

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

GRACE M COZAD
Claimant

APPEAL NO. 08A-UI-04800-DT

**ADMINISTRATIVE LAW JUDGE
DECISION**

ORSCHELN FARM & HOME LLC
Employer

**OC: 04/06/08 R: 01
Claimant: Respondent (2)**

Section 96.5-2-a – Discharge
871 IAC 24.32(9) – Suspension or Disciplinary Layoff
Section 96.3-7 – Recovery of Overpayment of Benefits

STATEMENT OF THE CASE:

Orscheln Farm & Home, L.L.C. (employer) appealed a representative's May 7, 2008 decision (reference 02) that concluded Grace M. Cozad (claimant) was qualified to receive unemployment insurance benefits. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on June 3, 2008. The claimant participated in the hearing. Matt Gerhard appeared on the employer's behalf and presented testimony from one other witness, Eldon Graham. Based on the evidence, the arguments of the parties, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUE:

Was the claimant discharged or suspended for work-connected misconduct?

FINDINGS OF FACT:

The claimant started working for the employer on May 22, 2007. Since about June or July 2007 she worked full time as assistant manager at the employer's Perry, Iowa, agricultural and home improvement retail store. Her last day of work was March 19, 2008.

The employer had observed a pattern of suspicious cash refunds that pointed toward the claimant. As a result, on about February 19, 2008 the employer installed a special surveillance camera to pursue its investigation. From that time through March 13 the employer observed approximately 31 cash refund transactions involving the claimant which it deemed to be fraudulent. On March 13 specifically there were two transactions, one at 5:53 p.m. and another at 6:01 p.m. The claimant was working a 7:30 a.m. to 6:30 p.m. shift that day. At those two times, the claimant processed two cash refunds for \$105.99 and \$127.19, respectively, documented as being for two large items. However, the video surveillance indicated there were no customers in the vicinity and no items on the sales counter. Further, the video surveillance indicated that the claimant placed the cash removed from the sales register into her pocket. On the customer return form there were places for three signatures, the customer, the manager on

duty, and a sales associate; the video surveillance recorded the claimant completing two places on the form.

The claimant was not scheduled to work on March 14, March 15, and March 16. She was scheduled and did work on March 17 and March 18. She was not scheduled for work on March 19 but was summoned in to work for a "staff meeting." Once arriving at the store the claimant was contacted by the local police and asked to come to the police station. When she arrived, she was informed that she was the suspect in a theft investigation and was read her rights. Representatives from the employer then spoke to her at the police station and informed her that she was being suspended without pay pending outcome of the police investigation. As of the date of the hearing there had not been any charges filed or resolved.

REASONING AND CONCLUSIONS OF LAW:

A claimant is not qualified to receive unemployment insurance benefits if an employer has suspended or discharged the claimant for reasons constituting work-connected misconduct. Iowa Code § 96.5-2-a. Before a claimant can be denied unemployment insurance benefits, the employer has the burden to establish the claimant was suspended or discharged for work-connected misconduct. Cosper v. IDJS, 321 N.W.2d 6 (Iowa 1982); Iowa Code § 96.5-2-a. For purposes of unemployment insurance eligibility, a suspension is treated as a temporary discharge and the same issue of misconduct must be resolved. 871 IAC 24.32(9).

In order to establish misconduct such as to disqualify an employee from benefits an employer must establish the employee was responsible for a deliberate act or omission which was a material breach of the duties and obligations owed by the employee to the employer. 871 IAC 24.32(1)a; Huntoon v. Iowa Department of Job Service, 275 N.W.2d 445 (Iowa 1979); Henry v. Iowa Department of Job Service, 391 N.W.2d 731, 735 (Iowa App. 1986). The conduct must show a 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. 871 IAC 24.32(1)a; Huntoon, supra; Henry, supra. 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. 871 IAC 24.32(1)a; Huntoon, supra; Newman v. Iowa Department of Job Service, 351 N.W.2d 806 (Iowa App. 1984).

The employer has established by a preponderance of the evidence that the claimant was responsible for the misappropriation of moneys at least on March 13. The claimant's taking of the money shows a willful or wanton disregard of the standard of behavior the employer has the right to expect from an employee, as well as an intentional and substantial disregard of the employer's interests and of the employee's duties and obligations to the employer. The employer suspended or discharged the claimant for reasons amounting to work-connected misconduct.

A secondary issue included on the hearing notice was whether "gross misconduct" has been established. If "gross misconduct" is shown, all of the claimant wage credits earned from all employers prior to her separation the date of discharge would be cancelled or nullified. Iowa Code § 96.5-2-b. "Gross misconduct" found where "the claimant loses employment as a result of an act constituting an indictable offense in connection with the claimant's employment,

provided the claimant is duly convicted thereof or has signed a statement admitting the commission of such an act.” Iowa Code § 96.5-2-c. An “indictable offense” is an offense other than a simple misdemeanor. Iowa Code § 801.4. In terms of theft of property, in order to be at least a serious misdemeanor, the monetary value of the property taken must be at least \$200.01. Iowa Code § 714.2(4). As of the time of the hearing there had been no criminal proceeding commenced or resolved, nor any indication of any written admission of theft. Therefore, as of this point, “gross misconduct” has not been established. However, an employer may seek a redetermination as to whether the separation was for “gross misconduct” within five years from the effective date of the claimant’s claim for unemployment insurance benefits. Iowa Code § 96.5-2-c.

Iowa Code § 96.3-7 provides:

7. Recovery of overpayment of benefits. 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.

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.

Because the claimant’s suspension was disqualifying, benefits were paid to which the claimant was not entitled. Those benefits must be recovered in accordance with the provisions of Iowa law.

DECISION:

The representative’s May 7, 2008 decision (reference 02) is reversed. The employer discharged or suspended the claimant for disqualifying reasons. As of March 19, 2008 benefits are withheld until such time as the claimant 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 is overpaid benefits in the amount of \$625.00.

Lynette A. F. Donner
Administrative Law Judge

Decision Dated and Mailed

ld/css