

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

SHERRY A ATWATER
Claimant

KWIK TRIP INC
Employer

APPEAL 20A-UI-02590-AD-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 02/23/20
Claimant: Appellant (1R)

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

STATEMENT OF THE CASE:

On March 25, 2020, Sherry Atwater (claimant) filed an appeal from the March 19, 2020 (reference 01) unemployment insurance decision that found she was not eligible for benefits.

A telephone hearing was set for April 28, 2020 at 11 a.m. At that time, the hearing was continued by agreement of the parties to allow time for the claimant to receive and review employer's exhibits.

The hearing was rescheduled for May 1, 2020 at 8 a.m. A continued hearing was held at that time. The claimant participated personally. Kwik Trip Inc. (employer) participated by Store Leader Stacy Oestreich.

Employer's Exhibits 1- 8 were admitted. Official notice was taken of the administrative record.

ISSUES:

- I. Was the separation a layoff, discharge for misconduct, or voluntary quit without good cause?
- II. Was the claimant overpaid benefits?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds:

Claimant worked for employer as a full-time guest service worker. Claimant's first day of employment was June 9, 2015. The last day claimant worked on the job was February 20, 2020. Claimant's immediate supervisor was Oestreich. Claimant separated from employment on February 20, 2020. Claimant was discharged by Oestreich and Oestreich's supervisor, Kim Keil, on that date.

Claimant was discharged due to repeated failures to follow the Guest Service Agreement. That requires employees to take certain actions when interacting with guests, including greeting them; not talking to coworkers when interacting with guests; listening to guest complaints and “mak[ing] it right with the guest” or contacting a supervisor to assist; suggesting items to guests; asking guests if they would like to use their rewards card and suggesting they sign up for one; and thanking the guest and asking them to return after a transaction is completed. Exhibit 7. The Guest Service Agreement is reviewed with employees approximately every three months, including that employees should “make it right” with customers when there is a complaint.

The most recent incident leading to discharge occurred on February 19, 2020. On that date, a customer approached claimant to report the store’s car vacuum was not working and that she had lost \$3.00 in it as a result. Claimant did not initially offer to refund the guest, instead questioning why the guest had continued to put money in it and saying she was unable to give her a refund. Only after the guest became upset and started to leave the store did claimant offer to refund the money. By that time the guest was frustrated and declined the refund. Claimant could have refunded the guest’s money or called a supervisor for assistance, but did not do so.

Only after the guest left did the claimant contact Oestreich to report the incident. Claimant also had another customer tell Oestreich that claimant had not been rude during the interaction. Oestreich told claimant she would review the video to determine what had occurred. Oestreich did review the video, which included audio, and determined what had occurred.

Claimant had previously received a warning on February 4, 2020 for failing to follow the Guest Service Agreement. This included documentation of several unfavorable interactions with guests and the “secret shopper,” where claimant failed to follow the Guest Service Agreement. That document warned claimant that further issues may result in discharge Exhibit 5.

Claimant’s failure to follow the Guest Service Agreement was also noted in her February 18, 2020 performance appraisal. This included ten “secret shopper” interactions where claimant failed to follow the Guest Service Agreement. That appraisal also warned claimant that further issues may result in discharge. Exhibit 4.

The discharge document noted the prior disciplinary action and performance review. It also noted several more instances where claimant had not followed the Guest Services Agreement, on February 6, 10, and 14, 2020. Exhibit 3.

The unemployment insurance system shows claimant has received weekly benefits in the amount of \$426.00 for a total of eight weeks, from the benefit week ending February 29, 2020 and continuing through the benefit week ending April 25, 2020. Claimant also received benefits in the amount of \$32.00 for the benefit week ending March 14, 2020. The total amount of benefits paid to date is \$3,440.00. Claimant has also received Federal Pandemic Unemployment Compensation (FPUC) benefits in the amount of \$2,400.00.

REASONING AND CONCLUSIONS OF LAW:

For the reasons set forth below, the March 19, 2020 (reference 01) unemployment insurance decision that found claimant not eligible for benefits is **AFFIRMED**. Claimant is not eligible for benefits until she earns wages for insured work equal to ten times her weekly benefit amount, provided she is otherwise eligible.

- I. Was the separation a layoff, discharge for misconduct, or voluntary quit without good cause?

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 provides in relevant part:

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 bears the burden of proving that a claimant is disqualified from receiving benefits because of substantial misconduct within the meaning of Iowa Code section 96.5(2). *Myers v. Emp't Appeal Bd.*, 462 N.W.2d 734, 737 (Iowa Ct. App. 1990). 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). What constitutes misconduct justifying termination of an employee and what misconduct warrants denial of unemployment insurance benefits are two separate decisions. *Pierce v. Iowa Dep't of Job Serv.*, 425 N.W.2d 679 (Iowa Ct. App. 1988).

