

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

PEGGY S LANG
Claimant

APPEAL NO: 13A-UI-13892-DWT

**ADMINISTRATIVE LAW JUDGE
DECISION**

KWIK SHOP INC
Employer

**OC: 11/24/13
Claimant: Respondent (1)**

Iowa Code § 96.5(2)a - Discharge

PROCEDURAL STATEMENT OF THE CASE:

The employer appealed a representative's December 12, 2013 determination (reference 01) that held the claimant qualified to receive benefits and the employer's account subject to charge because she had been discharged for reasons that do not disqualify her from receiving benefits. The claimant participated at the January 13 hearing. Jaime Lopez, Brian Fisher and Misty Hoskinson appeared on the employer's behalf. During the hearing, Employer Exhibit One was offered and admitted as evidence. Based on the evidence, the arguments of the parties, and the law, the administrative law judge concludes the claimant is qualified to receive benefits.

ISSUE:

Did the employer discharge the claimant for reasons constituting work-connected misconduct?

FINDINGS OF FACT:

The claimant started working for the employer in August 2005. She was working full time for the employer as a district advisor. The claimant supervised, Hoskinson, a store manager. Prior to November 5, 2013, the claimant's job was not in jeopardy.

On November 5, the claimant was at Hoskinson's store to do an audit. While the claimant was in Hoskinson's store office alone, Hoskinson's cell phone rang. The employer had informed employees they were not allowed to have their cell phones on during work hours. When Hoskinson's cell phone rang, the claimant went into the jacket pocket that Hoskinson had left in the office and turned off Hoskinson's cell phone. When Hoskinson returned to the office, the claimant told her she had turned off her cell phone. Also while the claimant was alone in Hoskinson's office, she reached into Hoskinson's jacket pocket a second time and retrieved a tissue. The claimant kept the tissue.

After work, Hoskinson went to pay her cellphone bill with money she had in her jacket and it was not there. Hoskinson was missing \$95.00. The next morning, Hoskinson looked in the office to make sure the money was not in her office. She then reviewed the store's surveillance video and concluded the claimant took the money out of her jacket.

The morning of November 6, Hoskinson told the claimant that someone had stolen money from her and the store was missing \$300.00 of lottery tickets. The claimant came to Hoskinson's store and counted the lottery tickets five times. On the fifth count, all the lottery tickets were accounted for. Hoskinson did not say anything about the video tape.

Hoskinson was on a final written warning for performance issues. She became nervous when she thought she had lottery tickets missing and contacted the employer's human resource department. She reported that the video tape showed the claimant taking money from Hoskinson's jacket.

The employer reviewed the video tape and talked to the claimant on November 14 or 25. Initially, the claimant did not know what the employer was talking about when the employer asked if she had taken anything out of Hoskinson's jacket. At first the claimant denied taking anything out of Hoskinson's pocket. After the employer told the claimant that a video tape showed her taking something out of a pocket, the claimant said she had taken a tissue and also told the employer she had removed Hoskinson's cell phone, but put the cell phone back. The employer suspended the claimant. After reviewing all information, the employer discharged the claimant on November 25 for theft, taking \$95.00 from Hoskinson.

The claimant established a claim for benefits during the week of November 24, 2013. The claimant filled claims for the weeks ending December 7, 2013, through January 11, 2014. The claimant received her maximum weekly benefit amount of \$408.00 for each of these weeks.

REASONING AND CONCLUSIONS OF LAW:

A claimant is not qualified to receive unemployment insurance benefits if an employer discharges her for reasons constituting work-connected misconduct. Iowa Code § 96.5(2)a. The employer has the burden to prove the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law. *Cosper v. Iowa Department of Job Service*, 321 N.W.2d 6 (Iowa 1982). The propriety of a discharge is not at issue in an unemployment insurance case. An employer may be justified in discharging an employee, but the employee's conduct may not amount to misconduct precluding the payment of unemployment compensation. The law limits disqualifying misconduct to willful wrongdoing or repeated carelessness or negligence that equals willful misconduct in culpability. *Lee v. Employment Appeal Board*, 616 N.W.2d 661, 665 (Iowa 2000).

The law defines misconduct as:

1. A deliberate act and a material breach of the duties and obligations arising out of a worker's contract of employment.
2. A deliberate violation or disregard of the standard of behavior the employer has a right to expect from employees. Or
3. An intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to the employer.

Inefficiency, unsatisfactory conduct, unsatisfactory performance due to inability or incapacity, inadvertence or ordinary negligence in isolated incidents, or good faith errors in judgment or discretion do not amount to work-connected misconduct. 871 IAC 24.32(1)(a).

This case revolves around the issue of whether the claimant took \$95.00 from Hoskinson. Employer Exhibit One, a copy of the video surveillance, shows the claimant took something out

of a jacket pocket, but the video does establish what the claimant took out of Hoskinson's pocket.

Hoskinson and the claimant socialized outside of work. The claimant hired Hoskinson and promoted her to store manager. As a result of their friendship since March 2011, when the claimant hired Hoskinson, it would not be unusual for the claimant to take a tissue out for Hoskinson's jacket pocket. The claimant asserted she knew Hoskinson had a tissue in her pocket when she turned off Hoskinson's cell phone earlier.

Hoskinson testified that she was nervous after she thought she had \$300.00 in missing lottery tickets. Hoskinson was on a final warning for performance issues. Even though the claimant initially told the employer she had never taking anything out of Hoskinson's jacket, the employer did tell her why this question was asked. After the employer told the claimant a video tape showed the claimant taking something out of Hoskinson's jacket pocket, the claimant told the employer she had taken out a tissue and also reported taking out Hoskinson's cell phone. Since the claimant told the employer she took out a tissue and cell phone before she was allowed to look at the video, her story has been consistent and her testimony is credible.

While the claimant used poor judgment when she took a tissue out for Hoskinson's jacket, given the relationship between the two this was action does not rise to the level of work-connected misconduct. Hoskinson may have had \$95.00 missing, but if the claimant was going to take money, it seems unlikely she would not have also taken the rest of the money in Hoskinson's pocket.

The employer discharged the claimant, but the evidence does not establish that the claimant took any money from Hoskinson. As a result, the claimant did not commit work-connected misconduct. As of November 24, 2013, the claimant is qualified to receive benefits.

DECISION:

The representative's December 12, 2013 determination (reference 01) is affirmed. The employer discharged the claimant, but the evidence does not establish that the claimant committed work-connected misconduct. As of November 24, 2013, the claimant is qualified to receive benefits provided she meets all other eligibility requirements. The employer's account is subject to charge.

Debra L. Wise
Administrative Law Judge

Decision Dated and Mailed

dlw/css