IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

CHRISTINE L JONES Claimant **THE UNIVERSITY OF IOWA** Employer	**APPEAL 17R-UI-04526-JP-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 01/29/17** **Claimant: Respondent (2)**

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 February 20, 2017, (reference 01) unemployment insurance decision that allowed benefits. The parties were properly notified about the hearing. A telephone hearing was held on May 30, 2017. Claimant participated. Employer participated through benefits specialist Mary Eggenburg and assistant department director Elizabeth Fielder. Employer Exhibit 1 was admitted into evidence with no objection. Official notice was taken of the administrative record, including claimant's benefit payment history and wage history, 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 part-time as a cook 1 from July 13, 2016, and was separated from employment on January 27, 2017, when she was discharged.

The employer has a written policy that prohibits theft of the employer's property. Claimant was aware of the policy. The employer does not provide its employees with a discount on food.

On January 9, 2017, the employer became aware of that claimant was purchasing items at a reduced rate. A witness reported to the employer that claimant had ordered two chicken breasts and should have paid approximately $5.50, but she actually paid $.30. Ms. Fielder interviewed the cashier about the incident. The cashier told Ms. Fielder that claimant told the cashier that she had bread in her container, which is valued at $.30, not chicken breasts. According to the employer's protocol, containers are to be opened to show the cashier what is

inside. Claimant did not open her container at the register to show the cashier. The employer then began an investigation of all of claimant's purchases on her ID card. The employer discovered that claimant was only charged for toast/bread on nine occasions between December 18, 2016 and January 15, 2017.

On December 18, 2016, claimant purchased chips ($1.10), a beverage (at least $1.25), and she also had two containers. Claimant was charged for three pieces of toast and paid $.90. Claimant did not open the containers for the cashier. On January 14, 2017, the employer observed through video surveillance that claimant purchased two containers of fresh pineapple ($2.50 per container) and a small container of an unknown product. Claimant only paid $.90 for these items. Also on January 14, 2017, Claimant purchased for $.90 an ice tea (at least $1.25), candy (approximately $1.10), and an unopened container. On January 14, 2017 claimant also purchased a coffee (approximately $1.20) and she only paid $.30. Also on January 14, 2017, claimant was charged $.60 for toast/bread for a product in a container, but there is lettuce and tomato in an open container that should have been weighed, but the items were not weighed; claimant had an open and a closed container. On January 15, 2017, during claimant's shift, she had two separate purchases at the incorrect price. During one transaction, claimant purchased a chocolate milk (close to $1.00 in value), at least two bacon strips ($.50 per strip), and an unopened container of food for $.90. During the second transaction, claimant purchased a small container and large container. Claimant was only charged for two pieces of toast and paid $.60.

On January 18, 2017, Ms. Fielder interviewed claimant regarding the transactions. Ms. Fielder testified that claimant told the employer she typically orders a chicken sandwich or hamburger and pays either cash or ID card. Claimant did not recall what she purchased on January 9, 2017, but she told Ms. Fielder that she opens her containers and understands the policy to do so. Claimant stated she was aware that the cameras monitor the register. Claimant told Ms. Fielder that she does not pay attention to what the cashier charges her. During the interview, claimant told the employer it was the cashier's job to charge the right amount. The only items that the employer has for $.30 or less are condiments and toast/bread. On January 18, 2017, claimant was placed on administrative leave, pending investigation. During the investigation, the employer also investigated the cashier. The cashier told the employer that certain employees, including claimant, knew they were getting a discount. There were two other employees (not including claimant) that were benefiting from the cashier's discounting. The employer confirmed that the other two employees were getting discounts and then they were discharged. The cashier quit before the employer concluded its investigation. At the conclusion of the investigation, claimant was discharged on January 27, 2017.

On March 22, 2016, the employer gave claimant a written reprimand for holding back food items for discount purchase. Employer Exhibit 1. At a certain time during the day, the employer discounts the price of the remaining donuts and claimant had held back donuts for purchase until after the price was reduced. On December 13, 2016, the employer suspended claimant for serving herself food, which was against the employer's policy. Employer Exhibit 1.

The administrative record reflects that claimant has received unemployment benefits in the amount of $1,338.00, since filing a claim with an effective date of January 29, 2017, for the eight weeks ending March 25, 2017. The administrative record also establishes that the employer did participate in the fact-finding interview.

The administrative record reflects that claimant does not have other full- or part-time employment in the base period.

REASONING AND CONCLUSIONS OF LAW:

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

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).

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 reviewed the exhibit submitted. This administrative law judge finds the employer's version of events to be more credible than claimant'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).

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). 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). When reviewing an alleged act of misconduct, the finder of fact may consider past acts of misconduct to determine the magnitude of the current act. *Kelly v. Iowa Dep't of Job Serv.*, 386 N.W.2d 552, 554 (Iowa Ct. App. 1986). 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 Employment Appeal Board has previously stated in *Quintin H Wyatt v. The University Of Iowa*, 15B-UI-08148-EAB, (dated September 17, 2015):

> Theft from an employer is generally disqualifying misconduct. *Ringland Johnson Inc. v. Employment Appeal Board*, 585 N.W.2d 269 (Iowa 1998). In *Ringland* the Court found a single attempted theft to be misconduct as a matter of law. Even the theft of a item of negligible value a single time can be misconduct. Thus in *Tompkins-Kutcher v. EAB*, 11-0149 (Iowa App. 8/24/2011) a Casey's employee who took a wasted $10 container of soup from dumpster was disqualified for misconduct. Value is thus not the issue.

