

IOWA WORKFORCE DEVELOPMENT
Unemployment Insurance Appeals Section
1000 East Grand—Des Moines, Iowa 50319
DECISION OF THE ADMINISTRATIVE LAW JUDGE
68-0157 (7-97) – 3091078 - EI

CHRISTINE M MILLER
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CEDAR RAPIDS IA 52404

PEPSI-COLA GENERAL BOTTLERS
OF IOWA
c/o TALX UC EXPRESS
PO BOX 283
ST LOUIS MO 63166-0283

Appeal Number: 05A-UI-03455-RT
OC: 02-27-05 R: 04
Claimant: Respondent (2)

This Decision Shall Become Final, unless within fifteen (15) days from the date below, you or any interested party appeal to the Employment Appeal Board by submitting either a signed letter or a signed written Notice of Appeal, directly to the **Employment Appeal Board, 4th Floor—Lucas Building, Des Moines, Iowa 50319.**

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

STATE CLEARLY

1. The name, address and social security number of the claimant.
2. A reference to the decision from which the appeal is taken.
3. That an appeal from such decision is being made and such appeal is signed.
4. The grounds upon which such appeal is based.

YOU MAY REPRESENT yourself in this appeal or you may obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds. It is important that you file your claim as directed, while this appeal is pending, to protect your continuing right to benefits.

(Administrative Law Judge)

(Decision Dated & Mailed)

Section 96.5-2-a – Discharge for Misconduct
Section 96.3-7 – Recovery of Overpayment of Benefits

STATEMENT OF THE CASE:

The employer, Pepsi-Cola General Bottlers of Iowa, filed a timely appeal from an unemployment insurance decision dated March 22, 2005, reference 01, allowing unemployment insurance benefits to the claimant Christine M. Miller. After due notice was issued, a telephone hearing was held on April 20, 2005, with the claimant participating. Scott Klahsen, Human Resources Generalist, Margaret Merriau, Office Supervisor, and Brenda Wennekamp, Former Regional Manager; participated in the hearing for the employer. The administrative law judge takes official notice of Iowa Workforce Development Department unemployment insurance records for the claimant. Employer's Exhibits One through Three were admitted into evidence.

FINDINGS OF FACT:

Having heard the testimony of the witnesses and having examined all of the evidence in the record, including Employer's Exhibits One through Three, the administrative law judge finds: The claimant was employed by the employer as a full-time cashier from November 23, 2002 until she was discharged on February 24, 2005. The claimant was discharged for theft of money from the employer. On February 18, 2005 at approximately 2:30 p.m., the claimant went into the counting station or cash room and opened the safe and removed money from a cash bag and placed it in her waist area either under her shirt or under her pants and then left. This was observed in real time through the employer's video surveillance camera on the area in question, by the employer's witnesses, Margaret Merriau, Office Supervisor, and Brenda Wennkamp, Former Regional Manager. Since this was caught on the videotape, the tape was rewound and the claimant was observed doing the same thing from a different safe in the same area approximately 30 minutes earlier. That safe was missing \$50.00. Ms. Merriau did not know what to do so she went hurriedly out to the area where the claimant was and observed the claimant putting down her purse. Ms. Merriau was upset and unsure of how to proceed. She lost sight of the claimant for a period of time. Eventually the police were called and charges were filed against the claimant which are still pending. Prior to the arrival of the police, the claimant observed the consternation of Ms. Merriau and others and announced to Ms. Merriau that she was quitting at approximately 3:00 p.m. She gave no reasons. Shortly thereafter the claimant was confronted by Ms. Merriau, Ms. Wennkamp, and the police about taking the money. The contents of both safes were checked and the safe from the earlier incident caught on videotape was short \$50.00. There was nothing missing from the safe which was observed on real time. However, the claimant had some time to go back and replace the cash which she had removed.

