

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

JAMES M GOWING
Claimant

HY-VEE INC
Employer

APPEAL NO. 19A-UI-02261-B2T

**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 02/17/19
Claimant: Appellant (2)

Iowa Code § 96.5-2-a – Discharge for Misconduct

STATEMENT OF THE CASE:

Claimant filed an appeal from a decision of a representative dated March 12, 2019, reference 01, which held claimant ineligible for unemployment insurance benefits. After due notice, a hearing was scheduled for and held on April 1, 2019. Claimant participated personally. Employer participated by hearing representative Trenton Kilpatrick and witnesses Isaac Wiese, Macy Stout and Sara Lawler. Employer's Exhibits 1-3 and Claimant's Exhibits A-D were admitted into evidence.

ISSUE:

The issue in this matter is whether claimant was discharged for misconduct?

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds: Claimant last worked for employer on February 20, 2019. Employer discharged claimant on February 20, 2019 because claimant made an agreement to sell items from the warehouse to Hy-Vee stores at a substantial discount to the list price that the item was to be sold to the stores.

Claimant worked as a purchasing assistant for employer at a distribution warehouse and previously worked at a grocery store for employer. Claimant shifted to his new position approximately one year prior to his termination. Claimant's new job required negotiating sales of items in the distribution center he worked to Hy Vee store managers. Employer stated that claimant was not free to negotiate with store managers about prices. Employer stated that on a daily basis, claimant and other purchasing assistants and purchasing leads were given a document giving them a list of products to be discounted in their sales of aged products to store managers.

Claimant stated that he and all of the other purchasing assistants would be free to give store managers special deals over and above the prices listed on the daily sales sheet in order to move aged products. Claimant stated that he made deals below the prices listed on the sales

sheet on at least fifty occasions during the year on the job. Claimant stated other purchasing assistants did the same thing.

On February 11-13, claimant organized a deal with a particular store manager who had often bought aged products from the distribution center. Claimant was discussing product that had been sitting for over two years and that claimant thought had recently been reduced to sixty percent off the normal price. As claimant saw that even this large discount did not move the merchandise, claimant negotiated the sale of a large amount of the product to the store manager at seventy-five percent off the original price. This amounted to a price difference of nearly \$35,000.00 off of the original price.

Employer stated that the items claimant sold were never discounted at sixty percent off, much less seventy-five percent off. Employer stated that in November, the products had been listed at thirty-three percent off, but that sale was no longer in effect.

Claimant admitted that he should have gotten approval of a supervisor before offering such a deal on products. He further stated that it was his belief that he was helping employer get rid of stale product. Employer stated that claimant's sale of product did not work to claimant's advantage in any way. As he was not paid any commissions, he made no extra money through the deal.

REASONING AND CONCLUSIONS OF LAW:

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).

A claimant is not qualified to receive unemployment insurance benefits if an employer has discharged the claimant for reasons constituting work connected misconduct. Iowa Code § 96.5-2-a. Before a claimant can be denied unemployment insurance benefits, the employer has the burden to establish the claimant was discharged for work-connected misconduct. *Cosper v. Iowa Department of Job Service*, 321 N.W.2d 6 (Iowa 1982), Iowa Code § 96.5-2-a.

In order to establish misconduct as to disqualify a former employee from benefits an employer must establish the employee was responsible for a deliberate act or omission which was a material breach of the duties and obligations owed by the employee to the employer. Rule 871 IAC 24.32(1)a; *Huntoon v. Iowa Department of Job Service*, 275 N.W.2d 445 (Iowa 1979); *Henry v. Iowa Department of Job Service*, 391 N.W.2d 731, 735 (Iowa Ct. App. 1986). The conduct must show a 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 the employee's duties and obligations to the employer. Rule 871 IAC 24.32(1)a; *Huntoon supra*; *Henry supra*. In contrast, 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 deemed misconduct within the meaning of the statute. Rule 871 IAC 24.32(1)a; *Huntoon supra*; *Newman v. Iowa Department of Job Service*, 351 N.W.2d 806 (Iowa Ct. App. 1984).

The employer bears the burden of proving that a claimant is disqualified from receiving benefits because of substantial misconduct within the meaning of Iowa Code section 96.5(2). *Myers*, 462 N.W.2d at 737. The propriety of a discharge is not at issue in an unemployment insurance case. An employer may be justified in discharging an employee, but the employee's conduct may not amount to misconduct precluding the payment of unemployment compensation. Because our unemployment compensation law is designed to protect workers from financial hardships when they become unemployed through no fault of their own, we construe the provisions "liberally to carry out its humane and beneficial purpose." *Bridgestone/Firestone, Inc. v. Emp't Appeal Bd.*, 570 N.W.2d 85, 96 (Iowa 1997). "[C]ode provisions which operate to work a forfeiture of benefits are strongly construed in favor of the claimant." *Diggs v. Emp't Appeal Bd.*, 478 N.W.2d 432, 434 (Iowa Ct. App. 1991).

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 Ct. 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. *State v. Holtz, 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. *State v. Holtz, Id.* In this matter, it

is believed that claimant and other purchasing assistants often made sales that were outside of the numbers listed on the sheet they were given. Claimant's matter-of-fact testimony in this matter was much more convincing than claimant's supervisor's testimony that this did not happen. Whereas he sounded assured that this happened all of the time, his supervisor seemed to be knowingly ignorant of her workers' actions. As claimant is believed to have acted in a like manner many other times with no recourse from employer, this action was only different because of the amount and cost of product sold.

The gravity of the incident, number of policy violations and prior warnings are factors considered when analyzing misconduct. The lack of a current warning may detract from a finding of an intentional policy violation. In this matter, the evidence fails to establish that claimant was discharged for an act of misconduct when claimant violated employer's policy concerning sale of product at a price below the set price for the product. Claimant was not warned concerning this policy.

The last incident, which brought about the discharge, fails to constitute misconduct because claimant acted in a like manner without any recourse many times prior to the incident that led to his termination. The administrative law judge holds that claimant was not discharged for an act of misconduct and, as such, is not disqualified for the receipt of unemployment insurance benefits.

DECISION:

The decision of the representative dated March 12, 2019, reference 01, is reversed. Claimant is eligible to receive unemployment insurance benefits, provided claimant meets all other eligibility requirements.

Blair A. Bennett
Administrative Law Judge

Decision Dated and Mailed

bab/scn