

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

VIOLA D MILTON
Claimant

HY-VEE INC
Employer

APPEAL 17A-UI-04812-DB-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 04/09/17
Claimant: Appellant (1)

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Code § 96.5(1) – Voluntary Quitting

STATEMENT OF THE CASE:

The claimant/appellant filed an appeal from the May 1, 2017 (reference 01) unemployment insurance decision that disallowed benefits based upon claimant's discharge from employment. The parties were properly notified of the hearing. A telephone hearing was held on May 23, 2017. The claimant, Viola D. Milton, participated personally. The employer, Hy-Vee Inc., participated through Hearing Representative Judy Berry and witnesses Deb Borwig, Richard Shere, and Gail Greer. Employer's Exhibits 1 – 7 were admitted.

ISSUES:

Was the claimant discharged for disqualifying job-related misconduct?
Did claimant voluntarily quit the employment with good cause attributable to employer?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed part-time as a night stock clerk. She began her employment on June 26, 2015 and her employment ended on April 14, 2017. Her job duties included unloading and stocking products. Tracy Wise was claimant's direct supervisor.

On April 13, 2017, Ms. Borwig observed a plastic sack on the bench seat in the dining area. See Exhibit 1. The bag contained Gain laundry pods, two bottles of bleach, and one package of coffee filters. See Exhibit 1. Ms. Borwig looked on the store server in order to figure out who purchased the items. When she reviewed the computer system, she did not find that any purchases had been made for all three of the products in the same transaction. Ms. Borwig instructed another employee to look in the bag for a receipt. The receipt listed purchases for a Lunchable and watermelon chunks. Ms. Borwig observed store video that showed the claimant purchasing the Lunchable and watermelon chunks.

Later on in the day, Ms. Borwig observed claimant carry the bag of items out the door without paying and she stopped her. Ms. Borwig asked to see a receipt for the items and claimant presented the receipt for the Lunchable and watermelon chunks. The two then proceeded to

customer service to review the computer system together to determine if claimant had paid for the items. Claimant responded that she paid by debit card but did not have the debit card with her. Ms. Borwig instructed her to call her later to provide the numbers on the debit card so that Ms. Borwig could further search for the payment transaction. Claimant did not call back with the numbers for her debit card.

The evening of April 13, 2017 claimant came to work as scheduled and was told by Tracy Wise that she had been discharged. See Exhibit 4. She showed Tracy Wise a receipt that purported to have the items from her previous shift that Ms. Borwig had questioned her about. See Exhibit 4. However, the receipt was dated 10:49 p.m., which would have been several hours after the encounter between claimant and Ms. Borwig. See Exhibit 4.

On April 14, 2017, claimant met with Ms. Borwig and Mr. Shere. At the meeting claimant admitted to Mr. Shere, in Gail Greer's presence, that she stole the items. Claimant was then discharged for theft.

This employer has a written policy against theft of property. See Exhibit 2. Claimant was aware of the written policy.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged for job-related misconduct. Benefits are denied.

As a preliminary matter, I find that the Claimant did not quit. Claimant was discharged from employment.

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).

Iowa Admin. Code r. 871-24.32(4) provides:

(4) Report required. The claimant's statement and employer's statement must give detailed facts as to the specific reason for the claimant's discharge. Allegations of misconduct or dishonesty without additional evidence shall not be sufficient to result in disqualification. If the employer is unwilling to furnish available evidence to corroborate the allegation, misconduct cannot be established. In cases where a suspension or disciplinary layoff exists, the claimant is considered as discharged, and the issue of misconduct shall be resolved.

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.

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). 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 focus of the administrative code definition of misconduct is on deliberate, intentional or culpable acts by the employee. *Id.*

When based on carelessness, the carelessness must actually indicate a "wrongful intent" to be disqualifying in nature. *Id.* 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).

Further, poor work performance is not misconduct in the absence of evidence of intent. *Miller v. Emp't Appeal Bd.*, 423 N.W.2d 211 (Iowa Ct. App. 1988). 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).

The employer has presented substantial and credible evidence that claimant was caught stealing items from the employer. This behavior was contrary to the best interests of the employer and is disqualifying misconduct, even without a prior warning. Benefits are denied.

DECISION:

The May 1, 2017 (reference 01) unemployment insurance decision is affirmed. Claimant was discharged from employment for job-related misconduct. Unemployment insurance benefits shall be withheld in regards to this employer until such time as claimant is deemed eligible.

Dawn Boucher
Administrative Law Judge

Decision Dated and Mailed

db/scn