

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

SHAWNDA GREEN

Claimant

TARGET CORPORATION

Employer

APPEAL 20R-UI-05159-SC-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

**OC: 01/26/20
Claimant: Appellant (1)**

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Code § 96.3(7) – Overpayment of Benefits
Public Law 116-136 § 2104(b) – Federal Pandemic Unemployment Compensation

STATEMENT OF THE CASE:

On March 4, 2020, Shawnda Green (claimant) filed an appeal from the February 26, 2020, reference 04, unemployment insurance decision that denied benefits based upon the determination Target Corporation (employer) discharged her for dishonesty in connection with her work. The parties were properly notified about the hearing. A telephone hearing was held on April 28, 2020. The administrative law judge (ALJ) issued a decision on May 4, 2020 affirming the unemployment insurance decision.

The claimant appealed the ALJ's decision to the Employment Appeal Board (EAB) who determined the claimant had been denied due process at the first hearing and remanded the case for another hearing. After new hearing notices were issued, a telephone hearing was held on July 14, 2020. The claimant participated personally. Shawanda Jones, her witness, did not answer either call at the number provided for the hearing. The employer participated through Tyler Newell, Executive Team Leader (ETL) Assets Protection, and Janet Frasher, ETL Human Resources. The employer offered exhibits into the record; however, they were not admitted as the claimant had not received the documents and did not have an opportunity to review them prior to the hearing. The administrative law judge took official notice of the claimant's claim history.

ISSUES:

Did the employer discharge the claimant for job related misconduct?
Has the claimant been overpaid regular unemployment benefits and Federal Pandemic Unemployment Compensation (FPUC)?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed part-time as a Guest Advocate beginning on September 24, 2019, and was separated from employment on January 18, 2020, when she was discharged. The

employer has a zero-tolerance theft policy. It notifies employees during orientation that they will be discharged for theft from the company.

On January 3, the claimant got into a verbal altercation with a cashier while purchasing personal items. The claimant paid for the food items in her cart, but failed to purchase five clothing items that she had covered with her coat. The claimant knew at the time she was loading the items into her vehicle that she had not paid for them, but took no additional action to return or pay for the items.

Tyler Newell, ETL Assets Protection, learned of the incident and began an investigation. He reviewed the claimant's shifts in the 30 days prior to the January 3 incident to see if similar incidents had occurred. He discovered on December 13, 2019, the claimant took two items to the self-checkout, a package of gummy candy and a container of soup, but only paid for the candy. As they did each time, Newell and his team ran an item search to see if the claimant purchased the unpaid item at some point prior to or after the transaction in question. Each time, they discovered she had not.

Newell then conducted live and taped surveillance of the claimant during her shifts. On January 14, Newell observed the claimant put a package of bottles of tea on the rack at the bottom of the cart. She did not present the item to the cashier for payment, but loaded the tea into her vehicle.

On January 16, the claimant had selected a protein powder that she placed in the child seat at the front of the cart. Before going to the checkout, she moved the protein powder to the rack on the bottom of the cart. She made other purchases, but did not present the protein powder to the cashier. The claimant then loaded the product into her vehicle.

On January 17, the claimant placed Lotrimin in her cart along with other items. When she got to the checkout, she covered the Lotrimin with her coat and did not present it to the cashier. She then left with the product without paying. On January 18, the employer discharged the claimant for theft.

The claimant filed her claim for benefits effective January 26, 2020. She has received \$1,755.00 in regular benefits and \$2,400.00 in Federal Pandemic Unemployment Compensation (FPUC) during the 13 weeks ending April 25.

REASONING AND CONCLUSIONS OF LAW:

1. Did the employer discharge the claimant for job related misconduct?

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment due to job-related misconduct. Benefits are denied.

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 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). Misconduct must be "substantial" to warrant a denial of job insurance benefits. *Newman v. Iowa Dep't of Job Serv.*, 351 N.W.2d 806 (Iowa Ct. App. 1984). 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).

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.*

The findings of fact show how the disputed factual issues were resolved. After assessing the credibility of the witnesses who testified during the hearing, the reliability of the evidence

submitted, considering the applicable factors listed above, and using her own common sense and experience, the administrative law judge attributes more weight to the employer's version of events. The claimant does not dispute that some of the incidents occurred; instead, she provides her justification for the incidents.

