

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

DARRON D SMITH
Claimant

HY-VEE INC
Employer

APPEAL 20R-UI-05407-DB-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 03/08/20
Claimant: Appellant (1)

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Code § 96.3(7) – Recovery of Benefit Overpayment
PL 116-136 Section 2104(B) – Federal Pandemic Unemployment Compensation

STATEMENT OF THE CASE:

The claimant/appellant filed an appeal from the March 31, 2020 (reference 01) unemployment insurance decision that denied benefits based upon claimant's discharge from employment. An initial hearing on his appeal was scheduled for April 30, 2020. An administrative law judge entered a decision on May 5, 2020 reversing the unemployment insurance decision and finding that the claimant was allowed benefits, provided he was otherwise eligible. The employer appealed the decision to the Employment Appeal Board. On June 8, 2020, the Employment Appeal Board issued a decision that remanded the matter to an administrative law judge to conduct a hearing following due notice. The parties were properly notified of the July 8, 2020 hearing. A telephone hearing was held on July 8, 2020. The claimant, Darron D. Smith, participated personally. Attorney Francis J. Lange represented the claimant. The employer, Hy-Vee Inc., was represented by Marlene Smith and participated through witnesses Jackie Kuennen and Chris Cogan. Employer's Exhibits 1 through 7 were admitted. The administrative law judge took official notice of the claimant's unemployment insurance benefits records.

ISSUES:

Was the claimant discharged for disqualifying job-related misconduct?
Has the claimant been overpaid any unemployment insurance benefit?
Has the claimant been overpaid Federal Pandemic Unemployment Compensation?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed part-time as a hickory house kitchen clerk. He was employed from February 7, 2017 until March 10, 2020. Claimant's direct supervisor was Christian Jacobs. Claimant's normal working hours varied but he averaged approximately 15-17 hours per week. His job duties included but were not limited to serving food to guests that came to the hot and cold counters and cleaning.

The claimant was discharged from employment. The final incident leading to his discharge occurred on March 9, 2020. The claimant served himself mashed potatoes, two orders of toast, four bean salad, and a corn muffin. He came to the cash register and said that he had one side

item to pay for. Claimant had written his own ticket for the purchase of one side item and the employee running the cash register ran up the price for one side item, less the claimant's employee discount. Claimant paid for the one side item. The cashier then witnessed claimant pull multiple items out of the side warmer that were not paid for and were on his tray. The cashier reported this to her supervisor. In the morning, Ms. Kuennen investigated the incident by reviewing the video footage. Ms. Kuennen saw on the video footage that the claimant had mashed potatoes, two orders of toast, bean salad and a corn muffin on his tray. She contacted the claimant and asked him to meet with her.

Claimant met with Ms. Kuennen and Brian Thomas on March 10, 2020. When the claimant was asked what he had on his tray the night before, he initially lied, stating that he had only one side item. Ms. Kuennen then showed the claimant a picture of what he had on his tray that night which was obtained from the video footage. Claimant then admitted that he did not pay for the additional items. At that point he had already lied to Ms. Kuennen about what he had consumed.

Unauthorized removal of store property is considered a serious violation of the employer's written policies and can lead to discipline, up to and including termination. Ms. Kuennen informed the claimant that he was no longer employed with the company.

Claimant knew that spoiled or inedible food was required to be thrown away. The only time the claimant was allowed to consume food on site without paying for it was when a manager told claimant and several other employees that they could do so because there was an excess amount from a catering order. Claimant's job duties specifically included throwing food away when it became inedible, so he was aware that was the company's policy. A member of management did not give the claimant permission to take the unpaid food on March 9, 2020. The items that the claimant took without paying for them were not inedible, as the claimant did actually consume them.

Claimant received unemployment insurance benefits of \$350.00 from March 8, 2020 through April 18, 2020. The claimant has also received \$1,800.00 in Federal Pandemic Unemployment Compensation benefits from March 29, 2020 through April 18, 2020.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes as follows:

Claimant was discharged from employment. As such, 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).

Iowa Code § 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.

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).

Iowa Admin. Code r. 871-24.32(4) provides:

(4) Report required. The claimant's statement and employer's statement must give detailed facts as to the specific reason for the claimant's discharge. Allegations of misconduct or dishonesty without additional evidence shall not be sufficient to result in disqualification. If the employer is unwilling to furnish available evidence to corroborate the allegation, misconduct cannot be established. In cases where a suspension or disciplinary layoff exists, the claimant is considered as discharged, and the issue of misconduct shall be resolved.

The decision in this case rests, at least in part, upon the credibility of the parties. The issue must be resolved by an examination of witness credibility and burden of proof. 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 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. *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. *Id.*

After assessing the credibility of the witnesses who testified during the hearing, considering the applicable factors listed above, and using her own common sense and experience, the administrative law judge finds that the claimant's testimony that the food he failed to pay for was inedible is not credible, especially in light of the fact that the claimant consumed the food. Further, claimant's testimony that "a long time ago" "a couple employees" were not fired for eating cornbread muffins is not credible. Any instances that claimant witnessed other employees eating on the job without paying for food where he failed to report their actions to management are not indicative that the employer engaged in any disparate treatment when it discharged the claimant.

In this case, the claimant deliberately wrote his own food ticket stating that he had one side item, told the cashier that he was only having one side item, only paid for one side item, removed additional food from a warmer after paying for only one side item, and then consumed the food for which he had not paid for. Claimant then lied to the employer the next day when he was asked what food he had taken.

