

**IOWA DEPARTMENT OF INSPECTIONS AND APPEALS
ADMINISTRATIVE HEARINGS DIVISION, UI APPEALS BUREAU**

DENISE E GWINN
Claimant

HY-VEE INC
Employer

APPEAL 23A-UI-05212-DZ-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

**OC: 04/16/23
Claimant: Respondent (2)**

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

STATEMENT OF THE CASE:

Hy-Vee Inc, the employer/appellant,¹ filed an appeal from the Iowa Workforce Development (IWD) May 9, 2023 (reference 01) unemployment insurance (UI) decision. The decision allowed Ms. Gwinn REGULAR (state) UI benefits because IWD concluded the employer dismissed her from work on April 15, 2023 for a reason that did not disqualify her from receiving UI benefits.

On May 26, 2023, the Iowa Department of Inspections and Appeals (DIA) UI Appeals Bureau mailed a notice of hearing to the employer and Ms. Gwinn for a hearing scheduled for June 8, 2023 at 2:00 p.m. The DIA UI Appeals Bureau changed the time of the hearing from 2:00 p.m. to 10:00 a.m. So, on May 30, 2023, the Iowa DIA UI Appeals Bureau mailed a second notice of hearing to the employer and Ms. Gwinn for a hearing scheduled for June 8, 2023 at 10:00 a.m. The employer called to participate in the hearing on June 8 at 10:00 a.m. Ms. Gwinn did not call in. The undersigned administrative law judge rescheduled the hearing because the DIA UI Appeals Bureau had not sent the notice of hearing for the 10:00 a.m. hearing at least ten calendar days before the hearing, as required by Iowa Admin. Code r. 871-26.6(1).

On June 9, 2023, the Iowa DIA UI Appeals Bureau mailed a third notice of hearing to employer and Ms. Gwinn for a hearing scheduled for June 28, 2023 at 10:00 a.m. The undersigned held a telephone hearing on June 28, 2023. The employer participated through Nate Fehl, store director, Bea Cisler, store manager, Stacy Mitchel, Corporate Cost Control claims analyst and Ken Pess, Equifax hearing representative. Ms. Gwinn did not participate in the hearing. The undersigned took official notice of the administrative record and admitted Employer's Exhibits 1-2 as evidence.

ISSUES:

Did the employer discharge Ms. Gwinn from employment for disqualifying job-related misconduct?

Did IWD overpay Ms. Gwinn UI benefits?

If so, should she repay the benefits?

¹ Appellant is the person or employer who filed the appeal.

FINDINGS OF FACT:

Having reviewed the evidence in the record, the administrative law judge finds: Ms. Gwinn began working for the employer in December 2019. She worked as a full-time assistant gas station manager. Her employment ended on April 17, 2023.

On April 15, 2023, Ms. Gwinn was scheduled to work until 2:00 p.m. Ms. Gwinn told the other employee with whom she was working (Employee A) that she was leaving, and she left at 11:56 a.m. Employee A reported to Ms. Gwinn and did not ask Ms. Gwinn for details about her leaving. Another employee (Employee B) went to the gas station and saw Employee A working alone. Employee B reported to Mr. Fehl that Employee A was working alone. Mr. Fehl went to the gas station around 12:30 p.m. Employee A told Mr. Fehl that they did not know where Ms. Gwinn was or whether she was taking a break. Mr. Fehl directed Employee A to tell Ms. Gwinn to call him when Ms. Gwinn returned to work. At 1:29 p.m., Ms. Gwinn came back to work. Ms. Gwinn then called Mr. Fehl and told him that she had taken a long lunch.

The next day, at Mr. Fehl's direction, the human resources manager checked Ms. Gwinn's timecard. The timecard showed Ms. Gwinn did not clock out at 11:56 a.m. when she left on April 15, but she did clock out at 1:29 p.m.

On Monday, April 17, Mr. Fehl and Ms. Cisler met with Ms. Gwinn. Ms. Gwinn admitted to leaving at 11:56 a.m. on April 15 without clocking out, coming back to the store, and clocking out at 1:29 p.m. Ms. Gwinn told the employer that she forgot to clock out and she went home to check on her child and fell asleep.

The employer's policy prohibits time theft and provides that employees who do so are subject to discipline up to and including termination of employment. Ms. Gwinn acknowledged receiving the policy in December 2019. The employer terminated Ms. Gwinn's employment for time theft. Ms. Gwinn had no prior discipline record.

