

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

DOLLY E GONZALEZ

Claimant

APPEAL 16A-UI-05644-SC-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

SSP AMERICA GLADCO INC

Employer

OC: 04/24/16

Claimant: Respondent (2)

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

Iowa Code § 96.5(1) – Voluntary Quitting

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:

SSP America Gladco, Inc. (employer) filed an appeal from the May 11, 2016, (reference 01) unemployment insurance decision that allowed benefits based upon the determination it discharged Dolly E. Gonzalez (claimant) for unsatisfactory work performance which is not disqualifying misconduct. The parties were properly notified about the hearing. A telephone hearing began on June 6, 2016 and concluded on June 8, 2016. The claimant participated personally and through interpreters Romina (employee number 9198) and Louis (employee number 10342) from CTS Language Link. The employer participated through General Manager Rob Peterson. Employer's Exhibits 1 through 3 were received. Official notice was taken of the administrative record, specifically the fact-finding documents, the claimant's database readout (DBRO), and her wage history.

ISSUES:

Was the claimant discharged for disqualifying job-related misconduct?

Has the claimant been overpaid unemployment insurance benefits, and if so, can the repayment of those benefits to the agency be waived?

Can charges to the employer's account be waived?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed full-time as a Server and Bartender beginning on December 3, 2001, and was separated from employment on April 21, 2016, when she was discharged. When the claimant worked as a bartender, she was the only person who had access to her cash drawer besides members of management.

The employer has a cash handling policy which states employees are to properly account for the cash and sales they handle. The employer also has surveillance cameras that interact with the point of sale system (POS). When an employee enters a sale into the POS, what is being entered is imposed on the image of the employee in the camera system. The employer has a contract with DTT Loss Prevention Services to randomly audit its workplace via camera for many employee issues including, but not limited to, proper food handling procedures, employee conduct while at work, dress code violations, and if the cash handling policy is being followed. The audits are sent to the employer's Loss Prevention department.

On March 1, 2016, during an audit by DTT, the claimant was observed not following the cash handling policy. (Employer's Exhibit 3.) She sold a beer to a customer for \$9.00, tax included, and started check number 870. She delivered the check to the customer who paid in cash. The claimant recorded a sale for "add condiment" for \$0.53, tax included, into the POS, entered \$10.00 cash as payment received, and deposited the \$9.47 change in her tip jar. Approximately one hour later, a second customer came in and ordered the same beer as the first customer. The claimant did not enter a sale into the POS. She then reprinted check number 870, delivered it to the second customer and closed out the check when he paid with a credit card.

The employer's Loss Prevention Department began its own investigation into the claimant's conduct. Other cash handling discrepancies were discovered during the investigation. On March 15, March 29, and April 10, 2016, the claimant was again observed presenting the same check to multiple customers until the final customer paid with a credit card. The claimant would then keep the cash the other customers had paid. On March 15 and March 29, 2016, when working as a server, the claimant would go behind the bar, pour beer, deliver it to a customer and never enter it into the POS.

During the investigation, DTT continued its random audits. On April 12, 2016, the claimant was again observed by DTT to be in violation of the cash handling policies. (Employer's Exhibit 2.) She opened check number 7674 when the customer ordered one beer. The customer then ordered a second beer and she added it to the check for a total of \$18.00. When she delivered the check to the customer, he paid in cash. One minute later, the claimant opened check number 7714 which had one item, "add condiment" for \$0.53, and placed all the money the customer had given her in the cash drawer creating an overage in her cash drawer. A second customer came in approximately 20 minutes later and ordered the same beer and food. The claimant voided or asked a manager to void one of the beers from check number 7674 and added the customer's food sale to that ticket. The customer paid for check number 7674 and left. At the end of the night, the employees each take their cash drawers to the manager's office which gives employees time with their cash drawers outside the camera's view. The manager counts the money and records the count. If the drawer is over or short money, the employee is given a written warning. On the evening of April 12, 2016, the claimant's drawer did not have any overages from the day.

On April 17, 2016, Loss Prevention Specialist Burt Rushton notified General Manager Rob Peterson of the claimant's cash handling policy violations. On April 19, 2016, during a DTT audit, the claimant was again observed violating the cash handling policy. (Employer's Exhibit 1.) The claimant delivered a beer to a customer. She then opened check number 5093 and entered "add condiment" for a sale totaling \$0.53. The customer paid in cash, the claimant closed out the check, and placed all of the cash in the drawer creating a cash overage in the claimant's drawer. Peterson counted the claimant's drawer that night and there was no corresponding overage.

Rushton interviewed the claimant via telephone while Peterson was present in the office. The claimant did not have an explanation for the incidents that occurred. The claimant was then discharged on April 21, 2016 for violation of the employer's cash handling policy. The claimant did not receive any warnings prior to her discharge.

The administrative record reflects that claimant has received unemployment benefits in the amount of \$3,241.00, since filing a claim with an effective date of April 24, 2016, for the seven weeks ending June 11, 2016. The wages earned from this employer are the only wages in the claimant's base period. The administrative record establishes that the employer provided written documentation that, without rebuttal, would have resulted in disqualification.