Misconduct serious enough to warrant discharge is not necessarily serious enough to warrant a denial of job insurance benefits. Such misconduct must be "substantial." *Newman v. Iowa Dep't of Job Serv.*, 351 N.W.2d 806 (Iowa Ct. App. 1984). The focus is on deliberate, intentional, or culpable acts by the employee. When based on carelessness, the carelessness must actually indicate a "wrongful intent" to be disqualifying in nature. *Newman, Id.* In contrast, 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. *Newman, Id.*

When reviewing an alleged act of misconduct, the finder of fact may consider past acts of misconduct to determine the magnitude of the current act. *Kelly v. Iowa Dep't of Job Serv.*, 386 N.W.2d 552, 554 (Iowa Ct. App. 1986). However, conduct asserted to be disqualifying misconduct must be both specific and current. *West v. Emp't Appeal Bd.*, 489 N.W.2d 731 (Iowa 1992); *Greene v. Emp't Appeal Bd.*, 426 N.W.2d 659 (Iowa Ct. App. 1988).

Because our unemployment compensation law is designed to protect workers from financial hardships when they become unemployed through no fault of their own, we construe the provisions "liberally to carry out its humane and beneficial purpose." *Bridgestone/Firestone, Inc. v. Emp't Appeal Bd.*, 570 N.W.2d 85, 96 (Iowa 1997). "[C]ode provisions which operate to work a forfeiture of benefits are strongly construed in favor of the claimant." *Diggs v. Emp't Appeal Bd.*, 478 N.W.2d 432, 434 (Iowa Ct. App. 1991).

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 administrative law judge found Oestreich's testimony to be more reliable than claimant's. Claimant largely acknowledged the prior disciplinary actions and the reasons therefore. The main factual dispute was whether claimant contacted Oestreich during the interaction with the customer on February 19, 2020, to ask for assistance. Claimant testified she did. However, claimant could not recall what Oestreich's response was, if any. On the other hand, Oestreich testified that claimant did not contact her for assistance. Oestreich also testified she had reviewed video of the incident, which included audio, to confirm that was the case. Claimant's inability to recall specifically what her interaction was with Oestreich, combined with Oestreich's credible testimony and her review of the video, led the administrative law judge to conclude that claimant did not contact Oestreich during the interaction with the customer.

Furthermore, claimant testified that she did not note the time of her discharge, when Oestreich's supervisor was present, that Oestreich had failed to assist her during the February 19 interaction. If claimant had indeed asked for assistance from Oestreich and the poor interaction with the customer was at least in part due to that, it would seem reasonable for claimant to raise this issue at the time of discharge. However, she did not. Furthermore, the administrative law judge finds it unlikely that Oestreich would be untruthful about the events in question. There is no clear motivation for her to do so. On the other hand, there is a clear motivation for claimant to seek to minimize or shift blame for the events leading to her discharge. For these reasons, the factual disputes were resolved as set forth above.

Employer has carried its burden of proving claimant is disqualified from receiving benefits because of a current act of substantial misconduct within the meaning of Iowa Code section

96.5(2). Claimant repeatedly failed to follow the Guest Service Agreement, despite being aware of it; being capable of following it; and being warned of the consequences if she failed to do so.

The administrative law judge is sympathetic to claimant. The issues leading to her discharge may seem small in a vacuum and minor to the overall performance of her duties. However, customer service was a critical part of claimant's job, and while a failure to greet or thank here or there may not seem monumental, repeatedly failing to do so when being aware and capable of doing so amounts to insubordination. The last incident leading to discharge was a continuation of claimant's pattern of failing to follow the Guest Service Agreement.

For these reasons, the administrative law judge finds claimant was discharged for a current act of substantial job-related misconduct, such that she must be disqualified from benefits.

II. Was the claimant overpaid benefits?

Iowa Code section 96.3(7) provides, in pertinent part:

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.

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 unemployment insurance system shows claimant has received weekly benefits in the amount of \$426.00 for a total of eight weeks, from the benefit week ending February 29, 2020 and continuing through the benefit week ending April 25, 2020. Claimant also received benefits in the amount of \$32.00 for the benefit week ending March 14, 2020. The total amount of benefits paid to date is \$3,440.00.

Because this decision finds claimant is not eligible for payments, she has been overpaid benefits in the amount of \$3,440.00. Benefits shall be recovered. 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.

DECISION:

The March 19, 2020 (reference 01) unemployment insurance decision that found claimant not eligible for benefits is AFFIRMED. Claimant is not eligible for benefits until she earns wages for insured work equal to ten times her weekly benefit amount, provided she is otherwise eligible.

Claimant has been overpaid benefits in the amount of \$3,440.00. Benefits shall be recovered. 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.

REMAND:

The issue of overpayment of Federal Pandemic Unemployment Compensation (FPUC) benefits is remanded to the Benefits Bureau of IWD for an investigation and decision.



Andrew B. Duffelmeyer
Administrative Law Judge
Unemployment Insurance Appeals Bureau
1000 East Grand Avenue
Des Moines, Iowa 50319-0209
Fax (515) 478-3528

May 5, 2020
Decision Dated and Mailed

abd/scn

Note to Claimant: This decision determines you are not eligible for regular unemployment insurance benefits. If 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 due to disqualifying separations 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>.