

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

TINA M FUNKE

Claimant

CASEY'S MARKETING COMPANY

Employer

APPEAL 19A-UI-08339-AW-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 09/22/19

Claimant: Respondent (1)

Iowa Code § 96.5(2)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:

Employer filed an appeal from the October 17, 2019 (reference 01) unemployment insurance decision that allowed benefits. The parties were properly notified of the hearing. A telephone hearing was held on November 14, 2019, at 11:00 a.m. Claimant participated. Employer participated through James Rogers, Store Manager. Claimant's Exhibits A – D were admitted. Official notice was taken of the administrative record.

ISSUES:

Whether claimant was discharged due to disqualifying job-related misconduct.

Whether claimant was overpaid benefits.

Whether claimant should repay those benefits and/or whether employer should be charged due to its participation in the fact-finding interview.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed as a full-time second assistant manager from September 23, 2013 until her employment with Casey's Marketing Company ended on September 25, 2019. (Rogers Testimony) Claimant's direct supervisor was James Rogers, Store Manager. (Rogers Testimony)

On September 23, 2019, a customer entered the store with a can of fix-a-flat, went to a shelf of fix-a-flat products, put the can he brought into the store with him on the shelf, took a can from the shelf and exited the store. (Claimant Testimony) The customer did not speak to a store employee. (Claimant Testimony) Claimant went to the shelf to investigate and found an empty can of fix-a-flat on the shelf. (Claimant Testimony) Claimant followed the customer from the store and asked the customer to return to the store to discuss the matter further. (Claimant Testimony) The customer returned and explained that the can was defective and he was exchanging it for another one. (Rogers Testimony) The customer was unable to produce a receipt for the can. (Rogers Testimony) Claimant believed the customer was shoplifting and it

was in employer's best interest for the customer to pay for the new can. (Claimant Testimony) The customer paid for the can and left the store. (Rogers Testimony) Claimant had not experienced an incident like this in the past. (Claimant Testimony) Employer has a policy that requires employees to remain in the store in the event of theft. (Rogers Testimony) Claimant was not aware of the policy and had not been trained on what to do in the event of suspected shoplifting. (Claimant Testimony) Claimant had no prior warnings for violating the policy.

On September 24, 2019, an employee was ill and left prior to the end of her shift. (Rogers Testimony) Claimant stayed 38 minutes past the end of her own shift to cover her ill coworker's shift. (Rogers Testimony) Claimant stayed until the next shift arrived and she believed there was adequate coverage. (Claimant Testimony) Claimant did not obtain management approval to work past her shift. (Rogers Testimony) Employer has a policy that provides employees may only stay up to six minutes past the end of their shifts without management approval. (Rogers Testimony) The policy is included in the employee handbook. (Rogers Testimony) Claimant had access to the handbook. (Rogers Testimony) Claimant had no prior warnings for violating the policy.

Claimant received a corrective action statement on September 9, 2019 for having an unprofessional attitude with a coworker and lack of time management on August 31, 2019. (Exhibit A) The warning states that claimant would be expected to speak to team members in a professional manner and work on her time management skills or the next step will be disciplinary action up to termination. (Exhibit A) On September 25, 2019, claimant was discharged for the incidents on September 23, 2019 and September 24, 2019. (Exhibit B)

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes claimant was discharged for no disqualifying reason. Benefits are allowed, provided claimant is otherwise eligible.

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 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 Admin. Code r. 871-24.32(1)(a) provides:

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 of misconduct has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. *Reigelsberger v. Emp't Appeal Bd.*, 500 N.W.2d 64, 66 (Iowa 1993); accord *Lee v. Emp't Appeal Bd.*, 616 N.W.2d 661, 665 (Iowa 2000). Further, 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).

Iowa Admin. Code r. 871-24.32(8) provides:

(8) *Past acts of misconduct.* While past acts and warnings can be used to determine the magnitude of a current act of misconduct, a discharge for misconduct cannot be based on such past act or acts. The termination of employment must be based on a current act.

A determination as to whether an employee's act is misconduct does not rest solely on the interpretation or application of the employer's policy or rule. A violation is not necessarily disqualifying misconduct even if the employer was fully within its rights to impose discipline up to or including discharge for the incident under its policy. 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). What constitutes misconduct justifying termination of an employee and what misconduct warrants denial of unemployment insurance benefits are two separate decisions. *Pierce v. Iowa Dep't of Job Serv.*, 425 N.W.2d 679 (Iowa Ct. App. 1988).

Misconduct serious enough to warrant discharge is not necessarily serious enough to warrant a denial of job insurance benefits. Such misconduct must be "substantial." *Newman v. Iowa Dep't of Job Serv.*, 351 N.W.2d 806 (Iowa Ct. App. 1984). The law limits disqualifying misconduct to substantial and willful wrongdoing or repeated carelessness or negligence that equals willful misconduct in culpability. *Lee v. Employment Appeal Bd.*, 616 N.W.2d 661 (Iowa 2000).

It is the duty of the administrative law judge, as the trier of fact, 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 evidence you believe; 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.*

The findings of fact show how I have resolved the disputed factual issues in this case. I assessed the credibility of the witnesses who testified during the hearing, considering the applicable factors listed above, and using my own common sense and experience. Specifically, I find the claimant's testimony to be credible that the September 9, 2019 warning for time management to be a result of her productivity during work hours and not due to staying after her shift without management approval.

Employer discharged claimant for the sum of multiple issues. The most recent incidents that resulted in claimant's discharge were her reaction to a shoplifting incident and her staying late to cover a coworker's shift without management approval. These incidents were both good faith errors in judgment or discretion for which claimant had not received a prior warning. These were not current acts of misconduct. A warning for an unprofessional attitude with a coworker

and poor time management is not similar to a warning for the conduct that resulted in claimant's discharge; the employer's simple accrual of a certain number of warnings counting towards discharge does not establish repeated negligence or deliberation and is not dispositive of the issue of misconduct for the purpose of determining eligibility for unemployment insurance benefits. Employer has not met its burden of proving disqualifying, job-related misconduct. Benefits are allowed, provided claimant is otherwise eligible.

Because claimant's separation was not disqualifying, the issues of overpayment, repayment and chargeability are moot.

DECISION:

The October 17, 2019 (reference 01) unemployment insurance decision is affirmed. Claimant was discharged for no disqualifying reason. Benefits are allowed, provided claimant is otherwise eligible. The issues of overpayment, repayment and chargeability are moot.

Adrienne C. Williamson
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Decision Dated and Mailed

acw/scn