

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

TAMMI S JOHNSON
Claimant

APPEAL 15A-UI-09700-JCT

**ADMINISTRATIVE LAW JUDGE
DECISION**

DUNCOMBE GAS & GROCERY INC
Employer

OC: 07/26/15
Claimant: Respondent (1)

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:

The employer filed an appeal from the August 19, 2015, (reference 01) unemployment insurance decision that allowed benefits based upon separation. The parties were properly notified about the hearing. A telephone hearing was held on September 14, 2015. The claimant participated personally. The employer participated through Stuart J. Cochrane, Attorney at Law. Mike Symens and Angelina Schultz testified for the employer. Claimant Exhibits A, B, and C were admitted into evidence.

ISSUES:

Did the claimant voluntarily leave the employment with good cause attributable to the employer or did the employer discharge the claimant for reasons related to job misconduct sufficient to warrant a denial of benefits?

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

Can any 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 store manager and was separated from employment on July 28, 2015.

On the claimant's final day of work, she witnessed a scuffle in the parking lot between her manager's fiancé, Angelina Schultz, and a well-known customer named Wanda. At one point, the claimant stepped into the doorway to see what was happening and was instructed by the manager and owner, Mr. Symens, to return to her work station. Following the incident, Ms. Schultz was on the employer premises and requested the claimant step away from her work

duties to speak with her, saying "Excuse me, I want to talk to you in private". The claimant did not respond and Ms. Schultz that she wanted to explain what happened with Wanda to the claimant but was treated with "much disrespect." When the claimant did not voluntarily go speak to her, she was directed by her manager, Mr. Symens to go "into the back and let Angelina (Ms. Schultz) explain."

The conversation in the back room between Ms. Schultz and the claimant ended with Ms. Schultz, lifting up her left hand and pointing to her engagement ring. The evidence is disputed as to whether Ms. Schultz said "See this? I could get you fired." Or "See this? You're fired" but the claimant interpreted the gesture and subsequent comment as being discharged. She walked to the front of the store and told Mr. Symens that she had just been fired by Ms. Schultz. He responded that Ms. Schultz could not fire the claimant, to which the claimant repeated she had been fired, and Mr. Symens also repeated that Ms. Schultz could not fire her. The claimant then requested that Mr. Symens do something about Ms. Schultz, and Mr. Symens did not respond. Separation subsequently occurred.

The employer testified that Ms. Schultz never was an employee, at the time of the claimant's employment or thereafter. Understandably, as the owner's significant other, she had interest in the business and its success. Three weeks after the claimant's separation, the health inspector visited, and Ms. Schultz, whose maiden name is McWilliams, signed the inspection, as the "person in charge" (Claimant Exhibit C.) The report also references that "all management was fired." Ms. Schultz testified she was not representing herself as an employee for the inspection report, but served as buffer between Mr. Symens and the health inspector because Mr. Symens was upset.

The administrative record reflects that claimant has received unemployment benefits in the amount of \$1780.00, since filing a claim with an effective date of July 26, 2015, through the week ending September 5, 2015. The administrative record also establishes that the employer did participate in the fact-finding interview.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant did not quit, but was discharged from employment for no disqualifying reason.

Iowa Code § 96.5(1) provides:

An individual shall be disqualified for benefits:

1. Voluntary quitting. If the individual has left work voluntarily without good cause attributable to the individual's employer, if so found by the department.

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.

The first issue is whether the claimant voluntarily resigned from employment or was discharged. The unemployment insurance law disqualifies claimants who voluntarily quit employment without good cause attributable to the employer or who are discharged for work-connected misconduct. Iowa Code § 96.5-1 and 96.5-2-a. To voluntarily quit means a claimant exercises a voluntary choice between remaining employed or discontinuing the employment relationship and chooses to leave employment. To establish a voluntary quit requires that a claimant must intend to terminate employment. *Wills v. Employment Appeal Board*, 447 N.W.2d 137, 138 (Iowa 1989); *Peck v. Employment Appeal Board*, 492 N.W.2d 438, 440 (Iowa App. 1992).

