

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

68-0157 (9-06) - 3091078 - EI

RONALD B MONSMA
Claimant

APPEAL NO. 12A-UI-11366-L

**ADMINISTRATIVE LAW JUDGE
DECISION**

FOODS INC
Employer

OC: 08/19/12
Claimant: Appellant (2)

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

STATEMENT OF THE CASE:

The claimant filed a timely appeal from the September 11, 2012 (reference 01) decision that denied benefits. After due notice was issued, a hearing was held on October 31, 2012 in Des Moines, Iowa. Claimant participated. Employer participated through Store Manager Steve Taylor and Store Director Paul Johnson and was represented by Russell Samson, attorney at law.

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 as a full-time courtesy counter clerk from May 28, 2003 through August 18, 2012, when he was discharged. On August 17 at 2:30 p.m., Taylor made a physical count of two glass milk bottles and one water bottle on hand. (Employer's Exhibit 2) A glass milk bottle deposit is \$2.00 and a water bottle deposit is \$7.00. Employees do not clock out for 15 minute breaks but do so for half hour lunch breaks. It takes about 30 seconds to walk from the time clock to the courtesy counter area. Zach Lafleur worked until 6 p.m. and was not allowed behind the courtesy counter after 2:30 p.m. (Employer's Exhibit 1, p. 4) Nick Thomson worked behind the courtesy counter on August 17 and his time card reflects he was on break between 6:25 and 6:56 p.m. (Employer's Exhibit 1, p. 2) Four milk bottles were returned for a deposit refund of \$8.00 on the same transaction (number 81) at 6:54 p.m. Based upon the whereabouts of other employees at the time, transaction 81 was attributable to claimant alone and was the basis for the termination recommendation. (Employer's Exhibit 3) Claimant has no specific recollection of taking these bottles back. He was working by himself on a Western Union transaction, the phone was ringing, and the customers in line at the other end of the counter were irate. There are four registers at the courtesy counter with varying degrees of overlapping purpose for cigarettes, lottery, post office, cash/check drawer, and dry cleaning. The employer was not certain if the register balanced with the cash drawer from which transaction 81 was handled. No other employees were clocked in during the time frame at issue. (Employer's Exhibit 1, pp. 3, 5) Claimant went on break at 7:05 p.m. (Employer's Exhibit 1, p. 1) When

claimant was on break, Johnson handled a return of three milk bottles at 7:26 p.m. He then added those three bottles to crates that already had four in them. When he left at 11:15 p.m., he noticed there were still seven milk bottles in the crates. (Employer's Exhibit 4) At 6:30 a.m. on August 18 Taylor verified the milk bottle count Johnson noticed the night before and counted eight water bottles. He calculated that between 2:30 p.m. and 11:15 p.m. on August 17, there were a total of five milk bottle returns and seven water bottle returns. He went through individual register transactions for the same period of time and found 48 milk bottle returns and 15 water bottle returns leaving 43 milk bottles and eight water bottles unaccounted for. (Employer's Exhibit 2) Although water bottle returns were questioned the same day, they were not attributed to the claimant. The employer did not provide any documentation or transaction time information about the other 39 missing milk bottle returns. The employer relied on manual bottle counts and personnel assignment and break timing to assign responsibility for transaction 81, as clerk identity is not listed on register receipts and there is no video surveillance of the area.

There are four registers at the courtesy counter with varying degrees of overlapping purpose for cigarettes, lottery, post office, cash/check drawer, and dry cleaning. The employer was not certain if the register balanced with the cash drawer from which transaction 81 was handled. Milk and water bottle crates are kept in the back room. Bottles may stack up and are not necessarily sorted when turned in for redemption. Stock boys take them to the back room and the product distributor picks them up from there. It is possible for someone to take glass bottles from crates before the distributor picks them up. Policy instructs that if soda bottle and can redemption machines are broken, bottles and cans returned to the courtesy counter are not physically counted, but milk and water bottles are not redeemed through machines.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes claimant was discharged from employment for no disqualifying reason.

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.

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.

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). 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). 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). Poor work performance is not misconduct in the absence of evidence of intent. *Miller v. Emp't Appeal Bd.*, 423 N.W.2d 211 (Iowa Ct. App. 1988).

When the record is composed solely of hearsay evidence, that evidence must be examined closely in light of the entire record. *Schmitz v. IDHS*, 461 N.W.2d 603, 607 (Iowa App. 1990). Both the quality and the quantity of the evidence must be evaluated to see whether it rises to the necessary levels of trustworthiness, credibility, and accuracy required by a reasonably prudent person in the conduct of serious affairs. See, Iowa Code § 17A.14 (1). In making the evaluation, the fact-finder should conduct a common sense evaluation of (1) the nature of the hearsay; (2) the availability of better evidence; (3) the cost of acquiring better information; (4) the need for precision; and (5) the administrative policy to be fulfilled. *Schmitz*, 461 N.W.2d at 608. The Iowa Supreme Court has ruled that if a party has the power to produce more explicit and direct evidence than it chooses to present, the administrative law judge may infer that evidence not presented would reveal deficiencies in the party's case. *Crosser v. Iowa Dep't of Pub. Safety*, 240 N.W.2d 682 (Iowa 1976).

Severe accusations of theft and dishonesty require presentation of serious, verifiable evidence. While the allegations were not solely based on hearsay, the employer presented no testimony from key witnesses Zach Lafleur or Nick Thomson, no surveillance video, and no clerk transaction identification. There was no transaction evidence of the significant number of other missing milk bottle redemptions not attributed to the claimant. Finally, there was unsecure crate storage in the back room and no accounting of any bottles left in the courtesy counter or other temporary storage area. The employer has established that there may have been discrepancies in milk and water bottle redemptions according to register transaction receipts, most of which were not offered, and the number of bottles on hand, but it has not met its burden of proof that claimant was anything more than negligent in keeping track of redeemed bottles while multi-tasking during a busy and distracting period working alone behind the courtesy

counter. Because of the lack of proof of deliberate misconduct and since he had no prior warnings for similar negligence issues, no misconduct has been shown. Benefits are allowed.

DECISION:

The September 11, 2012 (reference 01) decision is reversed. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed. The benefits withheld shall be paid, provided he is otherwise eligible.

Dévon M. Lewis
Administrative Law Judge

Decision Dated and Mailed

dml/kjw