

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

REBECCA A BOLLINGER
Claimant

APPEAL NO. 08A-UI-01775-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

REGIS CORP
Employer

**OC: 01/20/08 R: 04
Claimant: Respondent (2)**

Iowa Code Section 96.5(2)(a) – Discharge for Misconduct
Iowa Code section 96.3(7) – Recovery of Overpayment

STATEMENT OF THE CASE:

Regis Corporation filed a timely appeal from the February 13, 2008, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on March 7, 2008. Claimant Rebecca Bollinger participated. Jason Pachucki of Barnett Associates represented the employer and presented testimony through Stephanie Kirkland, Area Supervisor, and Hair Stylist Jolynn Leonard. The administrative law judge took official notice of the Agency's record of benefits disbursed to the claimant and received Exhibits One through Nine into evidence.

ISSUES:

Whether the claimant was discharged for misconduct in connection with the employment that disqualifies the claimant for unemployment insurance benefits.

Whether the claimant has been overpaid unemployment insurance benefits.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Rebecca Bollinger commenced her employment with Regis Corporation on January 6, 2004 and worked as a hair stylist at the employer's SmartStyle salon located inside the Davenport Wal-Mart. On October 1, 2006, Ms. Bollinger became the manager of the same salon.

On December 30, 2007, Ms. Bollinger and two SmartStyle stylists went shopping in the Davenport Wal-Mart store for bargains on Christmas merchandise. The Wal-Mart store had marked the down the Christmas merchandise by 50 percent. A Wal-Mart employee advised Ms. Bollinger and the stylists that the Christmas merchandise would be marked down an additional 25 percent the following day. Ms. Bollinger and the other stylists were concerned that merchandise they wanted would no longer be available the following day. In other words, they were concerned Wal-Mart customers would buy the merchandise at the 50 percent markdown price. It goes without saying that it was Wal-Mart's goal to sell the merchandise before additional markdowns were taken. Ms. Bollinger and the two stylists placed the Wal-Mart Christmas merchandise in which they were interested into a Wal-Mart shopping cart and then

wheeled the cart of unpaid for Wal-Mart merchandise into the SmartStyle salon. Ms. Bollinger and the two stylists removed the Wal-Mart merchandise from the Wal-Mart shopping cart and placed it on a shelf in the back room in the salon. The door to the back room of the salon had a door that closed, but did not lock. Later the same day, members of the Wal-Mart management team went to the SmartStyle salon. Stylist Jolynn Leonard was on duty. Ms. Bollinger was not on duty. Ms. Leonard initially thought that the Wal-Mart managers were there to perform a routine check of the alarm system. The Wal-Mart managers asked Ms. Leonard to open the door to the back room and Ms. Leonard complied. The Wal-Mart managers located the unpaid for Wal-Mart Christmas merchandise.

After the Wal-Mart managers departed the SmartStyle salon, Ms. Leonard notified Ms. Bollinger of what had occurred. Ms. Bollinger immediately contacted her supervisor, Area Supervisor Stephanie Kirkland. Ms. Bollinger told Ms. Kirkland she had done something stupid. Ms. Bollinger described her actions in connection with the unpaid for Wal-Mart Christmas merchandise and relayed the information Ms. Leonard had provided. SmartStyle was a tenant in the Wal-Mart store. The conduct of Ms. Bollinger and the two stylists created an issue in the relationship between SmartStyle and Wal-Mart that could impact on SmartStyle's continued tenancy at the Wal-Mart store.

On December 31, Ms. Kirkland spoke with the Wal-Mart store manager and assistant manager about the incident. The Wal-Mart manager indicated that they had turned the matter over to their loss prevention department. Ms. Kirkland returned to the Davenport Wal-Mart store on January 3 to follow up on her prior discussion with the Wal-Mart managers. The Wal-Mart managers indicated that they had been considering banning Ms. Bollinger and the two stylists from the Wal-Mart store, but had decided against a ban. The Wal-Mart managers told Ms. Kirkland that if Ms. Bollinger and the two stylists had been Wal-Mart employees, they would have been discharged from the employment.

After this second meeting with the Wal-Mart managers, Ms. Kirkland spoke with the Regis Regional Manager. Regis/SmartStyle has written "Company Security Regulations." The regulations set forth employee conduct that could lead to discipline up to and including discharge from the employment. Included in these regulations were provisions that addressed SmartStyle's tenant relationship with Wal-Mart and employees that negatively impacted on that relationship. The regulations prohibited "possession of Wal-Mart Merchandise without a receipt." The regulations prohibited "violations of any Wal-Mart security regulations or policies," "any other actions considered detrimental to maintaining our relationship with Wal-Mart," and "any other misconduct which adversely affects the Company [Regis/SmartStyle]." Ms. Bollinger had received a copy of the Company Security Regulations at the time of hire. As the manager of the salon, Ms. Bollinger was charged with providing the same regulations to newly hired SmartStyle employees during the orientation process. Ms. Bollinger had provided the materials to four employees during the year she managed the salon. Ms. Bollinger had completed a Regis/SmartStyle management training program in June 2007. Ms. Bollinger was fully aware of SmartStyle's tenant-landlord relationship with Wal-Mart.

