

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

KATHELEEN A PEIFFER
Claimant

CASEY'S MARKETING COMPANY
Employer

APPEAL 17R-UI-13030-H2T

**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 09/24/17
Claimant: Appellant (1)

Iowa Code § 96.5(2)a – Discharge for Misconduct

STATEMENT OF THE CASE:

The claimant filed an appeal from the October 12, 2017, (reference 01) unemployment insurance decision that denied benefits. The parties were properly notified about the hearing. A telephone hearing was held on January 17, 2018. Claimant participated. Employer participated through (representative) Felisha Gates, Area Manager and Bill Scott, Store Manager. Employer's Exhibit 1 was entered into the record.

ISSUE:

Was the claimant discharged due to job connected misconduct?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed full-time as a cashier beginning on April 20, 2016 through September 14, 2017 when she was discharged for theft. Ms. Gates was in the store on September 13, 2017 performing her regular monitoring duties when she noticed a suspicious cigarette void performed by the claimant transaction on September 1, 2017. She watched surveillance video of the transaction. Based upon what she observed on the surveillance video of the transaction, both she and Mr. Scott watched the surveillance video of the claimant's entire shift.

At around 3:26 a.m. the claimant tried to purchase a package of Marlboro cigarettes by writing a check and ringing up the transaction. Her check was declined by the computer. She put the Marlboro's back on the shelf and voided out the transaction. Just a few minutes later the claimant took a pack of USA Gold brand of cigarettes off the shelf and rang up the transaction as a cash transaction without putting any cash in the register. She then immediately went outside with the cigarettes to smoke one. The claimant's cash drawer was short \$15.00 dollars for that shift. Both Ms. Gates and Mr. Scott watched the entire surveillance video of the claimant's entire work shift, at no time during that shift, did the claimant pay for the cigarettes. The claimant had been given the employer's policies and knew that even one instance of theft would lead to her discharge.

When Mr. Scott spoke to the claimant on September 17, the claimant was provided an opportunity to give an explanation as to what had occurred but she did not do so. Instead she got angry, said “whatever” and left the store.

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.

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 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). Failure to sign a written reprimand acknowledging receipt constitutes job misconduct as a matter of law. *Green v Iowa Dep't of Job Serv.*, 299 N.W.2d 651 (Iowa 1980). When based on carelessness, the carelessness must actually indicate a “wrongful intent” to be disqualifying in nature. *Id.*

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).

Theft from an employer, even of a small amount is sufficient misconduct to disqualify a claimant from receipt of unemployment insurance benefits.

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.*

The claimant was not credible when she alleged that she took the cigarettes outside to give them to another employee at 3:30 a.m. right after her check was declined. The employer was credible that the claimant did not at any time pay for the cigarettes during her shift as both Ms. Gates and Mr. Scott watched surveillance of the claimant during her entire work shift. The claimant never mentioned her explanation to Mr. Scott when she had the opportunity to explain. The employer has established the claimant took cigarettes without paying for them. The claimant's taking cigarettes without paying for them is a disregard of the conduct the employer has a right to expect from its employees. Benefits are denied.

DECISION:

The October 12, 2017, (reference 01) decision is affirmed. 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.

Teresa K. Hillary
Administrative Law Judge

Decision Dated and Mailed

tkh/rvs