

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**JOHN WYATT S REICHERTS**  
Claimant

**APPEAL NO. 10A-UI-04162-VST**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**VON MAUR INC**  
Employer

**OC: 03/09/10**  
**Claimant: Respondent (2R)**

Section 96.5-2-A – Misconduct  
Section 96.3-7 – Overpayment of Benefits

**STATEMENT OF THE CASE:**

Employer filed an appeal from a decision of a representative dated March 9, 2010, reference 01, which held claimant eligible for unemployment insurance benefits. After due notice, a telephone conference hearing was scheduled for and held on April 22, 2010. Employer participated by Sara Whitlock, Store Manager Valley West. Claimant failed to respond to the hearing notice and did not participate. The record consists of the testimony of Sara Whitlock and Employer's Exhibits 1-7.

**ISSUES:**

Whether the claimant was discharged for misconduct; and

Whether the claimant has been overpaid unemployment insurance benefits.

**FINDINGS OF FACT:**

The administrative law judge, having heard the testimony of the witness and having considered all of the evidence in the record, makes the following findings of fact:

The employer owns and operates retail department stores. The store at which the claimant worked is located in the Valley West Mall in West Des Moines, Iowa. The claimant was hired on February 7, 2007, as a full-time sales associate.

Depending on the hours scheduled, an employee may be entitled to a lunch break and a fifteen minute break during the workday. Lunch breaks are unpaid. An employee is required to clock out and clock in. The fifteen minute break is a paid break. The employer has a code of conduct that applies to all employees. The code of conduct lists activities that, if committed, could result in termination. Number 5 prohibits fraudulent activities, including theft, deception in timekeeping records or falsification of company records. (Exhibit 4)

The employer has a loss prevention program that monitors departments in the store. On February 11, 2010, the claimant's department was being monitored. The claimant was seen

leaving his department at 1:00 p.m. and then actually leaving the store by the mall entrance. The claimant returned to the store at 1:25 p.m. and was back in his department at 1:27. He did not record this time on his timecard. He later took a fifteen minute break.

The claimant was asked by both his manager and the store manager if he had taken a lunch break on February 11, 2010. He said that he did not. The store manager, Sara Whitlock, then told him about the videotape and what had been observed. The claimant then said that he had come to work late and that he was hungry. He then admitted that he had left the store. He also admitted that what he did was deception in timekeeping. Ms. Whitlock terminated the claimant on February 12, 2010. The reason for his termination was his untruthfulness when asked about whether he had taken a lunch break on February 11, 2010.

### **REASONING AND CONCLUSIONS OF LAW:**

Iowa Code section 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.

Misconduct that disqualifies an individual from receiving unemployment insurance benefits occurs when there are deliberate acts or omissions that constitute a material breach of the worker's duty to the employer. One of the most fundamental duties owed to an employer is honesty. An employer can reasonably expect that an employee will answer truthfully when questions are asked by his employer. The claimant knew that the employer took seriously violations of its code of conduct. One provision of that code of conduct prohibited deception in timekeeping records.

In this case, the claimant took a lunch break to which he was not entitled and did not properly record on his timecard. What was even more serious as far as the employer was concerned, was that the claimant did not answer truthfully when asked by two managers whether he had taken a lunch break on February 11, 2010. He denied having taken a lunch break when specifically asked. The claimant agreed that his actions amounted to deception on timekeeping records. The employer then terminated the claimant.

The claimant did not participate in the hearing and his explanation for his conduct is unknown. The evidence obtained at the hearing shows misconduct on the part of the claimant. Benefits are denied.

The next issue is overpayment of benefits. Iowa Code section 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.

This matter is remanded to the Claims Section for a determination of the overpayment issue.

**DECISION:**

The decision of the representative dated March 9, 2010, reference 01, is reversed. Unemployment insurance benefits shall be withheld until claimant has worked in and been paid wages for insured work equal to ten times claimant's weekly benefit amount, provided claimant

is otherwise eligible. The overpayment issue is remanded to the Claims Section for determination.

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Vicki L. Seeck  
Administrative Law Judge

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Decision Dated and Mailed

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