The employer has met the burden of proof to establish that the claimant engaged in deliberate or willful misconduct. Taking items without paying for them is theft from the employer. Theft from an employer is generally disqualifying misconduct. *Ringland Johnson, Inc. v. Hunecke*, 585 N.W.2d 269, 272 (Iowa 1998). In *Ringland*, the Court found a single attempted theft to be misconduct as a matter of law. In this case, the claimant deliberately disregarded the employer's interest and knowingly violated a company policy on at least two occasions. The claimant engaged in disqualifying misconduct even without previous warning. Benefits are denied.

II. Has the claimant been overpaid regular unemployment benefits and Federal Pandemic Unemployment Compensation (FPUC)?

For the reasons that follow, the administrative law judge concludes the claimant has been overpaid regular unemployment benefits and FPUC.

Iowa Code § 96.3(7) provides, in pertinent part:

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.

PL116-136, Sec. 2104 provides, in relevant part:

EMERGENCY INCREASE IN UNEMPLOYMENT COMPENSATION BENEFITS.

...

(b) Provisions of Agreement

(1) Federal pandemic unemployment compensation.--Any agreement under this section shall provide that the State agency of the State will make payments of regular compensation to individuals in amounts and to the extent that they would be determined if the State law of the State were applied, with respect to any week for which the individual is (disregarding this section) otherwise entitled under the State law to receive regular compensation, as if such State law had been modified in a manner such that the amount of regular compensation (including dependents' allowances) payable for any week shall be equal to

(A) the amount determined under the State law (before the application of this paragraph), plus

(B) an additional amount of \$600 (in this section referred to as “Federal Pandemic Unemployment Compensation”).

....

(f) Fraud and Overpayments

...

(2) Repayment.--In the case of individuals who have received amounts of Federal Pandemic Unemployment Compensation to which they were not entitled, the State shall require such individuals to repay the amounts of such Federal Pandemic Unemployment Compensation to the State agency...

Since the claimant is not eligible for regular unemployment benefits, she was overpaid \$1,755.00 in regular unemployment benefits and \$2,400.00 in FPUC from January 26 through April 25. The claimant will be required to repay the benefits received unless the Employment Appeal Board reverses this decision on appeal or she is eligible for Pandemic Unemployment Assistance (PUA).

DECISION:

Regular Unemployment Insurance Benefits Under State Law

The February 26, 2020, reference 04, unemployment insurance decision is affirmed. The claimant was discharged from employment due to job-related misconduct. Benefits are withheld until such time as she has worked in and been paid wages for insured work equal to ten times her weekly benefit amount, provided she is otherwise eligible. As a result, she was overpaid \$1,755.00 in regular unemployment benefits and \$2,400.00 in FPUC.

Pandemic Unemployment Assistance (PUA) Under the Federal CARES Act

Even though the claimant is not eligible for regular unemployment insurance benefits under state law, she may be eligible for federally funded unemployment insurance benefits under the CARES Act. Section 2102 of the CARES Act creates a new temporary federal program called Pandemic Unemployment Assistance (PUA) that, in general, provides up to 39 weeks of unemployment benefits. An individual receiving PUA benefits may also receive the \$600 weekly benefit amount in FPUC. This decision does not address whether the claimant is eligible for PUA. For a decision on such eligibility, the claimant must apply for PUA, as noted in the instructions provided in the "Note to Claimant" on the last page of the decision.



Stephanie R. Callahan
Administrative Law Judge

July 22, 2020
Decision Dated and Mailed

src/scn

Note to Claimant. This decision determines you are not eligible for regular unemployment insurance benefits. If you disagree with this decision, you may file an appeal to the Employment Appeal Board by following the instructions on the first page of this decision. Individuals who do not qualify for regular unemployment insurance benefits, but who are currently unemployed for reasons related to COVID-19 may qualify for Pandemic Unemployment Assistance (PUA). **You will need to apply for PUA to determine your eligibility under the program.** Additional information on how to apply for PUA can be found at <https://www.iowaworkforcedevelopment.gov/pua-information>. If this decision becomes final or if you are not eligible for PUA, you may have an overpayment of benefits.