While the employer did not present the cashier to provide sworn testimony or submit to cross-examination, the combination of Ms. Eggenburg and Ms. Fielder's testimony, when compared to claimant's recollection of the event, establish the employer's evidence as credible. The employer is entitled to establish reasonable work rules and expect employees to abide by them. Since others have also been discharged for similar conduct, disparate application of the policy is not evident. The employer has presented substantial and credible evidence that claimant knowingly failed to pay full price on multiple occasions for the food items she purchased. Claimant's conduct is considered theft and is disqualifying misconduct. Benefits are denied.

Iowa Code section 96.3(7)*a, b*, 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.
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> *b.* (1) (a) 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. The employer shall not be relieved of charges if benefits are paid because the employer or an agent of the employer failed to respond timely or adequately to the department's request for information relating to the payment of benefits. This prohibition against relief of charges shall apply to both contributory and reimbursable employers.

(b) 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.

(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.

Iowa Admin. Code r. 871-24.10 provides:

Employer and employer representative participation in fact-finding interviews.

(1) "Participate," as the term is used for employers in the context of the initial determination to award benefits pursuant to Iowa Code section 96.6, subsection 2, means submitting detailed factual information of the quantity and quality that if unrebutted would be sufficient to result in a decision favorable to the employer. The most effective means to participate is to provide live testimony at the interview from a witness with firsthand knowledge of the events leading to the separation. If no live testimony is provided, the employer must provide the name and telephone number of an employee with firsthand information who may be contacted, if necessary, for rebuttal. A party may also participate by providing detailed written statements or documents that provide detailed factual information of the events leading to separation. At a minimum, the information provided by the employer or the employer's representative must identify the dates and particular circumstances of the incident or incidents, including, in the case of discharge, the act or omissions of the claimant or, in the event of a voluntary separation, the stated reason for the quit. The specific rule or policy must be submitted if the claimant was discharged for violating such rule or policy. In the case of discharge for attendance violations, the information must include the circumstances of all incidents the employer or the employer's representative contends meet the definition of unexcused absences as set forth in 871-subrule 24.32(7). On the other hand, written or oral statements or general conclusions without supporting detailed factual information and information submitted after the fact-finding decision has been issued are not considered participation within the meaning of the statute.

(2) "A continuous pattern of nonparticipation in the initial determination to award benefits," pursuant to Iowa Code section 96.6, subsection 2, as the term is used for an entity representing employers, means on 25 or more occasions in a calendar quarter beginning with the first calendar quarter of 2009, the entity files appeals after failing to participate. Appeals filed but withdrawn before the day of the contested case hearing will not be considered in determining if a continuous pattern of nonparticipation exists. The division administrator shall notify the employer's representative in writing after each such appeal.

(3) If the division administrator finds that an entity representing employers as defined in Iowa Code section 96.6, subsection 2, has engaged in a continuous pattern of nonparticipation, the division administrator shall suspend said representative for a period of up to six months on the first occasion, up to one year on the second occasion and up to ten years on the third or subsequent occasion. Suspension by the division

administrator constitutes final agency action and may be appealed pursuant to Iowa Code section 17A.19.

(4) "Fraud or willful misrepresentation by the individual," as the term is used for claimants in the context of the initial determination to award benefits pursuant to Iowa Code section 96.6, subsection 2, means providing knowingly false statements or knowingly false denials of material facts for the purpose of obtaining unemployment insurance benefits. Statements or denials may be either oral or written by the claimant. Inadvertent misstatements or mistakes made in good faith are not considered fraud or willful misrepresentation.

This rule is intended to implement Iowa Code section 96.3(7)"*b*" as amended by 2008 Iowa Acts, Senate File 2160.

Because the claimant's separation was disqualifying, benefits were paid to which she was not entitled. The unemployment insurance law provides that benefits must be recovered from a claimant who receives benefits and is later determined to be ineligible for benefits, even though the claimant acted in good faith and was not otherwise at fault. However, the overpayment will not be recovered when it is based on a reversal on appeal of an initial determination to award benefits on an issue regarding the claimant's employment separation if: (1) the benefits were not received due to any fraud or willful misrepresentation by the claimant and (2) the employer did not participate in the initial proceeding to award benefits. The employer will not be charged for benefits if it is determined that they did participate in the fact-finding interview. Iowa Code § 96.3(7), Iowa Admin. Code r. 871-24.10. In this case, the claimant has received benefits but was not eligible for those benefits. Since the employer did participate in the fact-finding interview the claimant is obligated to repay to the agency the benefits she received and the employer's account shall not be charged.

DECISION:

The February 20, 2017, (reference 01) unemployment insurance decision is reversed. Claimant was discharged from employment due to job-related misconduct. Benefits are withheld until such time as claimant has worked in and been paid wages for insured work equal to ten times her weekly benefit amount, provided she is otherwise eligible.

Claimant has been overpaid unemployment insurance benefits in the amount of $1,338.00 and is obligated to repay the agency those benefits. The employer did participate in the fact-finding interview and its account shall not be charged.

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Jeremy Peterson
Administrative Law Judge

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Decision Dated and Mailed

jp/rvs