

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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

MARK A ROUTH
Claimant

APPEAL NO: 18A-UI-09160-TN-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

ADVANCE STORES COMPANY INC
Employer

OC: 07/29/18

Claimant: Respondent (2)

Iowa Code § 96.5(2)a – Discharge

STATEMENT OF THE CASE:

Advance Stores Company, Inc., the employer, filed a timely appeal from a representative's unemployment insurance decision dated August 24, 2018, (reference 01) which held claimant eligible for unemployment insurance benefits. After due notice was provided, a telephone hearing was held on September 20, 2018. Claimant participated. Employer participated by Ms. Tanis Burrell, Hearing Representative and witnesses Mr. Tyler Bemisdarfer, District Manager and Mr. Jacob Campfield, General Manager. Employer's Exhibit 2 was admitted into the hearing record.

ISSUE:

The issues are whether the claimant was discharged for work-connected misconduct sufficient to warrant the denial of unemployment insurance benefits, and whether the claimant has been overpaid job insurance benefits and is liable to pay the overpayment.

FINDINGS OF FACT:

Having considered all of the evidence in the record, the administrative law judge finds: Mark A. Routh was employed by Advance Stores Company, Inc. from July 9, 2015 until August 2, 2018, when he was discharged from employment. Mr. Routh was employed as a parts sale pro on a full-time basis and was paid by the hour. His immediate supervisor was Jacob Campfield. Mr. Routh was discharged on August 26, 2018 when the company manager's concluded that he had violated the company's team member discount policy.

On June 24, 2018, Mr. Routh received a warning from the company for inappropriate use of the team member's employee discount policy. The claimant had purchased parts that had been "second sourced" from another automobile parts company. Established policy limits team members (employees) from purchasing parts from the company for their own use at any discounted price that was less than the employee would be allowed using his or her team member discount. The team member rule applied to all purchases made by company team members (employees). The policy sets the discount percentage, and limits the purchases by

team members to purchases for their own use or for the use of the employee's immediate family only. The policy prohibits transfer to others or resale by the employee.

The final warning issued to Mr. Routh on June 24, 2018, warned him that any further purchase from the company without applying the proper team member discount percentage would result in Mr. Routh's termination from employment. The warning was served upon Mr. Routh by Mr. Campfield and Mr. Bemisdarfer on June 24, 2018. The specific warning was given as a final warning, and given to Mr. Routh in addition to a general warning given to all employees about the proper use of company discounts. Mr. Routh refused to sign the warning. Company policy and the employer's expectations were reviewed with Mr. Routh at the time of warning.

On August 2, 2018, during a review of sales transactions, it was discovered that a "commercial account" using the name "Fat Fox Garage" had been created by Mr. Routh, using Mr. Routh's personal home address as the business address. The employer concluded that Mr. Routh had made numerous purchases and Mr. Routh was affording himself the larger discount given to "commercial accounts" and the purchased parts' discount given exceeded the discount level available to company team members. When questioned, Mr. Routh agreed that he had opened the account and that the location was his home address and provided no further explanation. Because the claimant had violated the terms of the company policy and had been warned, he was discharged from employment.

It is the claimant's position that he was not aware of the company's discount policy and he believed that the warning previously given to him applied only to "second source" purchases. The claimant asserts that the Fat Fox Garage was a business operated by his cousin on an intermittent basis who worked out of Mr. Routh's address. It is the claimant's belief that his discharge was because his brother, who was previously employed by the company, had turned in company management for alleged theft and management was retaliating against him.

REASONING AND CONCLUSIONS OF LAW:

The question before the administrative law judge is whether the preponderance of the evidence establishes that claimant was discharged for work-connected misconduct sufficient to warrant the denial of unemployment insurance benefits. It does.

Iowa Code section 96.5(2)a provides:

An individual shall be disqualified for benefits, regardless of the source of the individual's wage credits:

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 disqualification shall continue 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.

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).

