

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

CAROLYN J BAKER
Claimant

APPEAL NO. 08A-UI-10905-NT

**ADMINISTRATIVE LAW JUDGE
DECISION**

INTERACTIVE TELESERVICES CORP
Employer

OC: 10/12/08 R: 03
Claimant: Respondent (2-R)

Section 96.5-2-a – Discharge for Misconduct

STATEMENT OF THE CASE:

The employer filed an appeal from a decision of a representative dated November 6, 2008, reference 01, which held the claimant eligible for unemployment insurance benefits. After due notice was issued, a telephone conference hearing was scheduled for and held on December 5, 2008. The claimant participated personally. The employer participated by Sandy Fitch, hearing representative, and witnesses Carrie Brown, Teresa Hinkle, and Joyce LaRue. Exhibit Number One was offered into evidence and received without objection.

ISSUE:

The issue in this matter is whether the claimant was discharged for misconduct in connection with her work.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and having considered all the evidence in the record, finds: The claimant last worked for this employer from May 10, 2007, until October 16, 2008, when she was discharged from employment. Ms. Baker held the position of part-time telephone service representative and was paid by the hour.

The claimant was discharged based upon the employer's reasonable belief that the claimant had engaged in misappropriating property from a fellow employee on October 10, 2008. On Monday, October 13, 2008, a company employee reported that a substantial amount of money had been removed from her work cubicle the proceeding Friday. The company reviewed security tapes that showed activity in the cubicle in question. The security tapes showed Ms. Baker entering the cubicle, going through objects in the cubicle, and placing an envelope in her back pocket. The sequence of events in the video surveillance fit the facts of the removal of the funds, as the funds were in the cubicle and in an envelope similar to the one that the claimant was observed placing in her rear pocket. Prior to reporting back to work for her part-time employment, Ms. Baker contacted Joyce LaRue to determine if anything unusual was occurring at the workplace. Upon returning to work, the claimant was questioned with respect to her involvement of the misappropriation and local police authorities were summoned. The tape was reviewed by the claimant, management, and a police officer. The claimant was arrested

and charged with a criminal complaint. When informed of her discharge by telephone and the basis for her discharge from employment were stated to the claimant, Ms. Baker responded, "I certainly understand."

It is the claimant's position that she played no part in the misappropriation of funds or property. It is the claimant's position that she happened to be in the cubicle in question preparing to assist Joyce LaRue, who is wheelchair-bound, in going on break. It is the claimant's further position that what appeared to be activity in the nature of rummaging through the other worker's property was, in fact, the claimant tampering with the worker's equipment as a form of practical joke.

REASONING AND CONCLUSIONS OF LAW:

The question is whether the evidence in the record establishes that Ms. Baker was discharged for misconduct in connection with the employment. It does.

The evidence in the record shows the claimant captured by surveillance tape entering the cubicle in question and rummaging through the cubicle holder's possessions. It also shows the claimant removing an envelope and placing the envelope in her back pocket. The evidence establishes that the \$900.00 removed from the cubicle on October 10, 2008, was encased in a similar envelope. Based upon the employer's review of the security tape and the claimant's arrest for theft, the employer was reasonable in discharging the claimant based upon their belief that the claimant had engaged in theft or misappropriation of another worker's property during working hours and the employer's location. The administrative law judge also notes that before returning to her part-time employment after October 10, 2008, the claimant had placed a call to a fellow worker to determine if anything unusual was happening at work. When informed that she was being discharged and basis for it, the claimant responded, "I certainly understand."

Although the administrative law judge is aware that the claimant maintains that she was only in the cubicle waiting for another worker and playing a practical joke on the cubicle holder's equipment, the administrative law judge finds the claimant's testimony strains credibility.

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.

For the reasons stated herein, the administrative law judge concludes the claimant was discharged for misconduct.

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.

DECISION:

The representative's decision dated November 6, 2008, reference 01, is reversed. The claimant was discharge for misconduct. Unemployment insurance benefits are withheld until the claimant has worked in and been paid wages for insured work equal to ten times the claimant's weekly benefit amount, provided she is otherwise eligible. The administrative law judge remands the issue of potential overpayment to the Claims Division for a determination of

whether there has been an overpayment, the amount, and whether the claimant will have to repay the benefits.

Terence P. Nice
Administrative Law Judge

Decision Dated and Mailed

kjw/kjw