

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

SUNDAY MAYDEW
Claimant

DOLGENCORP LLC
Employer

APPEAL 19R-UI-03741-NM-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

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

Iowa Code § 96.5(2)a – Discharge 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 March 13, 2019, (reference 01) unemployment insurance decision that allowed benefits. A hearing was held on April 11, 2019. The administrative law judge reversed the March 13, 2019 (reference 01) decision, finding claimant's separation was disqualifying and remanding the issue of benefit overpayment for initial investigation and determination in Appeal No. 19A-UI-02547-B2-T. The claimant, who did not participate in the April 11, 2019 hearing appealed to the Employment Appeal Board (EAB). The EAB remanded the matter for hearing to allow the claimant to participate, but did not vacate the administrative law judge's decision. The issue of overpayment was decided in an April 16, 2019 (reference 06) decision, finding that claimant was overpaid \$1,062.00 in unemployment insurance benefits. That decision was appealed and affirmed in Appeal No. 19A-UI-03537-H2-T. A new telephone hearing was held on May 28, 2019 following the issuance of due notice. Claimant participated and testified. Employer participated through District Manager Jeff VanVelzen. Employer's Exhibits 1 through 4 were received into evidence.

ISSUES:

Was the claimant discharged due to disqualifying, job-related misconduct?
Has the claimant been overpaid benefits?
Should benefits be repaid by claimant due to the employer's participation in the fact finding?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant began working for employer on March 21, 2018. Claimant last worked as a full-time assistant store manager. Claimant was separated from employment on February 17, 2019, when she was discharged.

On February 10, 2019, claimant was observed, on the employer's closed circuit camera, ringing up a bag of chips for her own purchase. Claimant could be seen placing a \$20.00 bill on top of the register, opening the register, and taking out her change. Claimant placed her change on top of her \$20.00. At that time a customer came and the claimant processed the customer's transaction. When the transaction was complete, the video showed claimant taking her change

and the original \$20.00 and placing them inside her pocket. The employer submitted still shots from the security footage, allegedly showing this transaction. (Exhibit 4).

On February 17, 2019 VanVelzen and the loss prevention manager, Rick Rice, sat down to speak with claimant about the February 10, 2019 incident. Rice began the meeting by informing claimant that there were pinhole cameras throughout the entire store. Rice then explained various types of theft to claimant and asked if there was anything she had ever done to cause a loss in profit to the store. He further explained that, if she had done anything, it would be better to tell him. Claimant then admitted to consuming snacks or drinks on two or three occasions without paying for them. (Exhibit 2). Claimant denied engaging in any other behavior that would have resulted in a loss to the company or taking any money on February 10. Claimant was subsequently discharged based on her admission that she had previously consumed product without paying for, as this type of conduct is considered stealing and prohibited by the employer's policies. (Exhibit 1).

The claimant filed a new claim for unemployment insurance benefits with an effective date of February 17, 2019. Her weekly benefit amount was determined to be \$186.00. The claimant filed for and received unemployment insurance benefits for the weeks between February 17, 2019 and April 6, 2019. Both the employer and the claimant participated in a fact finding interview regarding the separation on March 8, 2019. The fact finder determined claimant qualified for benefits. At the time of the initial appeal hearing on this matter, the administrative law judge remanded the issues of overpayment and participation to the Benefits Bureau for initial investigation and determination. The issue of overpayment was decided in an April 16, 2019 (reference 06) decision, finding that claimant was overpaid \$1,062.00 in benefits. That decision was appealed and affirmed in Appeal No. 19A-UI-03537-H2-T.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment due to job-related misconduct. Benefits are denied.

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). Negligence does not constitute misconduct unless recurrent in nature; a single act is not disqualifying unless indicative of a deliberate disregard of the employer's interests. *Henry v. Iowa Dep't of Job Serv.*, 391 N.W.2d 731 (Iowa Ct. App. 1986).

The decision in this case rests, at least in part, on the credibility of the witnesses. 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.*

Here, claimant denied taking the money on February 10, 2019 or that she admitted to consuming product without paying for it during the February 17, 2019 meeting. This denial is contradictory of VanVelzen's recollection of the February 17, 2019 meeting. VanVelzen's recollection of events is consistent with the information in Exhibit 2. After assessing the credibility of the witnesses who testified during the hearing, reviewing the exhibits submitted by the parties, considering the applicable factors listed above, and using her own common sense and experience, the administrative law judge finds the employer's version of events to be more credible than the claimant's recollection of those events.

Taking product without paying for it is theft from the employer. Theft from an employer is generally disqualifying misconduct. *Ringland Johnson, Inc. v. Hunecke*, 585 N.W.2d 269, 272 (Iowa 1998). In *Ringland*, the Court found a single attempted theft to be misconduct as a matter of law. In this case, the claimant deliberately disregarded the employer's interest and knowingly violated a company policy. The claimant engaged in disqualifying misconduct even without previous warning. Benefits are denied.

The issue of overpayment was decided in an April 16, 2019 (reference 06) decision, finding that claimant was overpaid \$1,062.00 in unemployment insurance benefits. That decision was appealed and affirmed in Appeal No. 19A-UI-03537-H2-T. As that decision contained appeal rights and is consistent with this decision, the issues of overpayment and participation will not be further addressed in this decision.

DECISION:

Inasmuch as the decision was not vacated as a result of the Employment Appeal Board remand, the administrative law judge's decision in appeal 19A-UI-02547-B2-T is hereby adopted and incorporated herein as the decision for appeal 19R-UI-03741-NM-T. 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.

Nicole Merrill
Administrative Law Judge

Decision Dated and Mailed

nm/rvs