IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

PEGGY POLLEMA Claimant **DOLGENCORP LLC** Employer	**APPEAL 21A-UI-06779-SN-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 01/24/21** **Claimant: Appellant (1)**

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Admin. Code r. 871-24.32(1)a – Discharge for Misconduct

STATEMENT OF THE CASE:

The claimant filed an appeal from the March 2, 2021, (reference 01) unemployment insurance decision that denied benefits based upon the conclusion she was discharged because she violated a known rule. A telephone hearing was held on May 11, 2021. The parties were properly notified of the hearing. The claimant participated. The claimant was represented by Mary Hamilton. The employer participated through District Manager Sammir Osoro. Exhibits 1, 2, 3, and 4 were received into the record at this hearing. The hearing was postponed. After conducting cross examination of Mr. Osoro, Ms. Hamilton objected to the administrative law judge's decision to not admit the claimant's exhibits. The administrative law judge had not made a decision regarding the claimant's exhibits. He did not see them in the case file because they were sent to a zip code, 50318, which does not match any Iowa Workforce Development building.[1]

A hearing was scheduled for June 16, 2021. The claimant participated and was represented by Ms. Hamilton. The employer participated through Mr. Osoro and Hearing Representative Tom Kuiper. Exhibits 1, 2, 3, 4, A, B, C, D, E, F, G, H, I, J, K, L, M, N, O, P, Q, R, S, T, U, and V were received into the record. The administrative law judge denied admission to several exhibits because he could not determine what they were pictures of. Ms. Hamilton objected to this determination, but conceded she was not aware of their relevance, as her client had prepared the exhibits, and presumably their contents had not come up in client counseling. The administrative law judge rejected the claimant's motion to retain her markings because he did not receive this with the claimant's proposed exhibits. The claimant's direct examination was conducted by the administrative law judge. Official notice was taken of the administrative records. The hearing was postponed because Mr. Kuiper had another scheduled hearing.

A hearing was scheduled for July 7, 2021. The hearing was concluded on this date.

ISSUE:

Whether the claimant's separation from employment disqualifies her from benefits?

[1] The Iowa Workforce Development building has a zip code of 50319. IowaWorks has a zip code of 50315.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds:

The claimant was employed full-time as a store manager from December 9, 2017, until this employment ended on January 22, 2021, when she was terminated. From October 20, 2020 until her termination, the claimant's immediate supervisor was District Manager Sammir Osoro.

The employer has an employee handbook which contains policies regarding employee purchases and inventory management. The employee purchase policy states that a member of management must ring up subordinate purchases in the store, including the store manager. The policy also states that with the exception of food purchases for immediate consumption, these purchases must be made while the employee is off duty and the store is open to the public. The markdown policy states that any damaged items must be placed in the markdown cart and a 50% markdown applied to these items, after approval by the store manager. This is the only reason given for making a markdown. The employer provided a copy of these policies. (Exhibit 2) The claimant acknowledged receipt of the employee handbook on September 22, 2020. The employer provided a copy of the claimant's acknowledgment of receipt of the employee handbook. (Exhibit 3)

In early-January 2021, Mr. Osoro received reports from customers that the claimant was initiating 70% off markdowns on non-damaged goods. The claimant's store was had a much higher markdown rate than other stores in the region.

On January 6, 2021, Mr. Osoro sent a text message to the claimant stating he was going to visit the store because he was concerned about 70% markdowns posted in the store. Mr. Osoro asked if the claimant knew anything about this.

The claimant filed Occupational Safety and Health Administration and the Department of Human Services complaints against the employer on January 8, 2021. The claimant filed these complaints because she had authorized markdowns which were not consistent with the employer's policy.

On January 14, 2021, Mr. Osoro and Loss Prevention Manager Ric Rice arrived at the store. Mr. Rice and Mr. Osoro interviewed two of the claimant's subordinates. These two subordinates were terminated before the claimant's interview. Both informed Mr. Osoro and Mr. Rice that the claimant was conducting her own sales in the store. Mr. Osoro and Mr. Rice then interviewed the claimant regarding $8,500.00 in price overrides, which were conducted from August 1, 2020 to January 8, 2021. During that interview, the claimant initially denied she had conducted the price overrides in question. However, the claimant added that a former district manager, Jeff Van Val Zen, had authorized her to conduct price overrides of up to 30% for staff in the store. The claimant also admitted to purchasing cans after adding a personal discount. The claimant also had been donating damaged items to her sister's thrift store, Bargain Alley. Mr. Osoro asked the claimant to write her own statement as part of the investigation. The claimant refused to do so at first. The claimant became obstinate with Mr. Osoro and said she would record him with her cell phone. The employer provided the termination notice which summarizes Mr. Osoro's observations from that day. (Exhibit 3)

The employer provided a copy of the claimant's handwritten statement from that day. (Exhibit 4) In her written statement, the claimant states she was informed by her previous district manager and the regional manager that she was allowed to donate items and create her own sales. She

also alleges she was unaware of the policies specifically forbidding these practices. The claimant does not say she was authorized by these managers to apply discounts to her own items. (Exhibit 4) Mr. Osoro sent the information collected from his interview to Human Resources Director Jeri West, who determined the claimant should be terminated for the markdowns issue.

