

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

PAMELA S RILEY
Claimant

VEEKAY MANAGEMENT LLC
Employer

APPEAL 15A-UI-12825-JCT

**ADMINISTRATIVE LAW JUDGE
DECISION**

**OC: 10/18/15
Claimant: Respondent (2)**

Iowa Code § 96.5(2)a – Discharge for Misconduct
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 November 6, 2015, (reference 02) unemployment insurance decision that allowed benefits based upon separation. The parties were properly notified about the hearing. A telephone hearing was held on November 8, 2015. The claimant participated personally. The employer participated through Lexi King, owner. Employer Exhibit 1 was admitted into evidence. The administrative law judge took official notice of the administrative record, including fact-finding documents.

ISSUES:

Was the claimant discharged for disqualifying job-related misconduct?
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 part-time as a pit crew member for the employer, who operates a Pita Pit restaurant, and was separated from employment on October 2, 2015, when she was discharged for theft of food.

Prior to the claimant's separation, she had been verbally counseled on occasion with regard to the possible theft or misuse of food. The employer asserted at least two specific occasions in which the employer discussed concerns with the claimant's handling of the employer's food for her personal use. One instance involved the employer discovering a bag of prime rib pieces in a bag the claimant intended to take home without payment. The claimant asserted she had saved the "scrap pieces" of the prime rib to take home to her cat, but when the employer inspected the meat, it was in a bag of approximately two inches thick, and not just scrap pieces. The claimant did not request prior permission to collect the prime rib. A second instance occurred when the claimant was observed with bagged vegetables that had been sliced for

pitass, that the claimant had set aside. When confronted, the claimant stated she hadn't time to go grocery shopping. The employer also viewed remotely surveillance footage showing the claimant preparing and handing her daughter and granddaughter pitass but could not locate an accompanying receipt. Employees were permitted to consume food with permission or purchase discounted meals prior to consumption, and had to sign their receipts. The claimant was issued a verbal warning on September 25, 2015 related to her attendance and theft of food.

The final incident occurred on October 1, 2015, and involved alleged theft of three items; bacon strips, a pita, and soup. The claimant was observed by employees putting additional bacon on the grill for a pita, and consuming the additional bacon after the pita was complete for the customer. The claimant stated sometimes bacon sticks together and it was an accident. The employer believed based on the quantity of bacon consumed, and the frequency of "mistakes", that it was not a good faith error. The claimant could have given the extra bacon to the customer but chose to consume it for herself instead, and did not seek prior approval. The claimant was also observed preparing and eating a pita during her shift and the employer could not locate an accompanied, signed receipt. The claimant was also observed taking a cup of soup for personal consumption, which she stated was then for "tasting" purposes when confronted by the employer. The employer's policies do allow for an employee to test or taste a spoonful or two of soup, but not to "test" the soup for free, by way of consuming an entire cup's worth. Based on the repeated instances of the claimant's misuse of food for personal use, and theft, the claimant was discharged.

The administrative record reflects that claimant has received unemployment benefits in the amount of \$1008.00, since filing a claim with an effective date of October 18, 2015, through the week ending December 5, 2015. The administrative record also establishes that the employer did participate in the fact-finding interview on November 5, 2015, by way of Lexi King and Alan Thomas.

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.

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 employer has the burden to prove the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (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).

For unemployment insurance purposes, misconduct amounts to a deliberate act and a material breach of the duties and obligations arising out of a worker's contract of employment. Misconduct is a deliberate violation or disregard of the standard of behavior the employer has a right to expect from employees or is an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to the employer. Inefficiency, unsatisfactory conduct, unsatisfactory performance due to inability or incapacity, inadvertence or ordinary negligence in isolated incidents, or good faith errors in judgment or discretion are not deemed to constitute work-connected misconduct. 871 IAC 24.32(1)(a). Generally, continued refusal to follow reasonable instructions constitutes misconduct. *Gilliam v. Atlantic Bottling Co.*, 453 N.W.2d 230 (Iowa Ct. App. 1990).

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 testimony to be more credible than the claimant, and the employer has met its burden of proof to establish the claimant was discharged for job related misconduct.

On the claimant's final shift, she was observed consuming bacon she had not paid for, preparing and eating a pita that did not have an accompanied and signed receipt, and a cup of soup, which exceeded a spoonful or two for "testing" purposes. Even if the administrative law judge found the claimant's explanations for each item on October 1, 2015 to be credible, the claimant at a minimum ate bacon on her final shift, that she did not pay for, and arguably, could have given to a paying customer, if she in fact put too much bacon on the grill in a good faith error. It cannot be ignored that the claimant had been repeatedly issued verbal warnings for her misuse of employer food for her personal use or consumption. While the claimant may have intended to pay for the food, her repeated failure to pay for food or drink before consuming it after having been warned is evidence of carelessness to such a degree of recurrence as to rise to the level of disqualifying job related misconduct, or is evidence of deliberate theft. Either one is disqualifying job related misconduct. Benefits are denied.

Iowa Code § 96.3(7)a-b provides:

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 § 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 § 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.

(2) An accounting firm, agent, unemployment insurance accounting firm, or other entity that represents an employer in unemployment claim matters and demonstrates a continuous pattern of failing to participate in the initial determinations to award benefits, as determined and defined by rule by the department, shall be denied permission by the department to represent any employers in unemployment insurance matters. This subparagraph does not apply to attorneys or counselors admitted to practice in the courts of this states pursuant to § 602.10101.

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 it 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. The employer provided satisfactory participation in the fact-finding interview by way of Lexi King and Alan Thomas' participation. Since the employer did participate in the fact-finding interview the claimant is obligated to repay the benefits she received and the employer's account shall not be charged.

DECISION:

The November 6, 2015, (reference 02) 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 \$1008.00, and is obligated to repay the benefits. The employer's account (562987-000) shall not be charged for benefits associated with this claim.

Jennifer L. Coe
Administrative Law Judge

Decision Dated and Mailed

jlc/pjs