The decision in this case rests, at least in part, on the credibility of the witness. It is the duty of the undersigned as the trier of fact in this case, to determine the credibility of witnesses, weigh the evidence and decide the facts in issue.² The undersigned may believe all, part or none of any witness's testimony.³ In assessing the credibility of witnesses, the undersigned should consider the evidence using his or her own observations, common sense and experience.⁴ 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.⁵

The employer submitted images in Employer's Exhibit 1 purporting to show Ms. Gwinn leaving the store, leaving the parking, and clocking out on April 15. The undersigned finds the images do not establish any facts in this case as none of the images contain dates or timestamps. However, the undersigned finds credible Mr. Fehl and Ms. Cisler's testimony and the other documents the employer submitted as evidence as they are reasonable and consistent.

² *Arndt v. City of LeClaire*, 728 N.W.2d 389, 394-395 (Iowa 2007).

³ *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996).

⁴ *Id.*

⁵ *Id.*

IWD paid Ms. Gwinn REGULAR (state) UI benefits in the total gross amount of \$360.00 for the week of April 16-22, 2023. The employer did not participate in the fact-finding interview because it received the interview notice after the interview.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the undersigned concludes the employer discharged Ms. Gwinn from employment for job-related misconduct.

Iowa Code section 96.5(2)(a) and (d) provide, in relevant part:

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.

d. For the purposes of this subsection, "misconduct" means a deliberate act or omission by an employee that constitutes a material breach of the duties and obligations arising out of such the employee's contract of employment. Misconduct is 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. Misconduct by an individual includes but is not limited to all of the following:

...

(13) Theft of an employer or coworker's funds or property.

The employer has the burden of proof in establishing disqualifying job misconduct.⁶ The issue is not whether the employer made a correct decision in separating the claimant from employment, but whether the claimant is entitled to unemployment insurance benefits.⁷ Misconduct must be "substantial" to warrant a denial of job insurance benefits.⁸

In this case, the employer has established that Ms. Gwinn stole from the employer by leaving and not clocking out for over one-and-a-half hours on April 15. Theft is misconduct under the explicit statutory definition of misconduct. In addition, the Iowa Supreme Court has found a single attempted theft to be misconduct as a matter of law.⁹ Even the theft of a small value item can be misconduct. The Iowa Court of Appeals has found an employee who took a wasted

⁶ *Cosper v. Iowa Dep't of Job Serv.*, 321 N.W.2d 6 (Iowa 1982).

⁷ *Infante v. Iowa Dep't of Job Serv.*, 364 N.W.2d 262 (Iowa Ct. App. 1984).

⁸ *Newman v. Iowa Dep't of Job Serv.*, 351 N.W.2d 806 (Iowa Ct. App. 1984).

⁹ *Ringland Johnson Inc. v. Employment Appeal Board*, 585 N.W.2d 269 (Iowa 1998).

\$10.00 container of soup from a dumpster was disqualified for misconduct. Since the employer has established disqualifying, job-related misconduct, UI benefits are denied.

The undersigned further concludes IWD overpaid Ms. Gwinn REGULAR (state) UI benefits in the total gross amount of \$360.00 but Ms. Gwinn is not required to repay these benefits.

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.

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. If the department determines that an employer's failure to respond timely or adequately was due to insufficient notification from the department, the employer's account shall not be charged for the overpayment.

(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.

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 un rebutted 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.

Since Ms. Gwinn is not eligible for UI benefits based on how her job ended with the employer, she is not eligible for the UI benefits IWD already sent her. IWD overpaid Ms. Gwinn REGULAR (state) UI benefits in the total gross amount of \$360.00 for the week of April 16-22, 2023. But, since the employer did not participate in the fact-finding interview, Ms. Gwinn is not required to repay these UI benefits.

DECISION:

The May 9, 2023, (reference 01) UI decision is REVERSED. The employer discharged Ms. Gwinn from employment for job-related misconduct. Benefits are denied until Ms. Gwinn has worked in and been paid wages for insured work equal to ten times her weekly UI benefit amount, as long as no other decision denies her UI benefits.

IWD overpaid Ms. Gwinn REGULAR (state) UI benefits in the total gross amount of \$360.00. But Ms. Gwinn is not required to repay these UI benefits since the employer did not participate in the fact-finding interview.