Honesty is a reasonable, commonly accepted duty owed to the employer. Theft from an employer is generally disqualifying misconduct. *Ringland Johnson Inc. v. Emp't Appeal Bd.*, 585 N.W.2d 269 (Iowa 1998). In *Ringland* the Court found a single attempted theft to be misconduct as a matter of law. Even the theft of an item of negligible value a single time can be misconduct. See *Tompkins-Kutcher v. Emp't Appeal Bd.*, No. 11-0149 (Iowa Ct. App. 2011)(disqualifying a claimant who took home soup that was out of date and could not be sold).

The administrative law judge is persuaded the claimant knew or should have known his conduct was contrary to the best interests of the employer. Claimant's consumption of food for which he intentionally did not pay for is a material breach of his duties and obligations that arose out of his contract of employment with the employer. Further, the claimant's untruthfulness about the incident when questioned by Ms. Kuennen on March 10, 2020 is an additional material breach of his duties and obligations that arose out of his contract of employment with the employer.

Claimant's theft of property on March 9, 2020, combined with his untruthfulness about the incident on March 10, 2020 establish that the claimant did not engage in simply a "good faith error in judgment" pursuant to Iowa Admin. Code r. 871-24.32(1)(a). The employer has established that the claimant was discharged for a current act of substantial job-related misconduct, as such, benefits are denied. Because benefits are denied, the issues of overpayment and chargeability must be addressed.

Iowa Code § 96.3(7)a 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.

Because the claimant's separation was disqualifying, benefits were paid to which he was not entitled. The unemployment insurance law provides that benefits must be recovered from a claimant who receives benefits and is later determined to be ineligible for those benefits, even though the claimant acted in good faith and was not otherwise at fault. Iowa Code § 96.3(7).

In this case, the claimant has received benefits but was not eligible for those benefits. The claimant has been overpaid \$350.00 in regular State of Iowa unemployment insurance benefits from March 8, 2020 through April 18, 2020, which he must repay.

The next issue is whether the claimant was eligible for Federal Pandemic Unemployment Compensation ("FPUC") benefits and whether he was overpaid those benefits. The administrative law judge finds that he was not eligible for those benefits and is overpaid FPUC benefits as well.

PL116-136, Sec. 2104 provides, in pertinent part:

(b) Provisions of Agreement

(1) Federal pandemic unemployment compensation.--Any agreement under this section shall provide that the State agency of the State will make payments of regular compensation to individuals in amounts and to the extent that they would be determined if the State law of the State were applied, with respect to any week for which the individual is (disregarding this section) otherwise entitled under the State law to receive regular compensation, as if such State law had been modified in a manner such that the amount of regular compensation (including dependents' allowances) payable for any week shall be equal to

(A) the amount determined under the State law (before the application of this paragraph), plus

(B) an additional amount of \$600 (in this section referred to as "Federal Pandemic Unemployment Compensation").

....

(f) Fraud and Overpayments

(2) Repayment. -- In the case of individuals who have received amounts of Federal Pandemic Unemployment Compensation to which they were not entitled, the State shall require such individuals to repay the amounts of such Federal Pandemic Unemployment Compensation to the State agency...

Because claimant is disqualified from receiving regular unemployment insurance benefits, he is also disqualified from receiving FPUC benefits. The administrative law judge concludes that claimant has been overpaid FPUC benefits in the gross amount of \$1,800.00 from March 29, 2020 through April 18, 2020. Claimant must repay the FPUC benefits he received as well.

While the claimant may not be eligible for regular State of Iowa unemployment insurance benefits, he may be eligible for unemployment insurance benefits that have been made available to claimants under the Coronavirus Aid, Relief, and Economic Security Act ("Cares Act"). The Pandemic Unemployment Assistance ("PUA") section of the Cares Act discusses eligibility for claimants who are unemployed due to the Coronavirus. For claimants who are ineligible for regular unemployment insurance benefits under Iowa Code Chapter 96, they may be eligible under PUA.

Note to Claimant: If this decision determines you are not eligible for regular unemployment insurance benefits and you disagree with this decision, you may file an appeal to the Employment Appeal Board by following the instructions on the first page of this decision. Individuals who do not qualify for regular unemployment insurance benefits, but who are currently unemployed for reasons related to COVID-19 may qualify for Pandemic Unemployment Assistance (PUA). **You will need to apply for PUA to determine your eligibility under the program.** Additional information on how to apply for PUA can be found at <https://www.iowaworkforcedevelopment.gov/pua-information>.

DECISION:

The March 31, 2020 (reference 01) unemployment insurance decision is affirmed. Claimant was discharged from employment for substantial job-related misconduct. Unemployment insurance benefits are denied until claimant has worked in and earned wages for insured work equal to ten times his weekly benefit amount after his separation date, and provided he is otherwise eligible.

The claimant has been overpaid regular State of Iowa unemployment insurance benefits of \$350.00 between March 29, 2020 and April 18, 2020 and is obligated to repay the agency those benefits. The claimant has been overpaid FPUC benefits of \$1,800.00 from March 29, 2020 through April 18, 2020 and he is required to repay the agency those benefits he received as well.

Dawn Boucher
Administrative Law Judge

July 15, 2020
Decision Dated and Mailed

db/scn