The claimant also removed money from three different cash bags on February 14, 2005 and two different cash bags on February 17, 2005. This was observed by Ms. Merriau when she reviewed other videotapes after February 18, 2005. Total cash missing from the employer was \$433.00. The claimant told the police when confronted that she was making change but change is to be made from a box on the counter and not from the cash in the safe. The claimant did not need to get any cash or change for any business purpose. After the review of the other tapes, a decision was made to discharge the claimant and she was so informed by telephone on February 24, 2005. This was confirmed by a letter dated February 24, 2005 as shown at Employer's Exhibit One. The employer has specific rules prohibiting such theft and indicating that theft is in a group of violations which can result in a discharge on a first offense all as shown at Employer's Exhibit Three which is a copy of the employer's general rules of conduct, a copy of which the claimant received and for which she signed an acknowledgement. Pursuant to her claim for unemployment insurance benefits filed effective February 27, 2005, the claimant has received unemployment insurance benefits in the amount of \$1,422.00 as follows: \$237.00 per week for six weeks from benefit week ending March 12, 2005 to benefit week ending April 16, 2005. For benefit week ending March 5, 2005, the claimant reported vacation pay sufficient to nullify benefits for that week.

REASONING AND CONCLUSIONS OF LAW:

The questions presented by this appeal are as follows:

1. Whether the claimant's separation from the employment was a disqualifying event. It was.

2. Whether the claimant is overpaid unemployment insurance benefits. She is.

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's witnesses credibly testified, and the administrative law judge concludes, that the claimant was discharged on February 24, 2005. The claimant testified that she actually quit on February 18, 2005. The claimant's testimony is simply not credible. The claimant testified that she quit at 3:00 p.m. approximately 30 minutes after she was observed in real time taking money from the safe. It is true that the claimant had not yet been confronted by the employer and the police about the theft but one of the employer's witnesses, Margaret Merriau, Office Supervisor, had rushed into the area where the claimant was, upset and excited, which no doubt raised a suspicion of the claimant causing her to quit. The claimant remarked when she quit that because she handled money, she understood that her quit would be effective immediately. It appears to the administrative law judge that the claimant was attempting to avoid any repercussions from the theft and so claimed that she quit. Under these circumstances, the administrative law judge concludes that the claimant was actually discharged officially on February 24, 2005. The claimant cannot avoid the accusation of the theft of money by claiming a voluntary quit when she believes that the theft has been

discovered but before she was confronted. The date of the discharge coincides well with the claimant's claim for unemployment insurance benefits filed effective February 27, 2005. Accordingly, the administrative law judge concludes that the claimant was officially discharged on February 24, 2005.

In order to be disqualified to receive unemployment insurance benefits pursuant to a discharge, the claimant must have been discharged for disqualifying misconduct. The administrative law judge concludes that the employer has met its burden of proof to demonstrate by a preponderance of the evidence that the claimant was discharged for disqualifying misconduct. Ms. Merriau credibly testified that she observed the claimant taking money from a safe in real time and then when she rewound the tape, observed the claimant doing so approximately 30 minutes earlier from a different safe. The first safe was short \$50.00. The second safe was not short any money. However, Ms. Merriau also testified there was a period of time when the claimant could have went back into the safe and replaced the money taken. The administrative law judge notes that Ms. Merriau came out into the room where the claimant was, and Ms. Merriau was obviously upset and aroused the claimant's suspicions that she was caught. Ms. Merriau also credibly testified that she then reviewed tapes of prior days and observed the claimant taking money from three different moneybags on three different occasions on February 14, 2005 and taking money from two different moneybags on two different occasions on February 17, 2005. Ms. Merriau was most credible in her testimony. She was forthright and testified clearly as to what she had observed. The employer is missing \$433.00. Criminal charges are pending against the claimant. The claimant denied taking any money on February 14 and 17, 2005 but conceded that she went to the safe on February 18, 2005 to make change for a \$50.00 bill and a \$20.00 bill. However, the claimant testified that she only changed the \$20.00 bill, taking one ten, one five and five ones. The claimant did not explain why she did this from the safe when there was a box on the counter for such change. The administrative law judge notes that part of the testimony of Ms. Merriau was confirmed by the employer's other witness, Brenda Wennekamp, Former Regional Manager, who observed the video real time and also saw the claimant taking money. Under the evidence here, the administrative law judge concludes that the claimant did remove cash from the employer's cash bags on several occasions as testified to by the employer's witnesses and that these acts were deliberate acts constituting a material breach of her duties and obligations arising out of her worker's contract of employment and evince a willful or wanton disregard of the employer's interests and are disqualifying misconduct. The claimant's testimony to the contrary is not credible. The claimant denied that criminal charges were ever filed but this is not credible. The claimant conceded that the police were called to the scene on February 18, 2005 and the employer's witnesses credibly testified that criminal charges are pending against the claimant. The claimant also sought to misdirect the evidence by claiming that she quit because of harassment. However, as noted above, this testimony also is not credible. Accordingly, the administrative law judge concludes that the claimant was discharged for disqualifying misconduct and, as a consequence, she is disqualified to receive unemployment insurance benefits. Unemployment insurance benefits are denied to the claimant until or unless she requalifies for such benefits.

