, the claimant did not receive benefits due to fraud or willful misrepresentation. The claimant is not required to repay the overpaid benefits. The employer's account may be charged for the overpaid benefits. However, the employer's account shall not be charged for benefits for the period beginning June 23, 2019.

DECISION:

The May 20, 2019, reference 01, decision is reversed. The claimant was discharged on April 19, 2019 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 was overpaid \$2,310.00 in benefits for five weeks between May 19, 2019 and June 22, 2019. The claimant is not required to repay the overpaid benefits. The employer's account may be charged for the overpaid benefits. The employer's account shall not be charged for benefits for the period beginning June 23, 2019.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/rvs