

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

BONNIE J OLSON
Claimant

APPEAL NO. 10A-UI-14641-H2T

**ADMINISTRATIVE LAW JUDGE
DECISION**

FALLGATTERS MARKETS
Employer

OC: 08-22-10
Claimant: Respondent (2-R)

Iowa Code § 96.5(2)a – Discharge/Misconduct
Iowa Code § 96.3(7) - Recovery of Benefit Overpayment

STATEMENT OF THE CASE:

The employer filed a timely appeal from the October 19, 2010, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on December 10, 2010. The claimant did participate. The employer did participate through Doug Fallgatter, Owner, and Kevin Petznick, Store Manager, and was represented by Douglas A. Krull, Attorney at Law. Employer's Exhibit One was entered and received into the record.

ISSUE:

Was the claimant discharged due to job-related misconduct?

Has the claimant been overpaid any unemployment insurance benefits?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed as a pricing coordinator, full-time, beginning September 19, 1991, through August 21, 2010, when she was discharged. The claimant was discharged for theft from the employer. On July 19, Mr. Fallgatter noted that the claimant took a gallon jug of milk from the store without paying for it. He asked each of the two checkers who were working if the claimant had paid for the milk and both told him that they had not rung up her purchase. Wanting to insure that the claimant had not paid for the milk before he made any accusation against her, he wanted to check the surveillance tapes. There was a malfunction of the system that took weeks to fix before the employer was able to obtain the surveillance tape. The employer was not able to view the surveillance tapes until August 18 and 19. At that time, the employer also noted on the tapes that on August 9, 10, 16, 17, 18, and 20 the claimant took a twenty ounce bottle of pop on each occasion without paying for it. The claimant's allegation that the check-out lines were too long for her to wait to pay for the pop are not supported by a review of the employer's surveillance evidence. The checkout lines were not long; the claimant simply did not pay for the pop. The claimant had received the employer's handbook or policy book that prohibits theft. The employer provides that even one occasion of theft is grounds for discharge.

With over 40 employees, if the employer allowed each employee to steal one bottle of pop per day, their loss would quickly mount. An employer is not required to permit employees to steal from them.

When questioned about the milk, the claimant told the employer that she was talking the milk because she had purchased it the day before but not taken it home. The claimant was not able to produce a receipt nor was the employer ever to locate the previous purchase after reviewing the cash register receipts with the surveillance video. The way the employer's checkout lanes work, the claimant would have to have had the milk at the checkout lane for it to be scanned and rung up. Her explanation is not believable.

The claimant has received unemployment benefits after the separation on a claim with an effective date of August 22, 2010.

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.

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.

Generally, continued refusal to follow reasonable instructions constitutes misconduct. *Gilliam v. Atlantic Bottling Company*, 453 N.W.2d 230 (Iowa App. 1990).

The employer has established that the claimant engaged in an ongoing pattern of theft from them. The surveillance tape that contradicts the claimant's testimony, as well as the claimant's unbelievable explanation about the gallon of milk, persuades the undersigned that the claimant engaged in ongoing theft from the employer. Theft from the employer is sufficient misconduct to disqualify her from receipt of unemployment insurance benefits.

Iowa Code § 96.3-7, as amended in 2008, 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) 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. 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 section 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. The employer shall not be charged with the benefits.

(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 state pursuant to section 602.10101.

Because the claimant's separation was disqualifying, benefits were paid to which the claimant 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 whether or not the overpayment is recovered. Iowa Code § 96.3(7). In this case, the claimant has received benefits but was not eligible for those benefits.

DECISION:

The October 19, 2010 (reference 01) 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.

REMAND:

The matter of determining the amount of the potential overpayment and whether the overpayment should be recovered under Iowa Code § 96.3(7)b is remanded to the Agency.

Teresa K. Hillary
Administrative Law Judge

Decision Dated and Mailed

tkh/kjw