The administrative law judge notes that a redetermination can be made in this matter within five years from the effective date of the claimant's claim if the claimant has committed gross misconduct which is deemed to have occurred after the claimant leaves her employment as a result of an act constituting an indictable offense in connection with the claimant's employment provided the claimant is duly convicted thereof or has signed a statement admitting the commission of such an act. An indictable offense is the theft of an amount in excess of \$200.00. See Iowa Code section 96.5(2)(b).

Even should the claimant's separation be considered a voluntary quit on February 18, 2005, the administrative law judge would conclude that the claimant left her employment voluntarily without good cause attributable to the employer. As noted above, the administrative law judge concluded that the claimant said she quit because she suspected that her theft had been discovered by the employer and this is not good cause attributable to the employer. The claimant testified that she believed that she was being harassed and this is what motivated her quit. The claimant testified that she was sick and was treated differently but could not explain exactly how she was treated differently. It does appear that the employer did not want the claimant to return to work after contracting the flu until she was no longer contagious. The administrative law judge sees nothing wrong with that as the employer would not want the claimant to spread the flu to the other employees. Then the claimant testified that she quit because her hours were changing but the evidence establishes that that change was only temporary. The claimant may have expressed some general concerns about these matters but even the claimant conceded that she had never indicated or announced an intention to quit if any of her concerns were not addressed by the employer. The administrative law judge would conclude that there is not a preponderance of the evidence that the claimant's working conditions were unsafe, unlawful, intolerable or detrimental or that she was subjected to a substantial change in her contract of hire. The claimant, if she quit, quit simply because her theft had been discovered and this is not good cause attributable to the employer. The administrative law judge particularly notes the timing of the claimant's quit coming only 30 minutes after she took money from the employer. The administrative law judge also notes that when the claimant stated she quit, she also told the employer that she understood that because she handled money her quit would be effective immediately. It appears to the administrative law judge that the claimant really wanted to get out of her employer's location as fast as possible. Accordingly, even should the claimant's separation be considered a voluntary quit, the administrative law judge would conclude that the claimant voluntarily quit without good cause attributable to the employer and would still be disqualified to receive unemployment insurance benefits.

Iowa Code section 96.3-7 provides:

7. Recovery of overpayment of benefits. 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.

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 administrative law judge concludes that the claimant has received unemployment insurance benefits in the amount of \$1,422.00 since separating from her employer on or about February 24, 2005 and filing for such benefits effective February 27, 2005. The administrative law judge further concludes that the claimant is not entitled to these benefits and is overpaid such benefits. The administrative law judge finally concludes that these benefits must be recovered in accordance with the provisions of Iowa law.

DECISION:

The representative's decision of March 22, 2005, reference 01, is reversed. The claimant, Christine M. Miller, is not entitled to receive unemployment insurance benefits, until or unless she requalifies for such benefits, because she was discharged for disqualifying misconduct. The claimant has been overpaid unemployment insurance benefits in the amount of \$1,422.00.

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