

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

AMBERLYNN N KRANSON
Claimant

APPEAL NO. 11A-UI-04624-VST

**ADMINISTRATIVE LAW JUDGE
DECISION**

CSOI CORP
Employer

OC: 03/06/11
Claimant: Respondent (2-R)

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

STATEMENT OF THE CASE:

The employer filed an appeal from a representative's decision dated March 31, 2011, reference 01, which held the claimant eligible for unemployment insurance benefits. After due notice, a telephone conference hearing was scheduled for and held on May 3, 2011. The employer participated by Chad Smith, supervisor, and Ray Hultz, store manager. The claimant failed to respond to the hearing notice and did not participate. The record consists of the testimony of Chad Smith and the testimony of Ray Hultz.

ISSUES:

Whether the claimant was discharged for misconduct; and

Whether the claimant has been overpaid unemployment insurance benefits.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony of the witnesses and having considered all of the evidence in the record, makes the following findings of fact:

The employer is a convenience store located in Newton, Iowa. The claimant was hired on August 15, 2007, as a clerk. She was also cross-trained to work in the Godfather's Pizza restaurant that is part of the convenience store. She was a part-time employee. Her last day of work was January 18, 2011. She was terminated on January 18, 2011.

The incident that led to the claimant's termination occurred on December 24, 2010. The claimant and two other employees were working. The other two employees were busy making pizza. The employees did observe the claimant put a bag of items from the store under the counter. The claimant told the employees that she had paid for the items and that the receipt was in the bag.

The two employees were concerned, because they did not actually see the receipt. Employees were prohibited from ringing up their own purchases, a policy of which the claimant was aware.

The two employees expressed their concern to the store manager, Ray Hultz, on December 28, 2010, or December 29, 2010. He and Chad Smith proceeded to investigate the matter. The investigation required review of cash register tapes and surveillance video. Mr. Smith concluded that the claimant had taken merchandise worth \$94.55 from the store on December 24, 2010, without paying for it. He notified the owner approximately one week prior to the termination of the results of the investigation. The owner then made the decision to terminate the claimant.

When the claimant met with the employer on January 18, 2011, she gave several different versions of what occurred. She finally admitted that she took the items and intended to pay for them out of her next paycheck. The employer had procedures in place for loaning small amounts of money. The claimant had utilized this procedure in the past.

REASONING AND CONCLUSIONS OF LAW:

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.

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 duty to the employer. One of the most fundamental duties owed by the employee to the employer is honesty. An employer can reasonably expect that an employee will not misappropriate its property and take items that do not belong to the employee without paying for those items. The employer has the burden of proof to show misconduct.

The evidence established that the claimant stole merchandise from the employer worth \$94.55 on December 24, 2010. Although the claimant was not discharged until January 18, 2011, Chad Smith explained that it took a period of time to investigate whether the report of possible theft was indeed true. Mr. Smith said that the employer is cash register driven and therefore many roles of tape had to be reviewed and compared with surveillance video. The owner then had to be advised of the investigation. The administrative law judge concludes that the employer acted promptly upon receipt of a report of possible theft. Theft is misconduct. Benefits are therefore denied.

The next issue is overpayment of benefits.

Iowa Code section 96.3-7, as amended in 2008, provides:

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) 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. 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. The employer shall not be charged with the benefits.

(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.

The overpayment issue is remanded to the Claims Section for determination.

DECISION:

The representative's decision dated March 31, 2011, reference 01, is reversed. Unemployment insurance benefits shall be withheld until the claimant has worked in and been paid wages for insured work equal to ten times her weekly benefit amount, provided she is otherwise eligible. The overpayment issue is remanded to the Claims Section for determination.

Vicki L. Seeck
Administrative Law Judge

Decision Dated and Mailed

vls/kjw