

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

LYNSEY SELZER
Claimant

HOBBY LOBBY STORES INC
Employer

APPEAL 22A-UI-00186-JD-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

**OC: 10/17/21
Claimant: Appellant (2)**

Iowa Code § 96.5(1) – Voluntary Quit
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 Participation in Fact-Finding Interview

STATEMENT OF THE CASE:

On November 18, 2021, the employer, Hobby Lobby Stores, Inc., filed an appeal from the November 9, 2021, (reference 01) unemployment insurance decision that allowed benefits based on an Iowa Workforce Representative's determination that the claimant was discharged from her employment for no disqualifying reason. . The parties were properly notified about the hearing. A telephone hearing was held on January 21, 2022. Claimant, Lynsey Selzer, participated and testified. Employer participated through Anna Lee Miller, human resources specialist and Sherrie Spearman, District Manager. Employer's Exhibits 1-3. The administrative law judge took official notice of the administrative record.

ISSUES:

Was the claimant discharged for disqualifying job-related misconduct?

Has the claimant been overpaid unemployment insurance benefits, and if so, can the repayment of those benefits to the agency be waived?

Can charges to the employer's account be waived?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant began working for employer on November 7, 2016. Claimant last worked as a full-time co-manager at store #644. . Claimant was separated from employment on October 19, 2021, when the claimant was discharged due to violating several company policies. The employer discharged the claimant's supervisor and the General Manager of store #644 several days prior to the claimant's discharge. The investigation into the general manager's malfeasance also uncovered some issues regarding the claimant's work performance. The employer accused the claimant of time-theft and of theft of merchandise in addition to being complicit in not properly arming and

securing an exit door in the store where she worked. The accusations of theft stemmed from an incident where an employee approached the claimant regarding some time-edits on her timecard. The claimant directed the employee to discuss these edits with the General Manager as he was the individual who had edited that employee's timecard. The General Manager also directed the claimant to purchase some t-shirts and alter them at home with her "cricket" machine and then bring them back to the store for that customer. The claimant purchased these t-shirts with her credit card and when she brought the "cricketed" t-shirt back into the store the General Manager asked the claimant the best way to refund her money for the t-shirts. The claimant was under the impression that her G.M. was going to reimburse her with his own cash and was not aware that the G.M. had refunded her credit card the price of the t-shirts. The claimant discovered this refund after the General Manager had been terminated and one day before she was also terminated. The employer also discovered that the claimant was aware that her General Manager and other associates would often exit the store through a front emergency door that would have to be disarmed prior to exit and re-armed by someone on the inside. This door was a designated emergency exit that was never to be used as an employee exit or entrance. The claimant admitted that she had used that door as an exit door in the past and that if the door was not re-armed no theft protection equipment installed on the door would work. The claimant testified that her General Manager regularly used that door to exit the store and she would often find the door unarmed on her closing shift.

The administrative record reflects that claimant has received \$7,891.00 in regular unemployment benefits since filing a claim with an effective date of October 17, 2021, for the 14-week period between October 23, 2021 and January 22, 2022. The administrative record also establishes that the employer did participate in the fact-finding interview by submitting the claimant's signed acknowledgement of receipt the employee handbook, the termination paperwork that details the employer's specific determinations of misconduct and policies violated, and providing the Fact-Finder with the name and telephone number of a witness with first-hand information regarding the claimant's termination, Sherrie Spearman, District Manager.

REASONING AND CONCLUSIONS OF LAW:

- I. Did the employer discharge the claimant for job related misconduct?

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

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 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 of misconduct 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). Failure to sign a written reprimand acknowledging receipt constitutes job misconduct as a matter of law. *Green v Iowa Dep't of Job Serv.*, 299 N.W.2d 651 (Iowa 1980). 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). 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). Generally, continued refusal to follow reasonable instructions constitutes misconduct. *Gilliam v. Atlantic Bottling Co.*, 453 N.W.2d 230 (Iowa Ct. App. 1990). The Iowa Court of Appeals found substantial evidence of misconduct in testimony that the claimant worked slower than he was capable of working and would temporarily and briefly improve following oral reprimands. *Sellers v. Emp't Appeal Bd.*, 531 N.W.2d 645 (Iowa Ct. App. 1995).

