

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

PAMELA J RICHARDSON-CAR
Claimant

HY-VEE INC
Employer

APPEAL 17A-UI-03358-DB-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 03/05/17
Claimant: Appellant (2)

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Code § 96.5(1) – Voluntary Quitting

STATEMENT OF THE CASE:

The claimant/appellant filed an appeal from the March 22, 2017 (reference 01) unemployment insurance decision that denied benefits based upon her separation from employment. The parties were properly notified of the hearing. A telephone hearing was held on April 19, 2017. The claimant, Pamela J. Richardson-Car, participated personally. The employer, Hy-Vee Inc., was represented by Judy Berry and participated through witnesses Shelia McGuire, Patrick Sullivan, and Steven Almonrode. Employer's Exhibits 1 and 2 were admitted. The administrative law judge took administrative notice of the claimant's unemployment insurance benefits records including the fact-finding documents.

ISSUES:

Was the claimant discharged for disqualifying job-related misconduct?
Did claimant voluntarily quit the employment with good cause attributable to employer?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed part-time as a server in the employer's restaurant and bar from November 11, 2016 until March 7, 2017 when she was discharged. Claimant's job duties included serving food, drinks, accepting payment, and providing customer service to customers.

The final incident that led to claimant's discharge occurred on Sunday, March 5, 2017. During claimant's shift there were three customers sitting at the bar eating when claimant was working. Claimant took a break and during her break the customers asked Mr. Sullivan to provide their meal bills to them, which he did. Mr. Sullivan testified that two customers paid with cash and one customer paid with a credit card. However, Mr. Sullivan did not see two customers pay with cash and did not review the check registers. Mr. Sullivan put the two check registers near the cash register. When claimant returned from break and reviewed the two check registers, there was cash in one check register but not the other one. Claimant reported to Mr. Sullivan that one customer had not paid for his meal. Mr. Sullivan found this customer in the store and the customer told him that he did pay for his meal. Mr. Sullivan spoke to another manager on duty in the store and was told by that manager not to tell the claimant that he found the customer. Mr. Sullivan returned to the restaurant where claimant was still located and reported that he

never found the customer. He then voided the transaction out so that claimant would not be responsible for the loss.

This matter came to Mr. Almonrode's attention the next day on Monday, March 6, 2017. He reviewed a videotape of the incident. Mr. Almonrode testified that when he reviewed the videotape it showed the claimant taking cash out of both check registers and depositing the cash into her cash holder. However, Mr. Almonrode could not determine what denomination of cash the videotape showed claimant taking.

When claimant was discharged on Tuesday, March 7, 2017 she was told by Mr. Almonrode that the discharge was for theft of cash. She denied that she stole any cash. Mr. Almonrode reported to claimant that he had reviewed the incident on videotape. Claimant asked to review the videotape. Mr. Almonrode refused to allow claimant to review the videotape of the incident. No videotape was offered as evidence during the hearing in this matter. This matter was not reported to the police.

Claimant had received one previous discipline regarding her attendance. This was a written warning she received in December of 2016. She had not received any further discipline other than this written warning prior to her discharge from employment.

REASONING AND CONCLUSIONS OF LAW:

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

As a preliminary matter, I find that the Claimant did not quit. Claimant was discharged from employment.

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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. *Huntoon v. Iowa Department of Job Service*, 275 N.W.2d 445, 448 (Iowa 1979).

871 IAC 24.32(4) provides:

(4) Report required. The claimant's statement and the 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.

871 IAC 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.

Further, 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).

The employer did not offer the videotape that allegedly showed claimant stealing cash. Claimant denied stealing any cash. Mr. Almonrode testified that he could not see the denomination of cash on the videotape. If Mr. Almonrode could not identify the denomination of cash on the videotape, it is not credible that Mr. Almonrode could accurately identify any items taken out of the check register as cash, instead of a receipt or other type of item.

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). It is permissible to infer that the videotape was not submitted because it would not have been supportive of employer's position. *Id.*

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.* Mindful of the ruling in *Crosser*, the administrative law judge concludes that Mr. Almonrode's testimony that he saw claimant stealing cash from the check register is not credible. Claimant did not steal any cash.

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). When based on carelessness, the carelessness must actually indicate a "wrongful intent" to be disqualifying in nature. *Id.* Negligence does not constitute misconduct unless recurrent in nature; a single act is not disqualifying unless indicative of a deliberate disregard of the employer's interests. *Henry v. Iowa Dep't of Job Serv.*, 391 N.W.2d 731 (Iowa Ct. App. 1986). Further, poor work performance is not misconduct in the absence of evidence of intent. *Miller v. Emp't Appeal Bd.*, 423 N.W.2d 211 (Iowa Ct. App. 1988). 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 Bd.*, 616 N.W.2d 661 (Iowa 2000). Reoccurring acts of negligence by an employee would probably be described by most employers as in disregard of their interests. *Greenwell v Emp't Appeal Bd.*, No. 15-0154 (Iowa Ct. App. March 23, 2016). The misconduct legal standard requires more than reoccurring acts of negligence in disregard of the employer's interests. *Id.*

The claimant did not steal any cash. Because there was no final or current act of job-related misconduct, the employer has failed to meet its burden of proof. As such, benefits are allowed.

DECISION:

The March 22, 2017 (reference 01) unemployment insurance decision is reversed. 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.

Dawn Boucher
Administrative Law Judge

Decision Dated and Mailed

db/