

**IOWA WORKFORCE DEVELOPMENT
Unemployment Insurance Appeals Section
1000 East Grand—Des Moines, Iowa 50319
DECISION OF THE ADMINISTRATIVE LAW JUDGE
68-0157 (7-97) – 3091078 - EI**

**KRISTINA M TICKLE
908 DOUGLAS AVE APT 3
AMES IA 50010-6263**

**ZYLSTRA CYCLE COMPANY INC
1930 E 13TH ST
AMES IA 50010**

**Appeal Number: 06A-UI-04627-RT
OC: 04/02/06 R: 02
Claimant: Appellant (2)**

This Decision Shall Become Final, unless within fifteen (15) days from the date below, you or any interested party appeal to the Employment Appeal Board by submitting either a signed letter or a signed written Notice of Appeal, directly to the **Employment Appeal Board, 4th Floor—Lucas Building, Des Moines, Iowa 50319.**

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

STATE CLEARLY

1. The name, address and social security number of the claimant.
2. A reference to the decision from which the appeal is taken.
3. That an appeal from such decision is being made and such appeal is signed.
4. The grounds upon which such appeal is based.

YOU MAY REPRESENT yourself in this appeal or you may obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds. It is important that you file your claim as directed, while this appeal is pending, to protect your continuing right to benefits.

(Administrative Law Judge)

(Decision Dated & Mailed)

Section 96.5-2-a – Discharge for Misconduct

STATEMENT OF THE CASE:

The claimant, Kristina M. Tickle, filed a timely appeal from an unemployment insurance decision dated April 26, 2006, reference 01, denying unemployment insurance benefits to her. After due notice was issued, a telephone hearing was held on May 16, 2006, with the claimant participating. Nick Simons, General Manager, and Randy Johns, Dealer Principle, participated in the hearing for the employer, Zylstra Cycle Company, Inc., as did Brad Ott, Staff Accountant. Employer's Exhibits One through Three were admitted into evidence. The administrative law judge takes official notice of Iowa Workforce Development Department unemployment insurance records for the claimant.

FINDINGS OF FACT:

Having heard the testimony of the witnesses and having examined all of the evidence in the record, including Employer's Exhibits One through Three, the administrative law judge finds: The claimant was employed by the employer as a full-time general motor close manager or general merchandise manager from April 16, 2001, until she was discharged on April 7, 2006. The claimant was discharged for a "lack of confidence in the claimant's abilities." This lack of confidence arose over some missing jewelry. Between January 22 or 23 to January 25, 2006, the claimant attended a Harley Davidson dealer's meeting in Dallas, Texas. The claimant purchased for the dealership many thousands of dollars worth of merchandise and inventory. Of those purchases, the claimant purchased the jewelry items as shown at Employer's Exhibit One. All of the other items and merchandise purchased by the claimant were shipped by the sellers directly to the employer. However, the claimant personally took the jewelry as shown at Employer's Exhibit One and placed it in her luggage and took it back with her. The claimant did so because she believed the jewelry would be appropriate sale items for Valentine's Day but did not believe that the jewelry would reach the employer by Valentine's Day if it was shipped by the seller or the dealer. The claimant had authority at this meeting to make those purchases.

The claimant returned to Iowa on January 25, 2006 but her luggage arrived late, the next day, January 26, 2006. When the claimant received her luggage she unpacked the luggage and noted that the jewelry items were missing. However, the claimant did not immediately report the missing items to the employer. The employer received the invoice concerning the jewelry at Employer's Exhibit One on or about February 20, 2006 but it was set aside to be paid later. The employer's staff accountant, Brad Ott, eventually noticed the invoice but could not find the merchandise. The claimant was then questioned about the merchandise on or about March 13, 2006. The claimant informed the employer that she was not able to find the merchandise when she received her luggage. The claimant asked for one day to attempt to find it. Mr. Ott consented but the next day reported the missing items to the comptroller. The claimant did not contact Northwest Airlines, the airlines providing the return trip to the claimant from Dallas, until March 31, 2006 when she reported the loss of the jewelry. The claimant did not do so any sooner because she did not think that the airlines could do anything about it. The airline responded by a letter dated April 7, 2006 as shown at Employer's Exhibit Two indicating that she waited too long to report the loss; she needed to report such loss within 24 hours. The employer considered the matter and then gave the claimant a warning called a "situation statement" on April 6, 2006 as shown at Employer's Exhibit Three. However, the employer discharged the claimant the next day, April 7, 2006 because the employer had "lost faith" in the claimant's abilities. The claimant had never received any relevant warnings or disciplines nor had she been accused of anything similar previously.

REASONING AND CONCLUSIONS OF LAW:

The question presented by this appeal is whether the claimant's separation from employment was a disqualifying event. It was not.

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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. Huntoon v. Iowa Department of Job Service, 275 N.W.2d 445, 448 (Iowa 1979).

