

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

ANGELENA Y FOUNTAIN
Claimant

HY-VEE INC
Employer

APPEAL 15A-UI-09087-H2T

**ADMINISTRATIVE LAW JUDGE
DECISION**

**OC: 07/05/15
Claimant: Respondent (2)**

Iowa Code § 96.5(2)a – Discharge/Misconduct
Iowa Code § 96.3(7) - Recovery of Benefit Overpayment
871 IAC 24.10 – Employer Participation in the Fact-finding Interview

STATEMENT OF THE CASE:

The employer filed an appeal from the August 6, 2015, (reference 03) unemployment insurance decision that allowed benefits. The parties were properly notified about the hearing. A telephone hearing was held on September 1, 2015. The administrative law judge called the claimant at the telephone number she provided she could be reached at for the hearing. A message was left for the claimant telling her to call in to participate prior to the hearing being completed and the record closed. The claimant did not do so. Employer participated through Matt Egger, Manager of Perishables; Jeff Williams, Cash Accountability; Diana Baker, Assistant Manager; Kim Shafer, Human Resources Manager and was represented by James Transfaglia of Corporate Cost Control. Employer's Exhibit One was entered and received into the record.

ISSUES:

Was the claimant discharged due to job-connected misconduct?

Has the claimant been overpaid any unemployment insurance benefits, and if so, can the repayment of those benefits to the agency be waived?

Can any 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 kitchen clerk beginning on January 17, 2015 through April 13, 2015 when she was discharged.

The employer has written policies and procedures, a copy of which had been given to the claimant. She had also gone through employee training. Because the employer deals with prepared food, local health regulations prohibit employees from having outside or home prepared food or drink in the their work areas. The rule is intended to prevent cross contamination of grocery store prepared food that could potentially be sold to hundreds of

customers. Employees are allowed to bring food and drinks from home but that food must be kept in their lockers and consumed only in the employee break room.

As the claimant was walking into work on April 13 Mr. Eggers saw her with a cup of coffee in her hand and carrying homemade cookies. She was taking both to her work station. Mr. Eggers asked her why she was taking food and drink to her work station and she said her coffee would get cold if she saved it for her break time. The claimant was not allowed to drink, eat or store anything food at her work station.

On April 11 the claimant's coworkers reported that she had left the work area at 9:00 p.m. and taken her purse, which she improperly had stored in her work area, picked up a grocery cart and shopped for her own personal groceries while on the time clock. She shopped for over 40 minutes. She then left the grocery cart while she went upstairs and punched out on the employee time clock. Because the employer recognizes that sometimes employees forget to punch out, they have a sheet of paper next to the time clock where employees can write in the correct time if they failed to punch out correctly. The claimant made no attempt to leave a note asking to have her time card changed indicating that she intended the employer to pay her for the over 40 minutes she spent doing her own grocery shopping.

Mr. Eggers also reviewed surveillance video and saw that the claimant had rung up some of her own purchases in the area where she worked. Her later explanation to him that no one else was around was not believable in that two other employees were shown in the area and could have rung her up.

When Mr. Eggers and Ms. Shafer met with the claimant to discuss the issues on April 13, the claimant made it clear she knew what the rules were, but thought she would only be given a warning for violating the rules. The claimant intentionally broke the rules thinking she would be allowed to and only given a warning.

The claimant has received unemployment benefits after the separation on a claim with an effective date of July 5, 2015.

The employer did participate personally in the fact-finding interview through Mr. Eggers who provided the fact finder with essentially the same information provided at the appeal hearing.

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.

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).

Generally, continued refusal to follow reasonable instructions constitutes misconduct. *Gilliam v. Atlantic Bottling Company*, 453 N.W.2d 230 (Iowa App. 1990).

The claimant made it clear at her termination meeting in front of both Mr. Eggers and Ms. Shafer that she knew the rules but simply did not follow them. Her failure to punch out while she did her own grocery shopping is theft of time from the employer. Mr. Eggers concluded that the claimant not only shopped while on the clock, intentionally kept her purse in her work area, brought in coffee and cookies to her work area and rang up her own purchases in her work area in a two-day period was sufficient evidence of her intention not to follow known reasonable company rules. The claimant knew or should have known that she was not allowed to get paid for doing her own grocery shopping. Her theft of time, in conjunction with her intentional rule violations is sufficient misconduct to disqualify her from receipt of unemployment insurance benefits. Benefits are denied.

Iowa Code § 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.

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 § 96.8, subsection 5.

b. (1) 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 § 96.8, subsection 5. 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 § 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. The employer shall not be charged with the benefits.

(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 states pursuant to § 602.10101.

871 IAC 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 § 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 § 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 § 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 § 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 § 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 § 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 the claimant 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). In this case, the claimant has received benefits but was not eligible for those benefits. Since the employer participated in the fact-finding interview the claimant is obligated to repay the benefits she received to the agency and the employer's account shall not be charged.

DECISION:

The August 6, 2015, (reference 03) decision is reversed. 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. The claimant has been overpaid unemployment insurance benefits in the amount of \$1475.00 and she is obligated to repay the agency those benefits. The employer did participate in the fact-finding interview and their account shall not be charged.

Teresa K. Hillary
Administrative Law Judge

Decision Dated and Mailed

tkh/css