

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

HEATHER L BINNS
Claimant

APPEAL 17A-UI-06464-JP-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

THE UNIVERSITY OF IOWA
Employer

OC: 05/28/17
Claimant: Respondent (1)

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Code § 96.3(7) – Recovery of Benefit Overpayment
Iowa Admin. Code r. 871-24.10 – Employer/Representative Participation Fact-finding Interview

STATEMENT OF THE CASE:

The employer filed an appeal from the June 21, 2017, (reference 01) unemployment insurance decision that allowed benefits. The parties were properly notified about the hearing. A telephone hearing was held on July 13, 2017. Claimant participated. Employer participated through benefits specialist Mary Eggenburg and associate director Tricia Ross. Official notice was taken of the administrative record, including claimant's benefit payment history and the fact-finding documents, with no objection.

ISSUES:

Was the claimant discharged for disqualifying job-related misconduct?

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

Can 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 employed full-time as a nursing assistant from June 23, 2008, and was separated from employment on May 26, 2017, when she was discharged.

The employer has a drug free environment policy. The policy prohibits employees from possessing illegal drugs on the employer's property and if an employee violates this policy, it results in automatic discharge. Claimant was aware of the policy. The employer does not have a drug testing policy.

On May 22, 2017, at the end of claimant's shift, she badged out before leaving the employer. When claimant badged out, she had two bags (a green lunch bag and a glittery bag) over her shoulder. Claimant testified that nothing dropped from her bags. Claimant testified she would have had to turn the bags upside down to get something out of them. After claimant left, an employee picked up a baggie on the ground around where claimant had been that was later

determined to contain marijuana. The employee took the baggie to the office and it was turned over to the safety and security office.

On May 23, 2017, Doug Vance, safety and security director, brought a picture for Ms. Ross to identify. The picture was of claimant in the hallway on May 22, 2017. The picture was from the surveillance video. Ms. Ross testified she watched the video and saw a baggie fall from claimant's bag. The video was not provided as an exhibit for this hearing. Ms. Ross testified that Mr. Vance positively identified the substance as marijuana. Ms. Ross, claimant's direct supervisor, and Mr. Vance then met with claimant; this was the first time claimant was aware there was an issue. Mr. Vance told claimant she had dropped a bag of marijuana when she left on May 2, 2017. Claimant was in shock at the allegation. Mr. Vance told claimant there was a video of the incident. Claimant denied the baggie was hers. Claimant denied using drugs and requested a drug test immediately. The employer told claimant she was placed on administrative leave immediately pending the investigation. Claimant requested to see the video and said she was being setup, but did not know who set her up. The employer did not show claimant the video on May 23, 2017. After claimant left the employer, she went and had a drug test performed. The results of the drug test were negative.

On May 24, 2017, the employer had an investigatory meeting with claimant. The employer showed claimant the video from May 22, 2017. The employer paused the video and claimant pointed out that you cannot see anything falling; a white dot just appears on the ground. Claimant did not see a white spot on her bag, but one of her bags was glittery and shiny. Claimant presented the employer with her negative drug test results. Claimant asked the employer how it could tell the baggie fell from her; there was nothing on the floor the few seconds before claimant walked by and then there was a baggie when claimant was there. Claimant testified she believes she may have kicked the baggie into view. Mr. Vance told claimant he cannot pinpoint where the baggie fell from.

On May 26, 2017, the employer made the decision to discharge claimant. Safety and security felt there was strong enough evidence that the baggie of marijuana belonged to claimant. Ms. Ross believes that law enforcement was contacted.

REASONING AND CONCLUSIONS OF LAW:

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

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).

When the record is composed solely of hearsay evidence, that evidence must be examined closely in light of the entire record. *Schmitz v. Iowa Dep't Human Servs.*, 461 N.W.2d 603, 607 (Iowa Ct. App. 1990). The Iowa Supreme Court has ruled that if a party has the power to produce more explicit and direct evidence than it chooses to present, the administrative law judge may infer that evidence not presented would reveal deficiencies in the party's case.

Crosser v. Iowa Dep't of Pub. Safety, 240 N.W.2d 682 (Iowa 1976). 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 finds claimant's version of events to be more credible than the employer's recollection of those events.

Iowa Code section 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.

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 Admin. Code r. 871-24.32(4) provides:

(4) *Report required.* The claimant's statement and employer's statement must give detailed facts as to the specific reason for the claimant's discharge. 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. In cases where a suspension or disciplinary layoff exists, the claimant is considered as discharged, and the issue of misconduct shall be resolved.

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). The issue is not whether the employer made a correct decision in separating claimant, but whether the claimant is entitled to unemployment insurance benefits. *Infante v. Iowa Dep't of Job Serv.*, 364 N.W.2d 262 (Iowa Ct. App. 1984). What constitutes misconduct justifying termination of an employee and what

misconduct warrants denial of unemployment insurance benefits are two separate decisions. *Pierce v. Iowa Dep't of Job Serv.*, 425 N.W.2d 679 (Iowa Ct. App. 1988). Misconduct serious enough to warrant discharge is not necessarily serious enough to warrant a denial of job insurance benefits. Such misconduct must be "substantial." *Newman v. Iowa Dep't of Job Serv.*, 351 N.W.2d 806 (Iowa Ct. App. 1984).

In an at-will employment environment an employer may discharge an employee for any number of reasons or no reason at all if it is not contrary to public policy, but if it fails to meet its burden of proof to establish job related misconduct as the reason for the separation, it incurs potential liability for unemployment insurance benefits related to that separation. 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 employer has the burden of proof in establishing disqualifying job misconduct. *Cosper v. Iowa Department of Job Service*, 321 N.W.2d 6 (Iowa 1982). If a party has the power to produce more explicit and direct evidence than it chooses to do, it may be fairly inferred that other evidence would lay open deficiencies in that party's case. *Crosser v. Iowa Department of Public Safety*, 240 N.W.2d 682 (Iowa 1976). The employer's argument that the baggie of marijuana fell from claimant's bag or from her person is not persuasive. Claimant credibly testified that the video does not show that a baggie fell from her bag or her person. Claimant credibly testified she had a glittery and shiny bag on May 2, 2017 and the video merely showed a baggie appear on the ground when she went to badge out. Claimant credibly testified that she may have inadvertently kicked the baggie on the ground into view. Claimant's testimony that she did not possess the baggie of marijuana and it did not belong to her is corroborated by her testimony that she immediately took a drug test after she was informed of the allegations and the drug tests results were negative. It is noted that the employer did not present the video as evidence to rebut claimant's denial of said misconduct. The employer did not meet its burden of proof to show misconduct. Benefits are allowed.

As benefits are allowed, the issues of overpayment, repayment, and the chargeability of the employer's account are moot.

DECISION:

The June 21, 2017, (reference 01) unemployment insurance decision is affirmed. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided claimant is otherwise eligible. Any benefits claimed and withheld on this basis shall be paid.

Jeremy Peterson
Administrative Law Judge

Decision Dated and Mailed

jp/rvs