

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**GAYLE A PIRTLE**  
Claimant

**APPEAL NO. 11A-UI-06377-VST**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**CAN SHED LLC**  
Employer

**OC:04/03/11  
Claimant: Respondent (2R)**

Section 96.5-2-A – Discharge for Misconduct  
Section 96.3-7 – Overpayment of Benefits

**STATEMENT OF THE CASE:**

The employer filed an appeal from a decision of a representative dated May 4, 2011, reference 02, which held claimant eligible for unemployment insurance benefits. After due notice, a telephone conference hearing was scheduled for and held on September 12, 2011. Claimant participated. Employer participated by Julie Willard, Human Resources Representative, and Darren Peyton, Transportation Manager. The record consists of the testimony of Julie Willard; the testimony of Darren Peyton; the testimony of Gayle Pirtle; and Employer's Exhibits 1-3.

**ISSUES:**

Whether the claimant was discharged for misconduct; and

Whether the claimant was overpaid unemployment insurance benefits.

**FINDINGS OF FACT:**

The administrative law judge, having heard the testimony of the witnesses and having considered all of the evidence in the record, makes the following findings of fact:

The employer is a redemption center for bottles and cans. The claimant was hired on February 16, 2010, as a full-time customer service representative. She worked at the center located in Iowa City. Her last day of work was March 22, 2011. She placed on suspension pending investigation of theft. The claimant was terminated on April 7, 2011.

The claimant was responsible for taking in cans and bottles from customers for redemption. The claimant would then pay the customers for the bottles and cans. A written log was created to document the transactions. The employer became concerned because there were discrepancies between the written log and the number of cans/bottle received and the cash dispersals. Darren Peyton and Troy Willard investigated by reviewing surveillance tape and logs. The employer had five days of surveillance tape available prior to March 21, 2011, which is when the investigation commenced. The surveillance tape showed that the claimant, on three

occasions, put money in her pocket, which she had taken from the cash register. The total amount taken was \$180.00.

The employer turned over all of its surveillance tapes and logs to the Iowa City Police. The claimant was asked to get in touch with the police, which took some time due to the inability of the police to get hold of the claimant. A complaint was filed with the Iowa District Court for Johnson County on May 9, 2011. (Exhibit 1) The claimant eventually pled guilty and order for judgment was entered on July 7, 2011. (Exhibit 3)

The employer has a written policy, of which the claimant was aware, that theft of the employer's property could lead to immediate termination.

### **REASONING AND CONCLUSIONS OF LAW:**

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.

871 IAC 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.

Misconduct occurs when there are deliberate acts or omissions that constitute a material breach of the worker's duty to the employer. One of the most fundamental duties owed by an employee to an employer is honesty. An employer can reasonably expect that an employee will not misappropriate its property. The employer has the burden of proof to show misconduct.

The greater weight of the evidence in this case established that the claimant misappropriated cash from the employer's cash drawer. The claimant testified that she was taking cash for

“tips.” The claimant said that she would pick up cans or bottles that were left by customers and turn them in or be given a bag of bottles or cans by a customer and told that it was a tip. This explanation is not credible. It makes no sense that a customer would bring in a bag of cans or bottles and simply give it to an employee as a tip. There was a tip jar at the redemption center and customers would deposit any tips in the jar. The amount of tips in the tip jar was between ten and fifteen dollars a day whereas the amount of missing property was \$200.00. The claimant could not explain why there was nothing in the written records to indicate that a tip had been paid or why a tip was taken directly from the cash drawer when no customers were present.

The claimant also tried to say that she would take money to buy supplies. She could not explain why there was no receipt from the store where those supplies were purchased that would show what supplies were purchased and when. The administrative law judge concludes that the claimant’s testimony is not credible and that the employer has shown theft on her part. Theft of employer property is misconduct. Benefits are denied.

The next issue is overpayment of benefits.

Iowa Code section 96.3-7, 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) 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. 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. The employer shall not be charged with the benefits.

(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.

The overpayment issue is remanded to the Claims Section for determination.

**DECISION:**

The decision of the representative dated May 4, 2011, reference 02, is reversed. Unemployment insurance benefits shall be withheld until claimant has worked in and been paid wages for insured work equal to ten times claimant's weekly benefit amount, provided claimant is otherwise eligible. The overpayment issue is remanded to the Claims Section for determination.

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Vicki L. Seeck  
Administrative Law Judge

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Decision Dated and Mailed

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