

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

CHELSEY VIETH
Claimant

APPEAL NO: 17A-UI-07902-JE-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

GOODWILL INDUSTRIES OF NE IA INC
Employer

OC: 07/09/17
Claimant: Respondent (2)

Section 96.5-2-a – Discharge/Misconduct
Section 96.3-7 – Recovery of Benefit Overpayment

STATEMENT OF THE CASE:

The employer filed a timely appeal from the July 25, 2017, reference 01, decision that allowed benefits to the claimant. After due notice was issued, a hearing was held by telephone conference call before Administrative Law Judge Julie Elder on August 22, 2017. The claimant did not respond to the hearing notice and did not participate in the hearing or request a postponement of the hearing as required by the hearing notice. Michelle Peters, Director of Retail Sales and Tom Kuiper, Employer Representative, participated in the hearing on behalf of the employer. Employer's Exhibits 1 through 3 were admitted into evidence.

ISSUE:

The issue is whether the employer discharged the claimant for work-connected misconduct.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed as a part-time sales associate for Goodwill Industries from October 26, 2016 to July 6, 2017. She was discharged for participating in a short-ringing incident which is considered theft.

Short-ringing occurs when a cashier enters an amount for an item in the register which is not the full or correct price. If an employee purchases an item from the employer, she is required to have the cashier sign the purchasing form, the buyer must sign the form, and then a third employee signs the form as the witness. The receipt is then stapled to the purchasing form. The employer can match the transaction number from the receipt to the form which also has the date, the register number and the time of purchase, in addition to the three employee signatures. The employer also has a video surveillance system which includes coverage of the registers.

On June 29, 2017, the claimant signed a purchasing form as a witness to another employee's purchase. The receipt showed the other employee purchased six items, all of which were classified as "wares" at \$.50 per item for a total of \$3.00 (Employer's Exhibit Three). The other

categories used by the employer include clothes, which are listed as “hanging” items, and other goods listed as “household.” The employer randomly reviews employee purchasing forms and receipts. If a transaction is selected for review the employer watches the video of the register where it took place (Employer’s Exhibit One). The video clearly showed one item on the receipt labeled as “wares” was a blanket which is considered a “household” item and which sells for \$3.00 to \$5.00 depending on whether it is a traditional blanket or a throw (Employer’s Exhibit One). The video showed the other employee purchasing a pair of shorts and the receipt also listed the shorts as “wares” when that item should have been listed as “hanging” (Employer’s Exhibit One). The employer’s base price for adult shorts is \$4.25. The employer could not identify the other items from the video viewing it conducted July 5, 2017.

The employer met with the claimant July 6, 2017, and asked her if she knew what short-ringing was and the claimant said she did not although the definition is contained in the handbook which the claimant signed for October 26, 2017 (Employer’s Exhibit Two). The employer explained the practice and the claimant denied doing it and stated she did not know any other employees who short-ring either. The employer considers short-ringing theft and consequently notified the claimant, as well as the other two employees involved as the cashier and purchaser, their employment was terminated.

The claimant has claimed and received unemployment insurance benefits in the amount of \$450.00 for the five weeks ending August 12, 2017.

The employer personally participated in the fact-finding interview through the statements of Unemployment Insurance Consultant Rosa Lecero. The employer also submitted written documentation prior to the fact-finding interview.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment for disqualifying job misconduct.

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 proving disqualifying misconduct. *Cosper v. Iowa Department of Job Service*, 321 N.W.2d 6 (Iowa 1982). A claimant is not qualified to receive unemployment insurance benefits if an employer has discharged him for reasons constituting work-connected misconduct. Iowa Code section 96.5-2-a. 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 duties and obligations to the employer. See 871 IAC 24.32(1).

While the claimant denied participation in the short-ringing that took place June 29, 2017, she was pictured in the video and signed the form containing false information about the items purchased as the witness who was expected to insure the transaction was completed in an honest manner. The blanket and adult shorts were not wares as the claimant knew or should have known but rather should have been classified as "household" and "hanging" items on the receipt respectively. The employer's blankets sell for \$3.00 to \$5.00 and adult shorts start at \$4.25 which again the claimant knew or should have known. By acting as the witness to the short-ringing exchange the claimant was an equal accomplice in the theft.

