

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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**MERRIANNE R BROWN**

Claimant

**APPEAL 19A-UI-02351-NM-T**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**CASEY'S MARKETING COMPANY**

Employer

**OC: 02/17/19**

**Claimant: Respondent (2)**

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

Iowa Admin. Code r. 871-24.32(1)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:**

On March 18, 2019, the employer filed an appeal from the March 8, 2019, (reference 01) unemployment insurance decision that allowed benefits. The parties were properly notified about the hearing. A telephone hearing was held on April 10, 2019. Claimant participated and testified. Angela Fagan also participated as a witness on behalf of the claimant. Employer participated through Area Supervisor Adam Bergman. Employer's Exhibits 1 through 9 were received into evidence. Official notice was taken of the fact-finding documents in the administrative record.

**ISSUES:**

Was the claimant discharged for disqualifying, job-related misconduct?

Has the claimant been overpaid benefits?

Should benefits be repaid by claimant due to the employer's participation in the fact finding?

**FINDINGS OF FACT:**

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant began working for employer on July 11, 2013. Claimant last worked as a full-time store manager. Claimant was separated from employment on January 30, 2019, when she was discharged.

The employer has a policy in place which provides that employees are required to pay for any merchandise before consuming it or removing it from the store. The policy also provides that an employee purchasing merchandise must sign his or her receipt and place it the log book, as well as retain a copy for his or her own records. Claimant was aware of the policy, as she received a copy of the policy upon her hire and most recently in April 2018, was responsible for training

new employees on the policy, and for enforcing it with existing employees. (Exhibit 3). As part of the employer's loss prevention it also regularly conducts void audits. During these audits upper management are given a list of void transactions and randomly select two transactions to review for each employee.

On either January 23 or 24, Bergman was conducting a void audit. He randomly selected a void claimant made on December 25, 2018 involving two liters of pop. When reviewing the security footage Bergman observed claimant talking with some customers, who were her daughter, grandchild, and son-in-law. Bergman noticed the customer's, claimant's family, were eating some pizza and drinking some pop. He observed the adult family members leaving with several items, including the pizza and pop they were drinking and the two liters. When Bergman reviewed the transaction record he could not find any evidence that the pizza or pops were paid for. He did see that the two liters had been rung in, along with a candy bar and some chips, but that transaction was the one claimant voided. When the items were rung in again, only the candy bar and chips were entered, meaning the two liters were not paid for. Bergman noticed claimant also completed a transaction, but that purchase only included paying for some candy and a child's soda for her grandchild.

Bergman's findings then prompted a more in-depth review in which he reviewed other surveillance video from claimant's shifts and compared what he saw to transaction logs. Bergman observed claimant eating biscuits and gravy on December 24, 2018, an item called cheese pleasers on December 25, 2018, a breakfast sandwich on January 16, 2019, and biscuits and gravy on January 20, 2019. Bergman did not observe claimant paying for any of these items, nor could he account for their purchase in the transaction records. Based on his findings, the decision was made to discharge claimant from employment for theft. (Exhibit 5).

The claimant filed a new claim for unemployment insurance benefits with an effective date of February 17, 2018. The claimant filed for and received a total of \$2,802.00 in unemployment insurance benefits for the weeks between February 17 and April 6, 2019. Both the employer and the claimant participated in a fact finding interview regarding the separation on March 4, 2019, though not at the same time. The fact finder determined claimant qualified for benefits.

#### **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.

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.

871 IAC 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 Department of Job Service*, 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).

The decision in this case rests, at least in part, on the credibility of the witnesses. 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.*

Claimant denies the allegations made against her. Claimant responded to the allegations made against her by stating she paid for all the merchandise she planned to consume for the entire week on Mondays and that the incident involving her family on Christmas Day must have been an oversight. It is noted that December 24, one of the days in which claimant consumed items

that were not recorded in the transaction log, was a Monday, meaning there should have been a record of claimant's purchases for that day and for December 25. Additionally, Claimant acknowledged she did not have itemized receipts to support her claims, only her banks statements, which would show she paid for some items. After assessing the credibility of the witnesses who testified during the hearing, considering the applicable factors listed above, and using her own common sense and experience, the administrative law judge finds the employer has provided sufficient evidence to show claimant consumed product, or allowed others to so, without first paying for it. The claimant was observed in engaging in this behavior on multiple occasions.

Taking products and merchandise without paying for them or allowing others to do so 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. The claimant engaged in disqualifying misconduct even without previous warning. Benefits are denied.

The next issue in this case is whether the claimant was overpaid unemployment insurance 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.

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 § 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 she was not entitled. The unemployment insurance law provides 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 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 did participate in the fact-finding interview claimant is obligated to repay to the agency the benefits she received and the employer's account shall not be charged.

**DECISION:**

The March 8, 2019, (reference 01) unemployment insurance 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 \$2,802.00 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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Nicole Merrill  
Administrative Law Judge

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Decision Dated and Mailed

nm/rvs