

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

RHEA J CONROY
Claimant

HIGBEE WEST MAIN LP
Employer

APPEAL 17A-UI-04226-NM-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

**OC: 03/12/17
Claimant: Respondent (1)**

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Code § 96.3(7) – Recovery of Benefit Overpayment
Iowa Admin. Code r. 871-24.10 – Employer/Representative Participation Fact-finding Interview

STATEMENT OF THE CASE:

The employer filed an appeal from the April 11, 2017, (reference 01) unemployment insurance decision that allowed benefits. The parties were properly notified of the hearing. A telephone hearing was held on May 11, 2017. The claimant participated and testified. The employer participated through Assistant Store Manager Nancy Huaman. Employer's Exhibits 1 through 4 were received into evidence and official notice was taken of the administrative record.

ISSUES:

Was the claimant discharged for disqualifying job-related misconduct?
Has the claimant been overpaid any unemployment insurance benefits, and if so, can the repayment of those benefits to the agency be waived?
Can any charges to the employer's account be waived?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed full time as a ladies shoe associate from September 10, 2013, until this employment ended on March 13, 2017, when she was discharged.

On March 9, 2017, claimant was observed on security footage leaving the building for 39 minutes without clocking out. Claimant testified, at the time this occurred, she was going through a very emotional time in her personal life and just forgot to clock out. According to claimant there were several times during this time frame when her emotions overcame her and she needed to leave the sales floor. Claimant testified she would always tell someone where she was going and would clock out, but this time she forgot. Claimant further explained it was against her best interest to be on the clock but off the sales floor, as she worked on commission and had specific sales goals that were calculated based on the number of hours she worked. The employer concluded claimant's actions were deliberate because she walked past the time clock on her way out of and back into the building and made no attempts to later fix her time card. The employer did not question claimant about the incident prior to terminating her.

Claimant had no prior warnings for missed punches and the employer was unaware of other times this had occurred.

The claimant filed a new claim for unemployment insurance benefits with an effective date of March 12, 2017. The claimant filed for and received a total of \$3,034.00 in unemployment insurance benefits for the weeks between March 12 and May 6, 2017. Both the employer and the claimant participated in a fact-finding interview regarding the separation on April 10, 2017. The employer's participation was solely through written documentation. The fact finder determined claimant qualified for benefits.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes claimant was discharged from employment for no disqualifying reason.

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 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).

In an at-will employment environment an employer may discharge an employee for any number of reasons or no reason at all if it is not contrary to public policy, but if it fails to meet its burden of proof to establish job related misconduct as the reason for the separation, it incurs potential liability for unemployment insurance benefits related to that separation. A determination as to whether an employee’s act is misconduct does not rest solely on the interpretation or application of the employer’s policy or rule. A violation is not necessarily disqualifying misconduct even if the employer was fully within its rights to impose discipline up to or including discharge for the incident under its policy.

Claimant was discharged for failing to punch out while she took a break outside of the store. The conduct for which claimant was discharged was merely an isolated incident of poor judgment. Claimant provided credible testimony that she did not deliberately take a break without punching out, but that it slipped her mind due to the personal issues she was dealing with at the time. The employer did not provide any other incidents where claimant had left the store without punching out and claimant had no prior warnings for missed punches.

Claimant was careless, but the carelessness does not indicate “such degree of recurrence as to manifest equal culpability, wrongful intent or evil design” such that it could accurately be called misconduct. Iowa Admin. Code r. 871-24.32(1)(a); *Greenwell v. Emp’t Appeal Bd.*, No. 15-0154 (Iowa Ct. App. Mar. 23, 2016). An employee is entitled to fair warning that the employer will no longer tolerate certain performance and conduct. Without fair warning, an employee has no reasonable way of knowing that there are changes that need be made in order to preserve the employment. If an employer expects an employee to conform to certain expectations or face discharge, appropriate (preferably written), detailed, and reasonable notice should be given. Training or general notice to staff about a policy is not considered a disciplinary warning. Inasmuch as employer had not previously warned claimant about the issue leading to the separation, it has not met the burden of proof to establish that claimant acted deliberately or with recurrent negligence in violation of company policy, procedure, or prior warning. Benefits are allowed. The issues of overpayment and participation are moot.

DECISION:

The April 11, 2017, (reference 01) unemployment insurance decision is affirmed. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided she is otherwise eligible. The issues of overpayment and participation are moot.

Nicole Merrill
Administrative Law Judge

Decision Dated and Mailed

nm/rvs