

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

CHRISTOPHER A EKWALL
Claimant

FAREWAY STORES INC
Employer

APPEAL 16A-UI-04942-NM-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

**OC: 04/10/16
Claimant: Appellant (1)**

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

STATEMENT OF THE CASE:

The claimant filed an appeal from the April 26, 2016, (reference 01) unemployment insurance decision that denied benefits based upon his discharge for theft of company property. The parties were properly notified of the hearing. A telephone hearing was held on May 11, 2016. The claimant Christopher Ekwall participated and testified. The employer Fareway Stores Inc. participated through director of human resources, Theresa McLaughlin, grocery manager, Myron Hoffman, and grocery clerk Nicholas Scott. Employer's Exhibits 1 through 3 were received into evidence.

ISSUE:

Was the claimant discharged for disqualifying job-related 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 grocery clerk from September 10, 2012, until this employment ended on August 1, 2015, when he was discharged.

On August 1, 2015, Scott was working with claimant. Scott told claimant he was going on break, and then went to get some items to purchase from the store to eat on his break. The employer has a policy in place which requires employees to pay for any purchased items prior to consuming them or removing them from the store and to retain a receipt showing proof of purchase. (Exhibit 1). When Scott got to the checkout area, he had to wait in line for some time to pay for his items. Once Scott purchased his items, he took them back to the break area to consume them. Once Scott got back to the break area he saw claimant consuming several items that appeared to have been from the store. Scott found this odd, as claimant had somehow gotten to the break room with his items first and he had not seen claimant in the checkout line. Scott reported what he saw to Hoffman.

Hoffman then called claimant to the office to discuss the situation. Hoffman asked claimant if he had consumed the items in question or had a receipt to show he purchased them. Claimant replied he did consume the items and did not have a receipt. Hoffman testified claimant then

admitted to stealing the items. Hoffman issued claimant a written reprimand stating he admitted to stealing the items. (Exhibit 2). After issuing the reprimand, Hoffman informed claimant his employment was being terminated for failing to pay for his items. (Exhibit 3). Claimant testified he was aware of the employer's policies regarding employee purchases and theft. Claimant testified he was very tired on August 1, 2015, got distracted on his way to the cash register, and mistakenly believed he had paid for his items. Claimant testified he explained this to Hoffman during their meeting on August 1. Hoffman testified he recalled his meeting with claimant very well and did not remember him providing any explanation as to why he did not pay for the items.

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 § 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).

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 claimant has argued he did not knowingly violate the employer’s policy as he did not realize he had not paid for the items he consumed on his break. 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.*

I assessed the credibility of the witnesses who testified during the hearing, considering the applicable factors listed above, and using my own common sense and experience. I reviewed the exhibits submitted by the employer. I find the employer’s version of events to be more credible than the claimant’s recollection of those events.

Taking items for personal consumption without paying for them 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.

DECISION:

The April 26 , 2016, (reference 01) unemployment insurance decision is affirmed. The claimant was discharged from employment due to job-related misconduct. Benefits are withheld until such time as he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible.

Nicole Merrill
Administrative Law Judge

Decision Dated and Mailed

nm/css