Daniel Zeno
Administrative Law Judge

June 30, 2023
Decision Dated and Mailed

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APPEAL RIGHTS. If you disagree with this decision, you or any interested party may:

1. Appeal to the Employment Appeal Board within fifteen (15) days of the date under the judge's signature by submitting a written appeal via mail, fax, or online to:

**Employment Appeal Board
4th Floor – Lucas Building
Des Moines, Iowa 50319
Fax: (515)281-7191
Online: eab.iowa.gov**

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

AN APPEAL TO THE BOARD SHALL STATE CLEARLY:

- 1) The name, address, and social security number of the claimant.
- 2) A reference to the decision from which the appeal is taken.
- 3) That an appeal from such decision is being made and such appeal is signed.
- 4) The grounds upon which such appeal is based.

An Employment Appeal Board decision is final agency action. If a party disagrees with the Employment Appeal Board decision, they may then file a petition for judicial review in district court.

2. If no one files an appeal of the judge's decision with the Employment Appeal Board within fifteen (15) days, the decision becomes final agency action, and you have the option to **file a petition for judicial review in District Court** within thirty (30) days after the decision becomes final. Additional information on how to file a petition can be found at Iowa Code §17A.19, which is online at <https://www.legis.iowa.gov/docs/code/17A.19.pdf> or by contacting the District Court Clerk of Court <https://www.iowacourts.gov/iowa-courts/court-directory/>.

Note to Parties: YOU MAY REPRESENT yourself in the appeal or obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds.

Note to Claimant: It is important that you file your weekly claim as directed, while this appeal is pending, to protect your continuing right to benefits.

SERVICE INFORMATION:

A true and correct copy of this decision was mailed to each of the parties listed.

DERECHOS DE APELACIÓN. Si no está de acuerdo con la decisión, usted o cualquier parte interesada puede:

1. Apelar a la Junta de Apelaciones de Empleo dentro de los quince (15) días de la fecha bajo la firma del juez presentando una apelación por escrito por correo, fax o en línea a:

**Employment Appeal Board
4th Floor – Lucas Building
Des Moines, Iowa 50319
Fax: (515)281-7191
En línea: eab.iowa.gov**

El período de apelación se extenderá hasta el siguiente día hábil si el último día para apelar cae en fin de semana o día feriado legal.

UNA APELACIÓN A LA JUNTA DEBE ESTABLECER CLARAMENTE:

- 1) El nombre, dirección y número de seguro social del reclamante.
- 2) Una referencia a la decisión de la que se toma la apelación.
- 3) Que se interponga recurso de apelación contra tal decisión y se firme dicho recurso.
- 4) Los fundamentos en que se funda dicho recurso.

Una decisión de la Junta de Apelaciones de Empleo es una acción final de la agencia. Si una de las partes no está de acuerdo con la decisión de la Junta de Apelación de Empleo, puede presentar una petición de revisión judicial en el tribunal de distrito.

2. Si nadie presenta una apelación de la decisión del juez ante la Junta de Apelaciones Laborales dentro de los quince (15) días, la decisión se convierte en acción final de la agencia y usted tiene la opción de **presentar una petición de revisión judicial en el Tribunal de Distrito** dentro de los treinta (30) días después de que la decisión adquiriera firmeza. Puede encontrar información adicional sobre cómo presentar una petición en el Código de Iowa §17A.19, que se encuentra en línea en <https://www.legis.iowa.gov/docs/code/17A.19.pdf> o comunicándose con el Tribunal de Distrito Secretario del tribunal <https://www.iowacourts.gov/iowa-courts/court-directory/>.

Nota para las partes: USTED PUEDE REPRESENTARSE en la apelación u obtener un abogado u otra parte interesada para que lo haga, siempre que no haya gastos para Workforce Development. Si desea ser representado por un abogado, puede obtener los servicios de un abogado privado o uno cuyos servicios se paguen con fondos públicos.

Nota para el reclamante: es importante que presente su reclamo semanal según las instrucciones, mientras esta apelación está pendiente, para proteger su derecho continuo a los beneficios.

SERVICIO DE INFORMACIÓN:

Se envió por correo una copia fiel y correcta de esta decisión a cada una de las partes enumeradas.