Ms. Kirkland concluded that Ms. Bollinger and the two stylists had exercised poor judgment without an intent to commit a theft from Wal-Mart. However, Ms. Kirkland concluded that Ms. Bollinger had in fact negatively impacted SmartStyle's relationship with Wal-Mart in violation of SmartStyle's Company Security Regulations. On January 3, Ms. Kirkland met with Ms. Bollinger and the two stylists and notified them that they would be discharged from their employment.

Ms. Bollinger established a claim for unemployment insurance benefits that was effective January 20, 2008 and has received benefits totaling \$2,128.00.

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.

The employer has the burden of proof in this matter. See Iowa Code section 96.6(2). Misconduct must be substantial in order to justify a denial of unemployment benefits. Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of unemployment benefits. See Lee v. Employment Appeal Board, 616 N.W.2d 661 (Iowa 2000). The focus is on deliberate, intentional, or culpable acts by the employee. See Gimbel v. Employment Appeal Board, 489 N.W.2d 36, 39 (Iowa Ct. App. 1992).

While past acts and warnings can be used to determine the magnitude of the current act of misconduct, a discharge for misconduct cannot be based on such past act(s). The termination of employment must be based on a current act. See 871 IAC 24.32(8). In determining whether the conduct that prompted the discharge constituted a "current act," the administrative law judge considers the date on which the conduct came to the attention of the employer and the date on which the employer notified the claimant that the conduct subjected the claimant to possible discharge. See also Greene v. EAB, 426 N.W.2d 659, 662 (Iowa App. 1988).

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. See 871 IAC 24.32(4). When it is in a party's power to produce more direct and satisfactory evidence than is actually produced, it may fairly be inferred that the more direct evidence will expose deficiencies in that party's case. See Crosser v. Iowa Dept. of Public Safety, 240 N.W.2d 682 (Iowa 1976).

Iowa Code section 714.1(2) defines one form of theft as misappropriating the property of another by using or disposing it in a manner inconsistent with or a denial of the other's ownership rights. Iowa Code section 714.5 indicates, "That fact that a person has concealed ... unpurchased property in a store or other mercantile establishment, either on the premises or outside the premises, is material evidence of intent to deprive the owner...."

It takes very little effort to understand and appreciate Wal-Mart's concern about the misappropriation of its property through the conduct of Ms. Bollinger and the two stylists. While Ms. Bollinger may not have had an intent to commit wholesale theft of the merchandise from Wal-Mart, she clearly intended to deny Wal-Mart the opportunity to sell the merchandise at the 50 percent markdown price. Whether Ms. Bollinger realizes it or not, her conduct was in fact a form of theft. Ms. Bollinger's conduct was in blatant violation of SmartStyle's clearly stated policies. Ms. Bollinger, as the manager of the SmartStyle salon, was charged with promoting and enforcing the very policies that she violated. Ms. Bollinger, as the salon manager, was SmartStyle's chief representative at the Davenport Wal-Mart store and was on notice that all of her conduct vis-à-vis Wal-Mart impacted on the relationship between SmartStyle and Wal-Mart.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Ms. Bollinger's conduct was in willful and wanton violation of the interests of the employer and violated standards of conduct the employer reasonably expected of his employees, especially its manager. The administrative law judge further concludes that Ms. Bollinger was discharged for misconduct. Accordingly, Ms. Bollinger is disqualified for benefits until she has worked in and been paid wages for insured work equal to ten times her weekly benefit amount, provided she is otherwise eligible. The employer's account shall not be charged for benefits paid to Ms. Bollinger.

Iowa Code section 96.3-7 provides:

7. Recovery of overpayment of benefits. 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.

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.

Because Ms. Bollinger has been deemed ineligible for benefits, the benefits she has received constitute an overpayment that Ms. Bollinger must repay to Iowa Workforce Development. Ms. Bollinger is overpaid \$2,128.00.

DECISION:

The Agency representative's February 13, 2008, reference 01, decision is reversed. The claimant was discharged for misconduct. The claimant is disqualified for unemployment benefits until she has worked in and paid wages for insured work equal to ten times her weekly benefit allowance, provided she meets all other eligibility requirements. The employer's account will not be charged. The claimant is overpaid \$2,128.00.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/kjw