

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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

JENNIFER S MACKERMAN
Claimant

APPEAL NO: 19A-UI-05358-JE-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

HY-VEE INC
Employer

OC: 06/09/19
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 June 27, 2019, 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 July 30, 2019. The claimant did not respond to the hearing notice and did not participate in the hearing. Rick Morr, Store Director; Scott Foughty, Loss Prevention Supervisor; Brandy Virchow, Italian Manager; and Trenton Kilpatrick, Employer Representative, participated in the hearing on behalf of the employer. Employer's Exhibits One through Four were admitted into evidence.

ISSUE:

Whether the employer discharged the claimant for work-connected misconduct as defined by Iowa law.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed as a full-time assistant manager for Hy-Vee from June 29, 2017 to June 5, 2019. She was suspended without pay pending a criminal investigation for stealing \$6,357.35.

On Monday, June 3, 2019, the claimant counted the cash in the in top portion of the safe with Assistant Manager Michael Peterson, clocked out at 10:24 p.m. and left the building immediately at 10:28 p.m. with her cell phone in her hand (Employer's Exhibit One). The employer's video surveillance shows the claimant being picked up at that time (Employer's Exhibit One). The claimant returned to the store in street clothes and entered the store again at 11:06 p.m. and went immediately to the safe room directly behind the Customer Service counter (Employer's Exhibit One). Surveillance showed her opening the safe room door slightly and reaching in and shutting the light off before entering the room and proceeding to the safe, the bottom portion of which she entered (Employer's Exhibit One). She left the safe room at 11:08 p.m. and exited the store (Employer's Exhibit One). The following morning the employer discovered it was missing two register bags containing \$6,357.35

(Employer's Exhibit One). Both the claimant and Mr. Peterson state the two register bags were in the bottom portion of the safe and the money they counted in the top portion of the safe when they counted for their nightly closing duties the previous evening (Employer's Exhibit One).

On Wednesday, June 5, 2019, Store Director Rick Morr, Italian Manager Brandy Virchow and Loss Prevention Supervisor Scott Foughty, interviewed the claimant. The claimant indicated early in the interview that she had not put personal items in the safe (Employer's Exhibit Three). The employer asked her why she returned to the store and went to the safe in the dark and the claimant stated she needed to get her phone (Employer's Exhibit Three). She said she left her phone in the safe while at work (Employer's Exhibit Three). The employer reminded her she earlier stated she did not leave personal items in the safe (Employer's Exhibit Three). The claimant responded that she used the light on her cell phone to help count the safe and left her cell phone in the safe when done (Employer's Exhibit Three). She also stated the flash on her cell phone blinked when a call was missed and she had called her phone with her father's phone and left a message so it would be easier to find her phone in the safe when she went back to retrieve it (Employer's Exhibit Three). She could not say why the flash from her phone, which she stated went off every three seconds, was not visible on the surveillance in the darkened room (Employer's Exhibit Three). The employer asked her to explain why, when she had her cell phone in her hand when she clocked out and left the building at the end of her shift, she stated she left her cell phone in the safe and the claimant simply repeated she left her phone in the safe and did not know (Employer's Exhibit Three). The employer notified the claimant she was being suspended without pay pending the outcome of the criminal investigation and called the local police department who interviewed and charged the claimant with second degree theft (Employer's Exhibit Two).

The claimant has claimed and received unemployment insurance benefits in the amount of \$2,238.00 for the seven weeks ending July 27, 2019.

The employer participated personally in the fact-finding interview through the statements of Store Director Rick Morr; Italian Manager Brandy Virchow; and Loss Prevention Supervisor Scott Foughty.

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 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 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 or omissions that constitute a material breach of the worker's duties and obligations to the employer. See 871 IAC 24.32(1).

The employer's surveillance recordings clearly show the claimant left the store after her shift with her cell phone in her hand. She returned a short time later dressed in non-work attire and opened the door to the safe room slightly, reached in, and turned off the light and entered the room in the dark. She went to the lower portion of the safe where the register proceeds are kept and left soon after. She knew the combination to the upper and lower safe. The following morning two register bags worth \$6,357.35 were missing. No one else entered the safe room after the claimant clocked out and returned until the accounting manager went in the following morning and discovered the two bags missing. When the employer interviewed the claimant her responses were inconsistent with the facts the employer established.

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 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.

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 section 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 employer participated in the fact-finding interview personally through the statements of Store Director Rick Morr; Italian Manager Brandy Virchow; and Loss Prevention Supervisor Scott Foughty. Consequently, the claimant's overpayment of benefits cannot be waived and she is overpaid benefits in the amount of \$2,238.00 for the seven weeks ending July 27, 2019.

DECISION:

The June 27, 2019, reference 01, 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 received benefits but was not eligible for those benefits. The employer personally participated in the fact-finding interview within the meaning of the law. Therefore, the claimant is overpaid benefits in the amount of \$2,238.00 for the seven weeks ending July 27, 2019.

Julie Elder
Administrative Law Judge

Decision Dated and Mailed

je/scn