Under these circumstances, the administrative law judge concludes the claimant's conduct demonstrated a willful disregard of the standards of behavior the employer has the right to expect of employees and shows an intentional and substantial disregard of the employer's interests and the employee's duties and obligations to the employer. The employer has met its burden of proving disqualifying job misconduct. *Cosper v. IDJS*, 321 N.W.2d 6 (Iowa 1982). Therefore, benefits are denied.

Iowa Admin. Code r. 871-24.10 provides:

Employer and employer representative participation in fact-finding interviews.

(1) "Participate," as the term is used for employers in the context of the initial determination to award benefits pursuant to Iowa Code section 96.6, subsection 2, means submitting detailed factual information of the quantity and quality that if unrebutted would be sufficient to result in a decision favorable to the employer. The most effective means to participate is to provide live testimony at the interview from a witness with firsthand knowledge of the events leading to the separation. If no live testimony is provided, the employer must provide the name and telephone number of an employee with firsthand information who may be contacted, if necessary, for rebuttal. A party may also participate by providing detailed written statements or documents that provide detailed factual information of the events leading to separation. At a minimum, the information provided by the employer or the employer's representative must identify the

dates and particular circumstances of the incident or incidents, including, in the case of discharge, the act or omissions of the claimant or, in the event of a voluntary separation, the stated reason for the quit. The specific rule or policy must be submitted if the claimant was discharged for violating such rule or policy. In the case of discharge for attendance violations, the information must include the circumstances of all incidents the employer or the employer's representative contends meet the definition of unexcused absences as set forth in 871—subrule 24.32(7). On the other hand, written or oral statements or general conclusions without supporting detailed factual information and information submitted after the fact-finding decision has been issued are not considered participation within the meaning of the statute.

(2) "A continuous pattern of nonparticipation in the initial determination to award benefits," pursuant to Iowa Code section 96.6, subsection 2, as the term is used for an entity representing employers, means on 25 or more occasions in a calendar quarter beginning with the first calendar quarter of 2009, the entity files appeals after failing to participate. Appeals filed but withdrawn before the day of the contested case hearing will not be considered in determining if a continuous pattern of nonparticipation exists. The division administrator shall notify the employer's representative in writing after each such appeal.

(3) If the division administrator finds that an entity representing employers as defined in Iowa Code section 96.6, subsection 2, has engaged in a continuous pattern of nonparticipation, the division administrator shall suspend said representative for a period of up to six months on the first occasion, up to one year on the second occasion and up to ten years on the third or subsequent occasion. Suspension by the division administrator constitutes final agency action and may be appealed pursuant to Iowa Code section 17A.19.

(4) "Fraud or willful misrepresentation by the individual," as the term is used for claimants in the context of the initial determination to award benefits pursuant to Iowa Code section 96.6, subsection 2, means providing knowingly false statements or knowingly false denials of material facts for the purpose of obtaining unemployment insurance benefits. Statements or denials may be either oral or written by the claimant. Inadvertent misstatements or mistakes made in good faith are not considered fraud or willful misrepresentation.

This rule is intended to implement Iowa Code section 96.3(7)"b" as amended by 2008 Iowa Acts, Senate File 2160.

The unemployment insurance law requires benefits be recovered from a claimant who receives benefits and is later denied benefits even if the claimant acted in good faith and was not at fault. However, a claimant will not have to repay an overpayment when an initial decision to award benefits on an employment separation issue is reversed on appeal if two conditions are met: (1) the claimant did not receive the benefits due to fraud or willful misrepresentation, and (2) the employer failed to participate in the initial proceeding that awarded benefits. In addition, if a claimant is not required to repay an overpayment because the employer failed to participate in the initial proceeding, the employer's account will be charged for the overpaid benefits. Iowa Code section 96.3(7)a, b.

The claimant received benefits but has been denied benefits as a result of this decision. The claimant, therefore, was overpaid benefits.

Because the employer participated in the fact-finding interview, the claimant is required to repay the overpayment and the employer will not be charged for benefits paid.

Consequently, the claimant's overpayment of benefits cannot be waived and she is overpaid benefits in the amount of \$450.00 for the five weeks ending August 12, 2017.

DECISION:

The July 25, 2017, reference 01, decision is reversed. 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. The claimant has received benefits but was not eligible for those benefits. The employer personally participated in the fact-finding interview within the meaning of the law. Therefore, the claimant is overpaid benefits in the amount of \$450.00 for the five weeks ending August 12, 2017.

Julie Elder
Administrative Law Judge

Decision Dated and Mailed

je/rvs