

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

KYLE J GERISCHER
Claimant

CENTRO INC
Employer

APPEAL 18A-UI-01832-NM-T
**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 01/14/18
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:

The employer filed an appeal from the January 31, 2018, (reference 01) unemployment insurance decision that allowed benefits. The parties were properly notified of the hearing. A telephone hearing was held on March 7, 2018. The claimant participated and testified. The employer participated through Director of Human Resources Rhonda Griffin.

ISSUES:

Was the claimant discharged for disqualifying job-related misconduct?

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

Can any 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 was employed full time as a quality assurance technician from October 31, 2017, until this employment ended on January 4, 2018, when he was discharged.

At the time of his separation claimant was working on-site at the John Deere facility in Des Moines. On January 3, 2018, Griffin received a call from John Deere informing her they had surveillance footage of claimant taking items from their cafeteria without paying for them. They informed Griffin they believed this had happened eight or nine times before, with the most recent incident occurring on January 3, 2018. Griffin was not sure of the dates of the other incidents and only personally viewed footage of the January 3 incident, along with one other incident. Griffin explained, during high traffic times of the day, the cafeteria is staffed with workers to check out individuals making purchases. Individuals can use cash, credit, or debit to pay for purchases during these times. However, during low volume time periods, employees

are expected to use self-service kiosks to pay for their items. These kiosks only accept debit or credit cards. Of the two videos Griffin reviewed, one showed him walking right past a kiosk, without hesitation, without paying. The other video showed claimant stop at the kiosk and insert his debit card while he appeared to be looking around to see if anyone was watching. Griffin testified, it appeared claimant had put his debit card into the kiosk backwards so the payment was not able to be processed. Based on these observations, the decision was made to discharge claimant from employment.

Claimant testified he, along with several other employees, had previously been told by cafeteria workers that if they only had cash, and there were not any employees working the cash kiosks, they could take the items they wanted to purchase and come back later to pay for them. Claimant testified he did this on at least five to six occasions prior to January 3, 2018 and again on January 3. Claimant further testified, on January 4, 2018, prior to meeting with Griffin, he had gone to the cafeteria and paid for the items he took on January 3. Claimant testified he only did this when no one was working the kiosks and he did not have his wallet on him or his debit card did not have enough money. Prior to his termination no one had ever told claimant this was not acceptable and would lead to termination. Claimant denied ever looking around at a kiosk to see if anyone was watching or deliberately inserting his debit card incorrectly.

The explanation provided by the claimant at the hearing was the same explanation provided to Griffin at the time of his separation. No one with the employer looked into claimant's assertions that he had gone back and paid for all of the items he took with cash, nor did they ask any of the cafeteria workers if they had given this directive to claimant or any other employees. There are no applicable policies or procedures regarding purchases from the cafeteria, but Griffin testified the issue was discussed at a team meeting several weeks prior, after another employee was discharged for a similar incident. Griffin could not confirm claimant was present for that meeting. Claimant denied the topic was ever covered at any meetings he attended.

The claimant filed a new claim for unemployment insurance benefits with an effective date of January 14, 2018. The claimant filed for and received a total of \$3,311.00 in unemployment insurance benefits for the weeks between January 14 and March 3, 2018. Both the employer and the claimant participated in a fact finding interview regarding the separation on January 30, 2018. The fact finder determined claimant qualified for benefits.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes claimant was discharged from employment for no disqualifying reason.

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 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.

871 IAC 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 Department of Job Service*, 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).

In an at-will employment environment an employer may discharge an employee for any number of reasons or no reason at all if it is not contrary to public policy, but if it fails to meet its burden of proof to establish job related misconduct as the reason for the separation, it incurs potential liability for unemployment insurance benefits related to that separation. 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.

Claimant was of the understanding that it was acceptable to take items from the cafeteria and pay for them later if he only had cash available and no kiosks accepting cash were open. It is the duty of the administrative law judge as the trier of fact in this case, 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 believable evidence; 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.*

After assessing the credibility of the witnesses who testified during the hearing, considering the applicable factors listed above, and using her own common sense and experience, the administrative law judge finds the claimant's version of events to be credible. The claimant's explanation for his behavior at the time of the hearing was consistent with that provided at the time of his termination. The fact that another employee was discharged a few weeks prior following a very similar incident lends credibility to claimant's testimony that he and other employees were told by cafeteria workers that this behavior was acceptable. The employer did not perform any follow up investigation, either by speaking to the cafeteria workers or confirming whether items were eventually paid for, to refute claimant's testimony.

The conduct for which claimant was discharged was, at worst, an isolated incident of poor judgment, but more likely the result of misinformation. Claimant testified he was relying on information given to him by the cafeteria workers and was not aware his behavior could lead to discharge. An employee is entitled to fair warning that the employer will no longer tolerate certain performance and conduct. Without fair warning, an employee has no reasonable way of knowing that there are changes that need be made in order to preserve the employment. If an employer expects an employee to conform to certain expectations or face discharge, appropriate (preferably written), detailed, and reasonable notice should be given. Training or general notice to staff about a policy is not considered a disciplinary warning. Inasmuch as employer had not previously warned claimant about the issue leading to the separation, it has not met the burden of proof to establish that claimant acted deliberately or with recurrent negligence in violation of company policy, procedure, or prior warning. Benefits are allowed. As benefits are allowed, the issues of overpayment and participation are moot.

DECISION:

The January 31, 2018, (reference 01) unemployment insurance decision is affirmed. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided he is otherwise eligible. Any benefits claimed and withheld on this basis shall be paid. The issues of overpayment and participation are moot.

Nicole Merrill
Administrative Law Judge

Decision Dated and Mailed

nm/rvs