On January 22, 2021, Mr. Osoro terminated the claimant for violating the policies described above regarding store purchases and inventory management.

In late-January 2021, OSHA issued a corrective order to the employer because a thermometer was broken in one of its coolers. It did not issue any other corrections. The DHS did not take any corrective action against the employer.

The claimant provided a Reddit post from an unknown author dated April 26, 2021. The post asks if anyone else has been disciplined for conducting voids, aborts and price overrides. The author and commenters explain the overrides are due to legitimate purposes to match the price on the register or to abort transactions. (Exhibit Q)

REASONING AND CONCLUSIONS OF LAW:
The administrative law judge finds the claimant engaged in willful work-related misconduct.

Iowa Code section 96.5(2)a provides:

> An individual shall be disqualified for benefits, regardless of the source of the individual's wage credits:
>
> 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 disqualification shall continue 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 law disqualifies individuals who are discharged from employment for misconduct from receiving unemployment insurance benefits. Iowa Code § 96.5(2)a. They remain disqualified until such time as they requalify for benefits by working and earning insured wages ten times their weekly benefit amount. *Id*. Iowa Administrative Code rule 871-24.32(1)a provides:

> "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).

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).

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*.

After assessing the credibility of the witnesses who testified during the hearing, considering the applicable factors listed above, and using his own common sense and experience, the administrative law judge finds the employer's testimony more credible than the claimant's testimony.

The claimant provided various emails, text messages and testimony regarding myriad informal complaints she brought forth to members of management regarding perceived discrimination, OSHA concerns and worker's compensation. There is nothing on the record to establish a causal connection between any of these events and her termination either by direct evidence or through circumstantial evidence. Most importantly, the claimant contends Mr. Rice was the one who initiated the investigation of price overrides and damages in her position statement and there is not anything in the record to support he knew about any of these previously stated informal complaints. In that context, these exhibits are not explained in greater detail in the findings of fact.

The administrative law judge specifically finds that the claimant was not told she could mark down items on her own initiative by the previous district manager Jeff Van Vel Zen or other members of management. First, the claimant has provided evolving testimony on this point. At times, the claimant contends that all overrides were due to matching the register price with stickers in the store. At other times, the claimant excuses these overrides as authorized by a past manager. At other times, the claimant contends these overrides were conducted by subordinates, unbeknownst to her, rather than her personally. Second, the claimant offers a narrative that essentially alleges every member of management above her was seeking her removal. This conspiratorial narrative is inherently at odds with the idea she was given broad discretion to set prices at will. Third, the claimant also cannot explain why this authorization would deviate so markedly from the employer's policy. Finally, the claimant did not provide any evidence other than her own self-serving testimony to support this allegation. This was despite

conducting all of Mr. Osoro's testimony without him being aware of the claimant's exhibits. Indeed, the Reddit post she provides shows just how illusory this justification is because management authorizing a store manager to arbitrarily markdown items is not even mentioned as an explanation.

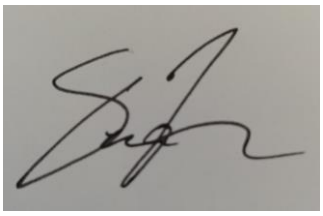
The administrative law judge finds the claimant's testimony that these overrides are due to naturally occurring reasons not credible. Again, the claimant has given many different and contradictory explanations for why the markdowns occurred.

The administrative law judge finds the claimant filed retaliatory complaints with OSHA and DHS, after receiving a text message from Mr. Osoro informing her that he was concerned about unauthorized markdowns on January 6, 2021. The claimant testified Mr. Osoro raised these concerns on January 6, 2021 and she filed these complaints two dates later. As a result, no causal connection can be made between her complaints, which were filed two days later, and her termination. The administrative law judge further finds the claimant's complaints were not the reason the employer terminated her.

The claimant has argued that this behavior cannot constitute willful misconduct because she had not been disciplined for this behavior in the past. The administrative law judge disagrees. The employer has provided a policy which states the only reason to perform markdowns for items other than matching a sale authorized by management is through the use of the markdown cart. The claimant's use of markdowns despite this policy is misconduct because it disregards a common employer interest to maintain its own inventory and margins. Benefits are denied.

DECISION:

The March 2, 2021, (reference 01), unemployment insurance decision is affirmed. 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.



Sean M. Nelson
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July 21, 2021
Decision Dated and Mailed

smn/lj