

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

KIMBERLY M EDWARDS
Claimant

HY-VEE INC
Employer

APPEAL 17A-UI-05768-DB

**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 04/30/17
Claimant: Appellant (1)

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 May 23, 2017 (reference 01) unemployment insurance decision that disallowed benefits based upon claimant's discharge from employment. The parties were properly notified of the hearing. An in-person hearing was held on July 11, 2017. The claimant, Kimberly M. Edwards, participated in person at the hearing. The employer, Hy-Vee Inc., was represented by Judy Berry, who participated by telephone. The employer also participated through witness Scott Pearson, who appeared in person. Employer's Exhibits 1 – 4 were admitted without objection.

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 at the employer's restaurant. Claimant was employed from November 18, 2015 until April 28, 2017, when she was discharged. Claimant's job duties included assisting customers by taking orders, delivering food, presenting invoices for payment and accepting payments from customers. Patrick Evans-Winfield and Tasha Price were two of claimant's immediate supervisors.

This employer has a written policy in place which states that falsifying company records, using physical or verbal abuse or profanity, removing company property without authorization, or defacing, destroying or the theft of property is not acceptable conduct. See Exhibit 3. The policy further states that violation of any rule, policy or procedure, whether included here, in the store level handbooks or postings, or stated orally by management personnel, will result in disciplinary action up to and including termination. See Exhibit 3. Claimant signed an acknowledgement of the policies. See Exhibit 2.

The final incident leading to discharge occurred on April 28, 2017. On this date, claimant served food and drinks to four customers. Two of the customers ordered drinks and claimant did not charge the customers for the drinks they received. See Exhibit 1. Both Mr. Evans-

Winfield and Ms. Price told Mr. Pearson that they personally witnessed the claimant fail to charge the customers for their drinks on this date. Claimant testified that she simply forgot to charge the customers for their drinks on this date.

On April 24, 2017, claimant had charged a customer a lower price for a coffee refill instead of a regular coffee. See Exhibit 1. Claimant did this intentionally and believed it was not a violation of the employer's policy because it was just one cup of coffee. Ms. Price witnessed this incident on this date as well and reported it to Mr. Pearson.

During the course of claimant's employment, there were no complaints between Ms. Price and claimant regarding any animosity or hostility between the two. Claimant was an experienced server who knew the process for correctly charging customers for products.

REASONING AND CONCLUSIONS OF LAW:

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

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

Iowa Code § 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).

Iowa Admin. Code r. 871-24.32(4) provides:

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

Iowa Admin. Code r.871-24.32(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.

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 administrative law judge had the ability to observe both witnesses' appearance and conduct in person during the hearing. Based upon the claimant's demeanor and conduct during the hearing, along with claimant's testimony that she believed it was allowable to intentionally charge a customer a lower price for coffee on April 24, 2017, leads the administrative law judge to find that the claimant's testimony that she simply forgot to charge customers for drinks on April 28, 2017 is not credible. While Mr. Pearson did rely on hearsay evidence, his demeanor during the hearing was forthright and his testimony was consistent regarding the April 28, 2017 incident that was reported to him.

"[T]he proper weight to be given to hearsay evidence ... will depend upon a myriad of factors – the circumstances of the case, the credibility of the witness, the credibility of the declarant, the circumstances in which the statement was made, the consistency of the statement with other corroborating evidence, and other factors as well." *Walthart v. Board of Directors of Edgewood-Colesburg Community School*, 694 N.W.2d 740, 744-45 (Iowa 2005). In this case, both Mr. Evans-Winfield and Ms. Price witnessed the claimant fail to charge customers for drinks on April 28, 2017. Both claimant and Mr. Pearson admit that claimant was an experienced server who knew how to properly charge customers for products. In light of the fact that claimant intentionally under charged a customer for coffee just days prior to the April 28, 2017 incident, it is reasonable to believe that claimant intentionally failed to charge customers for drinks on April 28, 2017.

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 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). The focus of the administrative code definition of misconduct is on deliberate, intentional or culpable acts by the employee. *Id.* 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).

This was not an incident of carelessness or the claimant simply forgetting to charge customers for drinks on April 28, 2017. Claimant intentionally failed to charge customers for drinks that she served them on April 28, 2017. Claimant also intentionally under charged a customer for coffee just days prior to the April 28, 2017 incident. It is clear that claimant’s actions on April 28, 2017 were intentional and they were a substantial violation of the employer’s policies and procedures.

The employer has a right to expect that an employee will not intentionally violate reasonable policies that the employer has in place. The employer’s policy against theft is reasonable. There is substantial evidence in the record to support the conclusion that claimant deliberately violated these rightful expectations in this case. Accordingly, the employer has met its burden of proof in establishing that the claimant’s conduct consisted of deliberate acts that constituted an intentional and substantial disregard of the employer’s interests. These actions rise to the level of willful misconduct. As such, benefits are denied.

DECISION:

The May 23, 2017 (reference 01) unemployment insurance decision is affirmed. Claimant was discharged from employment for 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.

Dawn Boucher
Administrative Law Judge

Decision Dated and Mailed

db/rvs