At the crux of the separation is whether the claimant was discharged by Ms. Schultz, and whether Ms. Schultz even had the authority to discharge the claimant or an employee. The employer by way of both Ms. Schultz and Mr. Symens both testified that Ms. Schultz was not an employee or member of management. Mr. Symens' residence was located directly above the employer's location, and as a result, Ms. Schultz was often on site between the locations. Ms. Schultz was permitted to be in the back room of the employer's premises, which is not customary for non-employees, and when she requested the claimant speak to her, the claimant was expected by Ms. Schultz and then directed by Mr. Symens, to go in the back room and speak to Ms. Schultz. Whether formally designated an employee or not, Ms. Schultz would be traditionally employee-only areas, expected employees to respect her requests (including speak to her when asked), and overtly demonstrated she had power by way of her presence and relationship with Mr. Symens.

Ms. Schultz clearly illustrated she knew she had power over the claimant's employment by way of the pointing to her engagement ring, and saying to the claimant, "See this? I could have you fired" or "See this? You're fired." Either way was an assertion of authority, and when the claimant confronted Mr. Symens, requesting intervention, he refused, thereby acquiescing to Ms. Schultz's assertion of power.

Further, the administrative law judge is persuaded that the assertion of power between Ms. Schultz and the claimant was not isolated, or even the claimant being hyper-sensitive inasmuch as Ms. Schultz just weeks later, maintained nothing had changed with regard to her employment status, yet held herself out to be the "person-in-charge" and signed the health inspection report, which included verbiage that management (and therefore the claimant) had been recently fired (Claimant Exhibit C.) Based on the evidence presented, the claimant reasonably believed that Ms. Schultz fired her, regardless of her official title. The separation is a discharge for unemployment purposes.

The next question in this case is whether the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law. The rules define misconduct as (1) deliberate acts or omissions by a worker that materially breach the duties and obligations arising out of the contract of employment, (2) deliberate violations or disregard of standards of behavior that the employer has the right to expect of employees, or (3) carelessness or negligence of such degree of recurrence as to manifest equal culpability, wrongful intent or evil design. 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 misconduct within the meaning of the statute. 871 IAC 24.32(1).

The employer has the burden to prove the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law. Iowa Code § 96.6-2; *Cosper v. Iowa Department of Job Service*, 321 N.W.2d 6, 11 (Iowa 1982). The propriety of a discharge is

not at issue in an unemployment insurance case. An employer may be justified in discharging an employee, but the employee's conduct may not amount to misconduct precluding the payment of unemployment compensation. The law limits disqualifying misconduct to substantial and willful wrongdoing or repeated carelessness or negligence that equals willful misconduct in culpability. *Lee v. Employment Appeal Board*, 616 N.W.2d 661, 665 (Iowa 2000).

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 employer has failed to meet its burden of proof in this case. At most, the claimant's refusal to speak to Ms. Schultz was an isolated incident of poor judgment and inasmuch as employer had not previously warned claimant about the issue leading to the separation, it has not met the burden of proof to establish that claimant acted deliberately or with recurrent negligence in violation of company policy, procedure, or prior warning, or that her conduct was willful and substantial misconduct. The claimant is allowed benefits.

Because the claimant is eligible for benefits, she has not been overpaid benefits. As a result, the issues of recovery of any overpayment and possible relief from charges are moot.

DECISION:

The August 19, 2015, (reference 01) decision is affirmed. The claimant did not quit but was discharged from employment for no disqualifying reason. Benefits are allowed, provided she is otherwise eligible. The claimant has not been overpaid unemployment insurance benefits and the employer's account is not subject to relief of charges.

Jennifer L. Coe
Administrative Law Judge

Decision Dated and Mailed

jlc/css