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 resulting from her employment with this employer 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 she was not aware of the cash handling policy and denied she engaged in the conduct of which she was accused. 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 the employer's version of events to be more credible.

The claimant engaged in theft from the employer when she kept money that customers had given her to pay for products they consumed. The claimant has argued that the employer cannot prove she took the money that her drawer was over on April 12 and April 19, 2016. However, the conclusion she took the money is reasonable as she was the only one with access to her cash drawer, was the only one who knew there was extra money in the cash drawer or the amount of that money, and the employer never found any shortages or overages in her cash drawer when it was counted at the end of the night.

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. The claimant engaged in disqualifying misconduct even without previous warning. Benefits resulting from her employment with this employer are denied.

Iowa Code § 96.7 provides, in pertinent part:

7. Recover 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) (a) 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. The employer shall not be relieved of charges if benefits are paid because the employer or an agent of the employer failed to respond timely or adequately to the department's request for information relating to the payment of benefits. This prohibition against relief of charges shall apply to both contributory and reimbursable employers.

(b) 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.

Iowa Admin. Code r. 871-24.10 provides:

Employer and employer representative participation in fact-finding interviews.

(1) "Participate," as the term is used for employers in the context of the initial determination to award benefits pursuant to Iowa Code section 96.6, subsection 2, means submitting detailed factual information of the quantity and quality that if unrebutted would be sufficient to result in a decision favorable to the employer. The most effective means to participate is to provide live testimony at the interview from a witness with firsthand knowledge of the events leading to the separation. If no live testimony is provided, the employer must provide the name and telephone number of an employee with firsthand information who may be contacted, if necessary, for rebuttal. A party may also participate by providing detailed written statements or documents that provide detailed factual information of the events leading to separation. At a minimum, the information provided by the employer or the employer's representative must identify the dates and particular circumstances of the incident or incidents, including, in the case of discharge, the act or omissions of the claimant or, in the event of a voluntary separation, the stated reason for the quit. The specific rule or policy must be submitted if the claimant was discharged for violating such rule or policy. In the case of discharge for attendance violations, the information must include the circumstances of all incidents the employer or the employer's representative contends meet the definition of unexcused absences as set forth in 871—subrule 24.32(7). On the other hand, written or oral statements or general conclusions without supporting detailed factual information and information submitted after the fact-finding decision has been issued are not considered participation within the meaning of the statute.

(2) "A continuous pattern of nonparticipation in the initial determination to award benefits," pursuant to Iowa Code section 96.6, subsection 2, as the term is used for an entity representing employers, means on 25 or more occasions in a calendar quarter beginning with the first calendar quarter of 2009, the entity files appeals after failing to participate. Appeals filed but withdrawn before the day of the contested case hearing will not be considered in determining if a continuous pattern of nonparticipation exists. The division administrator shall notify the employer's representative in writing after each such appeal.

(3) If the division administrator finds that an entity representing employers as defined in Iowa Code section 96.6, subsection 2, has engaged in a continuous pattern of nonparticipation, the division administrator shall suspend said representative for a period of up to six months on the first occasion, up to one year on the second occasion and up

to ten years on the third or subsequent occasion. Suspension by the division administrator constitutes final agency action and may be appealed pursuant to Iowa Code section 17A.19.

(4) "Fraud or willful misrepresentation by the individual," as the term is used for claimants in the context of the initial determination to award benefits pursuant to Iowa Code section 96.6, subsection 2, means providing knowingly false statements or knowingly false denials of material facts for the purpose of obtaining unemployment insurance benefits. Statements or denials may be either oral or written by the claimant. Inadvertent misstatements or mistakes made in good faith are not considered fraud or willful misrepresentation.

This rule is intended to implement Iowa Code section 96.3(7)"b" as amended by 2008 Iowa Acts, Senate File 2160.

Because the claimant's separation was disqualifying, benefits were paid to which she 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 benefits, even though the claimant acted in good faith and was not otherwise at fault. However, the overpayment will not be recovered when it is based on a reversal on appeal of an initial determination to award benefits on an issue regarding the claimant's employment separation if: (1) the benefits were not received due to any fraud or willful misrepresentation by the claimant and (2) the employer did not participate in the initial proceeding to award benefits. The employer will not be charged for benefits if it is determined that they did participate in the fact-finding interview. Iowa Code § 96.3(7), Iowa Admin. Code r. 871-24.10. In this case, the claimant has received benefits but was not eligible for those benefits. Since the employer did participate in the fact-finding interview the claimant is obligated to repay to the agency the benefits she received and the employer's account shall not be charged.

DECISION:

The May 11, 2016, (reference 01) unemployment insurance decision is reversed. 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. The claimant has been overpaid unemployment insurance benefits in the amount of \$3,241.00 and is obligated to repay the agency those benefits. The employer did participate in the fact-finding interview and its account shall not be charged.

Stephanie R. Callahan
Administrative Law Judge

Decision Dated and Mailed

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