The claimant is not qualified to receive unemployment insurance benefits if the employer discharges the claimant for reasons constituting work-connected misconduct. Iowa Code § 96.5(2)a. The employer has the burden to prove the claimant was discharged for work-connected misconduct as defined by Unemployment Insurance law. *Cosper v. Iowa Dep't of Job Serv.*, 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. For unemployment insurance purposes, misconduct amount 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 that the employer has a right to expect from its employees or it is an intentional and substantial disregard of the employer's interests and the standards of behavior that the employer has a right to expect from its employees under the provisions of the Iowa Employment Security law. Inefficiency, unsatisfactory conduct, unsatisfactory performance due to inability or incapacity, inadvertence or ordinary negligence in isolated instances do not constitute work-connected misconduct. 871 IAC-24.32(1)(a).

In the case at hand, the evidence shows that the claimant and other team members were given orientation and access to the company's policies and procedures. Through both orientation and policy, team members are informed that they are eligible to use only "team member's discount" to purchase items from the company for their own use or the use of their immediate family members. Employees are not allowed to use discounts to obtain parts or merchandise to give to others or to re-sell. The amount of discount that employees qualify for under the "team member discount" is set by the company and employees can only use the team discount. When the employer found that the team member discount policies were not being followed, a general warning was given to all employees. Mr. Routh was also specifically warned that any discounts available to him were at the team member discount rate and that failure to follow the discount policy would result in termination from employment. Mr. Routh was also given a review

explanation of the applicable team member discount policy by both Mr. Campfield and Mr. Bemisdarfer.

Mr. Routh was discharged when the employer concluded that Mr. Routh had created a "commercial account," using his residential address, to purchase parts using the commercial discount level, giving himself a discount that exceeded the discount that he was eligible for using the team member discount. When questioned about the matter, Mr. Routh admitted to opening the account at his home address and using it, but provided no further explanation.

The administrative law judge concludes that the employer has, by a preponderance of the evidence, established that the claimant knew or should have known that his actions were contrary to the employer's interests and standards of behavior and could jeopardize his employment with the company.

The administrative law judge finds the claimant's testimony that the account was opened for the benefit of his "cousin" who intermittently operates a repair business from the claimant's home address, strains credibility.

The claimant offered no evidence to demonstrate that an on-going repair business had been legally established at his home or that another person would be operating it as a business. The employer was reasonable in concluding Mr. Routh was not following company policy after being warned.

The preponderance of the evidence establishes the claimant was discharged for work-connected misconduct. Accordingly, the claimant is disqualified for benefits until he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount and is otherwise eligible.

Because the claimant's separation was disqualifying, benefits were paid to which he was not entitled. The administrative record reflects that the claimant has received unemployment insurance benefits in the amount of \$2,905.00 since opening an unemployment insurance claim with the effective date of June 29, 2018 for benefit week-ending dates August 11, 2018 through September 22, 2018. The administrative record also reflects the employer did not participate in the fact-finding interview.

The unemployment insurance law requires benefits be recovered from a claimant who receives benefits and is later denied benefits even if the claimant acted in good faith and was not at fault. However, a claimant will not have to repay an overpayment when an initial decision to award benefits on an employment separation issue is reversed on appeal if two conditions are met: (1) the claimant did not receive the benefits due to fraud or willful misrepresentation, and (2) the employer failed to participate in the initial proceeding that awarded benefits. In addition, if a claimant is not required to repay an overpayment because the employer failed to participate in the initial proceeding, the employer's account will be charged for the overpaid benefits. Iowa Code section 96.3(7)a, b.

The claimant received benefits but has been denied benefits as a result of this decision. The claimant, therefore, was overpaid benefits.

Because the claimant did not receive benefits due to fraud or willful misrepresentation and employer failed to participate in the finding interview, the claimant is not required to repay the overpayment and the employer account is subject to charge for the overpaid benefits.

DECISION:

The representative's unemployment insurance decision dated August 24, 2018, reference 01, is reversed. Claimant was discharged for work-connected misconduct. Unemployment insurance benefits are withheld until the claimant has worked in and been paid wages for insured work equal to ten times his weekly benefit amount and is otherwise eligible. Claimant was overpaid unemployment insurance benefits in the amount of \$2,905.00. Claimant is not liable to repay this amount and the employer's account is chargeable based upon the employer's failure to participate in the fact-finding interview.

Terry P. Nice
Administrative Law Judge

Decision Dated and Mailed

tn/scn/rvs