The employer's use of the term "theft" when it alleges "time-theft" and "theft of company property" were not fair characterizations of the claimant's actions. The claimant directing an associate to discuss the edits on her timecard made by the store manager does not equate to 'time-theft'. The claimant purchasing items and repurposing those items for a customer all at the request of her general manager is not theft when that manager refunds the purchases the claimant made on her credit card without her knowledge or acquiescence. The employer's credibility was severely strained by these unfair characterizations and none of those issues were disqualifying misconduct.

The claimant's disqualifying misconduct was her acknowledgement and admission that she was aware that the General Manager would often leave by a side door that was not an approved exit door for employees or customers other than in cases of emergency. The claimant admitted to using that door as an exit at times and also admitted that that alarm on that door had to be

deactivated to exit it and then re-armed from the inside in order to ensure the theft notification alarm would sound if anyone attempted to exit through that door. If the door was not re-armed any customer or associate could exit the store with stolen merchandise. The employer had a written policy regarding the safety and security protocol of the store and the claimant acknowledged that she knowingly violated this policy and failed to report others violating this policy to Sherrie Spearman, District Manager. The claimant's actions were intentional and deliberate and disqualifying. Benefits are denied.

- II. Has the claimant been overpaid unemployment insurance benefits and, if so, can the repayment of those benefits to the agency be waived and charged to the employer's account?

For the reasons that follow the administrative law judge finds, the claimant was \$7,891.00 overpaid regular unemployment insurance benefits, which she required to repay, because the employer did substantially participate in the fact-finding interview and its account shall not be charged.

Iowa Code section 96.3(7)a, b, as amended in 2008, provides:

Payment – determination – duration – child support intercept.

7. Recovery of overpayment of benefits.

a. If an individual receives benefits for which the individual is subsequently determined to be ineligible, even though the individual acts in good faith and is not otherwise at fault, the benefits shall be recovered. The department in its discretion may recover the overpayment of benefits either by having a sum equal to the overpayment deducted from any future benefits payable to the individual or by having the individual pay to the department a sum equal to the overpayment.

b. (1) (a) If the department determines that an overpayment has been made, the charge for the overpayment against the employer's account shall be removed and the account shall be credited with an amount equal to the overpayment from the unemployment compensation trust fund and this credit shall include both contributory and reimbursable employers, notwithstanding section 96.8, subsection 5. The employer shall not be relieved of charges if benefits are paid because the employer or an agent of the employer failed to respond timely or adequately to the department's request for information relating to the payment of benefits. This prohibition against relief of charges shall apply to both contributory and reimbursable employers.

(b) However, provided the benefits were not received as the result of fraud or willful misrepresentation by the individual, benefits shall not be recovered from an individual if the employer did not participate in the initial determination to award benefits pursuant to section 96.6, subsection 2, and an overpayment occurred because of a subsequent reversal on appeal regarding the issue of the individual's separation from employment.

(2) An accounting firm, agent, unemployment insurance accounting firm, or other entity that represents an employer in unemployment claim matters and demonstrates a continuous pattern of failing to participate in the initial determinations to award benefits, as determined and defined by rule by the

department, shall be denied permission by the department to represent any employers in unemployment insurance matters. This subparagraph does not apply to attorneys or counselors admitted to practice in the courts of this state pursuant to section 602.10101.

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 unrebutted 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.

Because the claimant’s separation was disqualifying, benefits were paid to which she was not entitled. 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. Iowa Code § 96.3(7). However, an overpayment, which results from a reversal of an initial allowance of benefits based on a separation, will not be recovered 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. Iowa Admin. Code r. 871-24.10(1). The employer will not be charged for benefits if it is determined that they did participate in the fact-finding interview. Iowa Code § 96.3(7), Iowa Admin. Code r. 871-24.10.

In this case, the claimant has received benefits, but she was not eligible for those benefits. The employer did participate in the fact-finding interview. Since the employer participated in the fact-finding interview, the claimant is obligated to repay to the agency the benefits she received and the employer’s account shall not be charged.

DECISION:

The November 9, 2021, reference 01, unemployment insurance decision is reversed. 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.

The claimant has been overpaid \$7,891.00 in regular unemployment insurance benefits, and she is obligated to repay the agency those benefits. The employer did participate in the fact-finding interview and its account shall not be charged.



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February 17, 2022
Decision Dated and Mailed

jd/kmj