

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

68-0157 (9-06) - 3091078 - EI

BRANDON BLOCTON

Claimant

APPEAL NO: 15A-UI-00721-ET

**ADMINISTRATIVE LAW JUDGE
DECISION**

CASEY'S MARKETING COMPANY

Employer

OC: 12/21/14

Claimant: Respondent (2)

Section 96.5-2-a – Discharge/Misconduct

Section 96.3-7 – Recovery of Benefit Overpayment

STATEMENT OF THE CASE:

The employer filed a timely appeal from the January 7, 2015, reference 01, decision that allowed benefits to the claimant. After due notice was issued, a hearing was held by telephone conference call before Administrative Law Judge Julie Elder on February 9, 2015. The claimant did not respond to the hearing notice by providing a phone number where he could be reached at the date and time of the hearing as evidenced by the absence of his name and phone number on the Clear2There screen showing whether the parties have called in for the hearing as instructed by the hearing notice. The claimant did not participate in the hearing or request a postponement of the hearing as required by the hearing notice. Kathy Burrs, Manager and Alisha Weber, Employer Representative, participated in the hearing on behalf of the employer.

ISSUE:

The issue is whether the employer discharged the claimant for work-connected misconduct.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed as a part-time cashier for Casey's from September 22, 2014 to December 11, 2014. He was discharged for theft.

On November 25, 2014, the claimant's drawer was \$80.00 short. Usually if the employer is short on one shift the money will show up on another shift and it balances within a few days. Store Manager Kathy Burrs notified her supervisor of the shortage and she notified the district manager who told them to wait a few days and see if it "bounces back."

Ms. Burrs' supervisor came to perform a routine monthly audit at the end of the month and the \$80.00 had not shown up and could not be found during the audit. Ms. Burrs asked her supervisor if she could look at the video to try to determine what happened to the money but her supervisor discouraged her from doing so because it was the end of the month and they did not know who to look at or where to start so although that large of a shortage bothered Ms. Burrs she had to let it go.

On December 12, 2014, the employee that was scheduled to work the overnight shift overslept and did not arrive on time. The employee that was working asked Ms. Burrs if she could call the claimant to come in until the overnight employee arrived and Ms. Burrs approved that request. The claimant was called and worked 40 minutes before the overnight employee came in for his shift. The claimant closed out his register as required and left the store.

The next morning Ms. Burrs went in to do the books from the day before and discovered the store was \$40.00 short. She stopped doing the books and immediately began viewing the video surveillance from the cameras positioned directly above the registers as well as at other locations. Ms. Burrs could tell the shortage occurred during the claimant's 40-minute shift because just prior to the claimant's shift the books and registers balanced but after his shift they were short \$40.00. Each time a new employee comes on the register the employee before him closes out of his shift and register.

While watching the video Ms. Burrs could see the claimant pull a tube of \$10.00 bills from the safe and each tube contains four ten dollar bills. When an employee takes money from the safe by pressing a button for a tube of whatever denomination of bills or change he needs, a red light comes on which prevents any other employee from entering the safe at the same time. After the claimant pulled the tube of four ten dollar bills out, instead of putting the money in the register as required, he set the \$40.00 off to the side of register two. He was working on register one at the time.

After watching the video several times, Ms. Burrs contacted her supervisor who came to watch the video and determine if she agreed with Ms. Burrs' assessment. After watching the surveillance footage, the supervisor also believed the claimant was responsible for the missing \$40.00. The claimant was also exactly \$40.00 short on his register during his 40-minute shift.

After watching that video Ms. Burrs went back and viewed the footage from November 25, 2014. The claimant was working on register two while a new trainee was working on register one. When both registers are running, register one "owns" the safe. If register 2 needs money from the safe it has to give the money to register one and borrow it back. On November 25, 2014, the claimant and the trainee were observed locking register one and walking away from the registers but the claimant went back and took two \$10.00 tubes, containing \$40.00 each, from the safe on two separate occasions but did not pay register one back with the money he took.

The video also showed the claimant taking two coupons for free pizzas from the envelope under the register.

