

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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**MARK R MILLER**  
Claimant

**NEBRASKA FURNITURE MART INC**  
Employer

**APPEAL 19A-UI-06809-DB-T**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**OC: 07/28/19  
Claimant: Respondent (1)**

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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/appellant filed an appeal from the August 14, 2019 (reference 01) unemployment insurance decision that allowed unemployment insurance benefits to the claimant based upon his discharge from employment. The parties were properly notified of the hearing. A telephone hearing was held on September 19, 2019. The claimant, Mark R. Miller, did not participate. The employer, Nebraska Furniture Mart Inc., participated through witnesses Tim Mullen and Jessica Niewohner. Employer's Exhibits 1 through 3 were admitted. The administrative law judge took official notice of the claimant's unemployment insurance benefits records, including the 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: Claimant was employed full-time as a retail flooring sales associate. This employer operates a store that sells appliances, flooring and electronics. Claimant was employed from February 12, 2018 until July 26, 2019, when he was discharged from employment.

The employer has a written staff pricing and shopping policy. See Exhibit 2. Claimant received a copy of this written policy. See Exhibit 3. The policy provides that staff pricing is available on purchases/payment made in the store by an employee, their spouse, or minor children. See Exhibit 2. The policy provides that the purchase must be for your own personal use or for a bona-fide gift. See Exhibit 2. The policy states "under no circumstances will you accept any reimbursement—this includes buying a gift with others and splitting the cost or having another person pay for an item that will be solely used by you." See Exhibit 2. The employer also has a separate discount policy named "Friends and Family" pricing, which is separate from staff

pricing. See Exhibit 2. There is no requirement that the employee pay for items purchased using the “Friends and Family” pricing. See Exhibit 2.

On July 24, 2019, claimant’s wife and aunt came into the store while the claimant was working. His wife and aunt went to the appliance area to purchase a new refrigerator and Adam Murphy helped them with the sale. See Exhibit 1. The claimant worked in the flooring department and not the appliance department. Claimant’s wife disclosed her spousal relationship with claimant to Mr. Murphy and Mr. Murphy proceeded to write up the order on claimant’s employee account. See Exhibit 1. At that time, Mr. Murphy asked if they would be financing it and the aunt stated that she would be paying for it and that it needed to be delivered to her address. See Exhibit 1. Claimant’s wife explained that the family was moving in with the aunt and the refrigerator was for the entire family. See Exhibit 1. No clarification was sought in whether claimant’s wife and aunt intended to use the employer’s staff pricing discount or friends and family pricing discount. Claimant was not with his wife and aunt when the purchase was made. Claimant was not consulted with about the transaction by Mr. Murphy or Mr. Mullen at the time the transaction was made. Claimant’s wife and aunt were allowed to purchase the merchandise using staff pricing. The next day, Mr. Mullen interviewed the claimant about the transaction, the claimant told him that he didn’t know that his wife was going to make the purchase which she had done the day before. See Exhibit 1.

Claimant’s administrative records establish that he has received benefits of \$2,000.00 between July 28, 2019 and August 24, 2019. The employer did not participate by telephone in the fact finding interview and the documentation in its statement of protest was not information of the quantity and quality that if unrebutted would be sufficient to result in a decision favorable to the employer.

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

For the reasons that follow, the administrative law judge concludes the claimant was discharged for no disqualifying reason. Benefits are allowed, provided claimant is otherwise eligible.

As a preliminary matter, I find that the Claimant did not quit. Claimant was discharged from employment.

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.

Iowa Admin. Code r. 871-24.32(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.

(emphasis added).

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. *Huntoon v. Iowa Dep't of Job Serv.*, 275 N.W.2d 445, 448 (Iowa 1979).

Iowa Admin. Code r. 871-24.32(4) provides:

(4) Report required. The claimant's statement and employer's statement must give detailed facts as to the specific reason for the claimant's discharge. Allegations of misconduct or dishonesty without additional evidence shall not be sufficient to result in disqualification. If the employer is unwilling to furnish available evidence to corroborate the allegation, misconduct cannot be established. In cases where a suspension or disciplinary layoff exists, the claimant is considered as discharged, and the issue of misconduct shall be resolved.

Iowa Admin. Code r.871-24.32(8) provides:

(8) Past acts of misconduct. While past acts and warnings can be used to determine the magnitude of a current act of misconduct, a discharge for misconduct cannot be based on such past act or acts. The termination of employment must be based on a current act.

Further, the employer has the burden of proof in establishing disqualifying job misconduct. *Cosper v. Iowa Dep't of Job Serv.*, 321 N.W.2d 6 (Iowa 1982). The issue is not whether the employer made a correct decision in separating claimant, but whether the claimant is entitled to unemployment insurance benefits. *Infante v. Iowa Dep't of Job Serv.*, 364 N.W.2d 262 (Iowa Ct. App. 1984). What constitutes misconduct justifying termination of an employee and what misconduct warrants denial of unemployment insurance benefits are two separate decisions. *Pierce v. Iowa Dep't of Job Serv.*, 425 N.W.2d 679 (Iowa Ct. App. 1988). Misconduct serious enough to warrant discharge is not necessarily serious enough to warrant a denial of job insurance benefits. Such misconduct must be "substantial." *Newman v. Iowa Dep't of Job Serv.*, 351 N.W.2d 806 (Iowa Ct. App. 1984). The focus of the administrative code definition of misconduct is on deliberate, intentional or culpable acts **by the employee**. *Id.* (emphasis added). When based on carelessness, the carelessness must actually indicate a "wrongful intent" to be disqualifying in nature. *Id.* Negligence does not constitute misconduct unless recurrent in nature; a single act is not disqualifying unless indicative of a deliberate disregard of the employer's interests. *Henry v. Iowa Dep't of Job Serv.*, 391 N.W.2d 731 (Iowa Ct. App. 1986). Further, poor work performance is not misconduct in the absence of evidence of intent. *Miller v. Emp't Appeal Bd.*, 423 N.W.2d 211 (Iowa Ct. App. 1988). 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 Bd.*, 616 N.W.2d 661 (Iowa 2000). Instances of poor judgment are not misconduct. *Richers v. Iowa Dept. of Job Services*, 479 N.W.2d 308 (Iowa 1991); *Kelly v. IDJS*, 386 N.W.2d 552, 555 (Iowa App. 1986).

In this case, claimant's actions and inactions were not misconduct. There is no credible evidence that the claimant instructed or consented to having his wife and aunt inappropriately use his employee discount. He was not with his wife and aunt at the time of the transaction and even stated to Mr. Mullen that he didn't know that his wife was going to make the purchase. Further, there is no credible evidence that claimant was even notified by his wife that a purchase was made by the aunt using staff pricing instead of friends and family pricing. Claimant's conduct is clearly not an intentional and substantial disregard of the employer's interest which rises to the level of willful misconduct. As such, benefits are allowed. Because benefits are allowed, the issue of overpayment is moot.

The employer did not participate by telephone in the fact finding interview and the documentation in its statement of protest was not information of the quantity and quality that if unrebutted would be sufficient to result in a decision favorable to the employer. As such, the employer failed to participate in the fact-finding interview pursuant to Iowa Admin. Code r. 871-24.10. The employer's account may be charged for benefits paid.

**DECISION:**

The August 14, 2019 (reference 01) unemployment insurance decision is affirmed. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided he is otherwise eligible. The employer's account may be charged for benefits paid.

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Dawn Boucher  
Administrative Law Judge

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Decision Dated and Mailed

db/rvs