

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

TIFFANY R FORTUNE

Claimant

APPEAL 19A-UI-01718-SC-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

BECKSTROM CONSTRUCTION INC

Employer

OC: 01/20/19

Claimant: Appellant (1)

Iowa Code § 96.6(2) – Timeliness of Appeal
Iowa Code § 96.5(2)a – Discharge for Misconduct

STATEMENT OF THE CASE:

Tiffany R. Fortune (claimant) filed an appeal from the February 12, 2019, reference 01, unemployment insurance decision that denied benefits based upon the determination Beckstrom Construction, Inc. (employer) discharged her for theft of company property. The parties were properly notified about the hearing. A telephone hearing was held on April 4, 2019. The claimant participated personally and was represented by Attorney Frederick Sinkevich. The employer participated through President Gerald Beckstrom and was represented by Attorney Erin Nathan. The Claimant's Exhibits B and C and the Employer's Exhibits 10 through 12 were admitted without objection. The Claimant's Exhibits A and D were admitted over the employer's objections on the basis of hearsay, foundation and relevance. The Employer's Exhibits 1, 4 through 7, and 9 were admitted over the claimant's objections based on the truth of the matter, foundation, and relevance. The Employer's proposed Exhibits 2, 3, and 8 were not offered into the record. The Department's Exhibits D1 and D2 were admitted into the record.

ISSUES:

Is the appeal timely?

Was the claimant discharged for disqualifying job-related misconduct?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed full-time as General Manager of the Office beginning on March 5, 2012, and was separated from employment on January 21, 2019, when she was discharged. The claimant was hired with a starting salary of \$47,000.00. She also accrued vacation which could occasionally be cashed out in lieu of taking the time off. She was responsible for all of the employer's bookkeeping and payroll. The claimant's mother also worked for the employer to clean the office and earned approximately \$300.00 a week. In March 2017, the claimant added her mother's wages to her paycheck.

At the end of a Christmas layoff in 2018, the claimant missed the deadline to direct deposit paychecks for employees and printed physical checks. President Gerald Beckstrom was in the

office while the checks printed. He noticed that the claimant's boyfriend, who also works for him, was receiving a paycheck that showed he had earned wages for 50 hours in the first week and 55 hours in the second week of payroll. Beckstrom, who had worked in the field with a small crew, knew the claimant's boyfriend was in another state during break and had not worked. Beckstrom contacted his accountant who reviewed his books and discovered discrepancies in the claimant's record keeping. Beckstrom hired a forensic accounting team who started an investigation.

The following weekend, Beckstrom continued looking for more information. He discovered the claimant had earned \$135,200.00 in wages, \$23,565.00 in bonuses, and \$13,120.18 in reimbursements for the 2018 calendar year. Beckstrom had increased the claimant's wages throughout the years but her salary should have only been around \$75,000.00. He also agreed to pay sixty percent of her monthly premium of \$1,189.00 for health insurance. He did not agree to pay her \$2,200.00 each month for insurance which is what she had collected. He also discovered that the claimant had her entire monthly health care premium being paid out of his business checking account.

Beckstrom discovered an unlabeled folder in the filing cabinet. This included invoices of product purchased on business accounts and delivered to the claimant's house for her personal construction project, a piece of paper on which someone had practiced signing Beckstrom's signature, and applications for lines of credit against the business that Beckstrom did not authorize or sign but had the claimant's handwriting. As a result of the information he discovered and even before the investigation by the forensic accountants concluded, he discharged the claimant for theft.

The unemployment insurance decision denying benefits was mailed to the claimant's address of record on February 12, 2019. The appellant did not receive the decision until February 25, 2019 when she found it in a snowbank in front of her neighbor's house. The city plows had been knocking her mailbox over on a regular basis. The appeal was submitted immediately upon receipt of the decision.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge finds the claimant's appeal to be timely and the claimant was discharged for job-related misconduct. Benefits are denied.

Iowa Code section 96.6(2) provides, in pertinent part:

Filing – determination – appeal.

The representative shall promptly examine the claim and any protest, take the initiative to ascertain relevant information concerning the claim, and, on the basis of the facts found by the representative, shall determine whether or not the claim is valid, the week with respect to which benefits shall commence, the weekly benefit amount payable and its maximum duration, and whether any disqualification shall be imposed. . . . Unless the claimant or other interested party, after notification or within ten calendar days after notification was mailed to the claimant's last known address, files an appeal from the decision, the decision is final and benefits shall be paid or denied in accordance with the decision.

Iowa Admin. Code r. 871-24.35(2) provides:

Date of submission and extension of time for payments and notices.

(2) The submission of any payment, appeal, application, request, notice, objection, petition, report or other information or document not within the specified statutory or regulatory period shall be considered timely if it is established to the satisfaction of the division that the delay in submission was due to division error or misinformation or to delay or other action of the United States postal service.

a. For submission that is not within the statutory or regulatory period to be considered timely, the interested party must submit a written explanation setting forth the circumstances of the delay.

b. The division shall designate personnel who are to decide whether an extension of time shall be granted.

c. No submission shall be considered timely if the delay in filing was unreasonable, as determined by the department after considering the circumstances in the case.

d. If submission is not considered timely, although the interested party contends that the delay was due to division error or misinformation or delay or other action of the United States postal service, the division shall issue an appealable decision to the interested party.

The claimant did not have an opportunity to appeal the unemployment insurance decision because the decision was not received in a timely manner due to circumstances outside the claimant's control. Without timely notice of a disqualification, no meaningful opportunity for appeal exists. See *Smith v. Iowa Emp't Sec. Comm'n*, 212 N.W.2d 471, 472 (Iowa 1973). Given the circumstances, the claimant's delay was reasonable and she filed the appeal within ten days of receipt; therefore, the appeal shall be accepted as timely.

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 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). 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).

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.*

The findings of fact show how the disputed factual issues were resolved. After assessing the credibility of the witnesses who testified during the hearing, the reliability of the evidence submitted, considering the applicable factors listed above, and using her own common sense and experience, the administrative law judge attributes more weight to the employer's version of events. The claimant was evasive when answering questions and occasionally provided contradictory testimony. Additionally, the claimant contends she received authorization from the employer regarding all of the transactions including, but not limited to, adding her mother's wages to her paycheck and receiving \$2,200.00 a month for her insurance premiums. However, the claimant's monthly insurance premium was only \$1,189.00, of which the employer only agreed to pay sixty percent, and the entire monthly payment was also being deducted from the employer's checking account for at least three months. The claimant's contention is not persuasive.

The employer has presented substantial and credible evidence that the claimant was misappropriating the employer's assets. Theft from an employer is generally disqualifying misconduct. *Ringland Johnson, Inc. v. Hunecke*, 585 N.W.2d 269, 272 (Iowa 1998). In *Ringland*, the Court found a single attempted theft to be misconduct as a matter of law. In this case, the claimant deliberately disregarded the employer's interest and violated the reasonable expectations an employer has a right to expect from an employee. The claimant engaged in disqualifying misconduct even without previous warning. Benefits are denied.

DECISION:

The claimant's appeal is timely. The February 12, 2019, reference 01, unemployment insurance decision is affirmed. 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.

Stephanie R. Callahan
Administrative Law Judge

Decision Dated and Mailed

src/scn