The parties agree, and the administrative law judge concludes, that the claimant was discharged on April 7, 2006. In order to be disqualified to receive unemployment insurance benefits pursuant to a discharge, the claimant must have been discharged for disqualifying misconduct. It is well established that the employer has the burden to prove disqualifying misconduct. See Iowa Code section 96.6(2) and Cosper v. Iowa Department of Job Service, 321 N.W.2d 6, 11 (Iowa 1982) and its progeny. Although it is a close question, the administrative law judge concludes that the employer has failed to meet its burden of proof to demonstrate by a preponderance of the evidence that the claimant was discharged for disqualifying misconduct. The only reason given by the employer for the claimant's discharge was that the employer "lost faith" or had a "lack of confidence in the claimant's abilities." This arose out of an incident in January of 2006 when the claimant purchased jewelry as shown at Employer's Exhibit One at a Harley Davidson dealer's meeting in Dallas, Texas. Rather than have the seller or dealer ship the jewelry, as the claimant did with all the other merchandise and inventory she purchased at the meeting, she personally took the jewelry items with her in her luggage. The claimant did have authority to purchase these items at the dealer's meeting. The claimant testified that she took the items of jewelry with her because it was close to Valentine's Day and she was afraid that if the dealer or seller shipped them the items would not arrive at the employer's store in Iowa in time for Valentine's Day. The administrative law judge concludes that this is a reasonable explanation for taking the items with her instead of having them shipped. However, when the claimant arrived in Iowa on January 25, 2006 her luggage was delayed. When the claimant claimed her luggage on January 26, 2006, the jewelry items as shown at Employer's Exhibit One were missing. There is not a preponderance of the

evidence that the claimant actually stole the jewelry items nor is the employer really suggesting that. Rather, the claimant did not report the loss of the items immediately to the employer after discovering the items missing. When the claimant reported the items to the employer is contested by the witnesses. The claimant testified that she reported the items in early February. The administrative law judge does not find this credible. The employer's witnesses testified that the first they learned of the missing jewelry was when the claimant was questioned about it when the employer received an invoice as shown at Employer's Exhibit One but could not find the merchandise as reflected in the invoice. The claimant then informed the employer that the jewelry had been lost in her luggage. It was only after that that the claimant contacted the airlines and learned that it was too late for the airlines to do anything as shown at Employer's Exhibit Two.

The administrative law judge concludes that the crucial issue here is whether the claimant's delay in reporting the loss of the merchandise to the employer was disqualifying misconduct. The claimant provided justification for taking the jewelry with her in her luggage. The claimant had authority to purchase the jewelry. There is no real suggestion that the claimant stole it. The problem here is that the claimant did not report it to the employer promptly. Although it is a very close question, the administrative law judge concludes that the claimant's failure to promptly report the missing jewelry does not rise to the level of disqualifying misconduct; that it was not a deliberate act constituting a material breach of her duties nor did it evince a willful or wanton disregard of the employer's interests nor was it carelessness or negligence in such a degree of recurrence so as to establish disqualifying misconduct. The administrative law judge specifically notes that the claimant had never received any relevant warnings or disciplines for such behavior nor had she ever been accused of such behavior before. The administrative law judge does conclude that the claimant's failure to report the merchandise promptly was inappropriate and was negligence or carelessness. However, the administrative law judge is constrained to conclude that the claimant's negligence or carelessness was an isolated instance and not disqualifying misconduct. The claimant had worked for the employer for almost five years and had the authority to make substantial purchases on behalf of the employer. It appears that the employer had some faith in the claimant, at least until March of 2006. The claimant had obviously done nothing in almost five years to shake that confidence. What finally convinces the administrative law judge that the claimant's actions were not disqualifying misconduct is the warning, identified as a "situation statement" at Employer's Exhibit Three. This was given to the claimant on April 6, 2006. However, the very next day, after others had discussed the incident, the claimant was discharged. If a warning was sufficient on April 6, 2006 disciplining the claimant, the administrative law judge concludes that the discharge the next day was not warranted at least for unemployment insurance purposes. The administrative law judge also notes that the invoice was dated February 2, 2006 and received no later by the employer than February 20, 2006 as per the testimony of Mr. Ott, but the items did not come to the employer's attention until March 13, 2006, a month after the date of the invoice and over three weeks after the employer had received the invoice, it appears that the employer also was not acting particularly promptly in handling its business matters.

In summary, and for all the reasons set out above, the administrative law judge concludes, although it is a close question, that the claimant was discharged but not for disqualifying misconduct, and, as a consequence, she is not disqualified to receive unemployment insurance benefits. Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of unemployment insurance benefits, and misconduct, to support a disqualification from unemployment insurance benefits, must be substantial in nature, including the evidence therefore. Fairfield Toyota, Inc. v. Bruegge, 449 N.W.2d 395, 398 (Iowa App. 1989). The administrative law judge concludes that there is

insufficient evidence here of substantial misconduct on the part of the claimant to warrant her disqualification to receive unemployment insurance benefits. Unemployment insurance benefits are allowed to the claimant, provided she is otherwise eligible.

DECISION:

The representative's decision of April 26, 2006, reference 01, is reversed. The claimant, Kristina M. Tickle, is entitled to receive unemployment insurance benefits, provided she is otherwise eligible, because she was discharged but not for disqualifying misconduct.

cs/pjs