The claimant asked for time off in December 2014, stating his mother was having surgery. The employer granted him the time off and other employees covered his shifts because the claimant stated he would cover their shifts but he never returned after December 12, 2014. He called the employer during the day on December 12, 2014, to ask for his schedule and Ms. Burrs said he needed to come in and fill out some paperwork on the computer before he could work again. The claimant stated he would be in at 2:00 p.m. but never showed up. His girlfriend came in to the store around 3:00 p.m. and Ms. Burrs asked her if the claimant was coming in and she seemed not to know what was going on but eventually said he would be in. The claimant never called or returned to the store and the employer terminated his employment for stealing \$120.00. The employer is pursuing criminal charges against the claimant.

The claimant has claimed and received unemployment insurance benefits in the amount of \$1,195.00 since his separation from this employer.

The employer personally participated in the fact-finding interview through the statements of Employer Representative Alisha Weber January 6, 2015, at 10:47 a.m. The employer also submitted written documentation prior to the fact-finding interview.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment for disqualifying job 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).

The employer has the burden of proving disqualifying misconduct. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). A claimant is not qualified to receive unemployment insurance benefits if an employer has discharged him for reasons constituting work-connected misconduct. Iowa Code section 96.5-2-a. Misconduct that disqualifies an individual from

receiving unemployment insurance benefits occurs when there are deliberate acts of omissions that constitute a material breach of the worker's duties and obligations to the employer. See 871 IAC 24.32(1).

Ms. Burrs and her supervisor found \$80.00 missing after the claimant worked November 25, 2014, and \$40.00 missing after he worked for 40 minutes December 12, 2014. Because the first theft occurred at the end of the month and they did not know who was responsible for it they did not pursue the theft at that time, believing the money would "bounce" back in the next few days but it did not do so. The employer then experienced another theft which clearly occurred during the 40 minutes the claimant worked December 12, 2014. Ms. Burrs watched the video for both dates and could see the claimant take the tubes of money from the safe and not put it in the register as required. She also observed him take two pizza coupons from underneath the register.

Ms. Burrs' testimony and obvious knowledge of the register, safe, and bookkeeping practices was credible and persuasive. In watching the video she determined the claimant took \$80.00 November 25, 2014, and \$40.00 December 12, 2014. Under these circumstances, the administrative law judge concludes the claimant's conduct demonstrated a willful disregard of the standards of behavior the employer has the right to expect of employees and shows an intentional and substantial disregard of the employer's interests and the employee's duties and obligations to the employer. The employer has met its burden of proving disqualifying job misconduct. Cosper v. IDJS, 321 N.W.2d 6 (Iowa 1982). Therefore, benefits are denied.

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.

The unemployment insurance law requires benefits be recovered from a claimant who receives benefits and is later denied benefits even if the claimant acted in good faith and was not at fault. However, a claimant will not have to repay an overpayment when an initial decision to award benefits on an employment separation issue is reversed on appeal if two conditions are met: (1) the claimant did not receive the benefits due to fraud or willful misrepresentation, and (2) the employer failed to participate in the initial proceeding that awarded benefits. In addition, if a claimant is not required to repay an overpayment because the employer failed to participate in the initial proceeding, the employer's account will be charged for the overpaid benefits. Iowa Code § 96.3-7-a, -b.

The claimant received benefits but has been denied benefits as a result of this decision. The claimant, therefore, was overpaid benefits.

Because the employer participated in the fact-finding interview, the claimant is required to repay the overpayment and the employer will not be charged for benefits paid.

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. In this case, the claimant has received benefits but was not eligible for those benefits. While there is no evidence the claimant received

benefits due to fraud or willful misrepresentation, the employer participated in the fact-finding interview personally through the statements of Alisha Weber. Consequently, the claimant's overpayment of benefits cannot be waived and he is overpaid benefits in the amount of \$1,195.00.

DECISION:

The January 7, 2015, reference 01, decision is reversed. The claimant was discharged from employment due to job-related misconduct. Benefits are withheld until such time as he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible. The claimant has received benefits but was not eligible for those benefits. The employer did personally participate in the fact-finding interview within the meaning of the law. Therefore, the claimant is overpaid benefits in the amount of \$1,195.00.

Julie Elder
Administrative Law Judge

Decision Dated and Mailed

je/pjs