

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

LORENA I SANCEN GRACIA
Claimant

IMAGE INC
Employer

APPEAL 20A-UI-00031-S1-T
**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 12/08/19
Claimant: Respondent (1)

Iowa Code § 96.5-2-a – Discharge for Misconduct
Iowa Code § 96.3-7 – Overpayment
871 IAC 24.10 – Employer Participation in the Fact-Finding Interview

STATEMENT OF THE CASE:

Image (employer) appealed a representative's December 26, 2019, decision (reference 01) that concluded Lorena Sancen Gracia (claimant) was eligible to receive unemployment insurance benefits. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on January 23, 2020. The claimant did not provide a telephone number where she could be reached and, therefore, did not participate. The employer participated by Kevin Gracey, Office Manager and Human Resources Manager.

The employer offered and Exhibits One and Two were received into evidence. The administrative law judge took official notice of the administrative file.

ISSUE:

The issue is whether the claimant was separated from employment for any disqualifying reason.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds that: The claimant was hired on April 23, 2019, as a full-time team lead. She previously worked for the employer from June 28, 2018 to February 15, 2019. The employer does not have an employee handbook. It has an employee agreement and a Drug and Alcohol Policy that the claimant signed on June 28, 2018, during her first period of employment. She did not sign any policies or enter into any agreements during her second period of employment. The claimant worked in a two-person team, cleaning private properties.

The claimant was absent or left work early on June 26, August 9, October 4, 7, and 8, 2019. She was absent due to her child being ill, appointments, or unknown reasons. The employer did not consider her to have properly reported her absences if she did not notify it at least seventy-two hours in advance.

On August 26, 2019, the employer issued the claimant a written warning and three-day suspension for having an open container of alcoholic beverage in the company vehicle. The employer notified the claimant that further infractions could result in termination from employment.

On October 3, 2019, the employer issued the claimant an evaluation. The employer told the claimant she was "doing great". It issued her a "raise to 22%".

On December 5, 2019, the employer issued the claimant a written warning for her quality of work after having received a complaint from a customer. In addition, the employer issued the claimant a termination of employment because another customer accused her of theft and the quality of the claimant's work. The customer told the employer that she laid a trap for the claimant by laying out a \$20.00 bill, a \$10.00 bill, and a \$150.00 Scheels gift card, and a \$150.00 Sportsman's Warehouse gift card. In addition, \$20.00 from a drawer was missing. The employer did not file any police report. At the termination on December 5, 2019, the employer requested that the claimant continue working through December 6, 2019. The claimant complied with the employer's request.

The claimant filed for unemployment insurance benefits with an effective date of December 8, 2019. The employer provided the name and number of Kevin Gracy as the person who would participate in the fact-finding interview on December 24, 2019. The fact finder called Mr. Gracy but he was not available. A message stated that the number could not be completed as dialed. The employer provided some documents for the fact finding interview rather than participating personally.

The notice of claim completed by Tamara Huinker, Owner, stated after "Reason", "Lorena has poor work attendance has misses 28 days in 7 mo. Also misconduct: signed that she understood policy no drug or alcohol during work hrs. suspenses (sic) 3 days for drinking on the job 8-27-19". The employer did not identify the dates or submit the specific rule or policy that the claimant violated which caused the separation.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow the administrative law judge concludes the claimant was not discharged for 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).

Iowa Admin. Code r.871-24.32(8) provides:

(8) Past acts of misconduct. While past acts and warnings can be used to determine the magnitude of a current act of misconduct, a discharge for misconduct cannot be based on such past act or acts. The termination of employment must be based on a current act.

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). The employer must establish not only misconduct but that there was a final incident of misconduct which precipitated the discharge.

At the appeal hearing, the employer's witness testified that the claimant was terminated for absenteeism and theft. The last incident of absenteeism provided by the employer occurred on October 8, 2019. The claimant was not discharged until December 5, 2019. The employer did not provide the claimant with any policies regarding absenteeism during her employment. In addition, the incident and termination dates are too remote. The employer was unable to provide sufficient evidence that the claimant's absenteeism was the final incident leading to the discharge.

The other reason that the employer testified was the cause for the discharge is theft. The owner did not mention this reason on the notice of claim. The claimant denied taking the items. The employer did not question why a customer would say they left cash and gift cards that valued over \$300.00 as bait with no cameras. It did not refer the matter to law enforcement. The claim is suspect. In addition, the employer did not end her employment immediately when it heard of her wrongdoing. It continued to send her out to work. This shows the employer was not concerned about the claimant's behavior.

The employer did not provide sufficient evidence of job-related misconduct. The employer did not meet its burden of proof to show misconduct. Benefits are allowed, provided the claimant is otherwise eligible.

DECISION:

The representative's December 26, 2019, decision (reference 01) is affirmed. The claimant was discharged. Misconduct has not been established. Benefits are allowed provided the claimant is otherwise eligible.

Beth A. Scheetz
Administrative Law Judge

Decision Dated and Mailed

bas/scn