

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

MARI HICKEY
Claimant

APPEAL NO. 09A-UI-11641-BT

**ADMINISTRATIVE LAW JUDGE
DECISION**

THE BON-TON DEPARTMENT STORES INC
Employer

**Original Claim: 06/28/09
Claimant: Respondent (2/R)**

Iowa Code § 96.5(2)(a) - Discharge for Misconduct
Iowa Code § 96.3-7 - Overpayment

STATEMENT OF THE CASE:

The Bon-Ton Department Stores, Inc. (employer), doing business as Younkers, appealed an unemployment insurance decision dated August 7, 2009, reference 02, which held that Mari Hickey (claimant) was eligible for unemployment insurance benefits. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on September 14, 2009. The claimant participated in the hearing. The employer participated through Angela Van Dyke, Assistant Store Manager, and Casey Doser, Loss Prevention Manager. Employer's Exhibits One through Five and Claimant's Exhibits A and B were admitted into evidence. Based on the evidence, the arguments of the parties, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUE:

The issue is whether the employer discharged the claimant for work-related misconduct?

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and having considered all of the evidence in the record, finds that: The claimant was employed as a part-time sales associate from November 7, 2005 through May 1, 2009. She was discharged for multiple violations of the employer's price adjustment and merchandise return policy. The employer honors a price adjustment upon the customer's request if the merchandise was previously purchased at a higher regular price within seven days prior to the current sale. An original sales receipt indicating the date and price of the item is required. The employer accepts returns on merchandise purchased at its store. An original receipt is required for all refunds to be issued in full accordance with the original method of payment. Returns without a receipt must be credited to a PLCC card or issued an E-merchandise credit card.

The claimant was counseled on July 24, 2008 in what the employer calls a documented discussion. She had a price adjustment done on July 21, 2008 for an item she purchased on December 22, 2007. Price adjustments can only be done within seven days of the original

purchase. The claimant is required to follow the same policies as customers and the policy is on the back of each receipt. She was warned that further instances would result in additional disciplinary action, up to and including termination.

The claimant received a first corrective warning on August 21, 2008 for another price adjustment policy violation. The claimant did a price adjustment on August 18, 2008 for a jacket that was purchased on July 12, 2008. Although she did not specifically request the price adjustment, she accomplished the same objective by repurchasing the exact item only minutes after returning it. The employer stated in the warning, "This is the definition of a price adjustment."

The employer began an investigation into the claimant's actions after her co-workers alerted the employer of the claimant's suspicious activity. It was determined the claimant had done two additional price adjustments in violation of company policy. She purchased a white blanket on January 14, 2009 for \$19.26. She returned the item on April 4, 2009 for the same amount at 12:14 p.m. The claimant later repurchased the same white blanket later that day at 6:16 p.m. for the reduced price of \$12.84. A second tech item was purchased on February 3, 2009 in the amount of \$10.69. She returned the item on April 4, 2009 at 12:14 p.m. for the purchase price and later that day at 6:16 p.m. bought the same item at the lower price of \$4.28.

During the investigation, the loss prevention manager discovered the claimant had also purchased three house décor items in the Dubuque, Iowa store and returned them without her receipt for a larger amount in the Davenport, Iowa store. She purchased an item on April 8, 2009 for the amount of \$2.26 and returned it on April 18, 2009 for the amount of \$2.50. A second item was purchased on April 8, 2009 for \$9.28 and returned on April 18, 2009 for \$13.60. A third item was purchased on April 10, 2009 and returned on April 18, 2009 for \$20.30. The claimant's employee discount was not subtracted from the refund price. She handed the clerk her driver's license so the clerk issued an electronic gift card.

A meeting was held with the claimant, Assistant Store Manager Angela Van Dyke, and Loss Prevention Manager Mike Schaeffer on May 1, 2009. When asked about the price adjustments made on April 4, 2009, the claimant initially did not remember them but then recalled and said she was tired of looking at the items so returned them and only repurchased them on the same date at the lower price because her daughter requested she do so. The merchandise returned in the Davenport store on April 18, 2009 was returned without a receipt and for more money because the claimant said she left the receipt in her other purse. The claimant was suspended at the end of the meeting and subsequently discharged by telephone.

The claimant filed a claim for unemployment insurance benefits effective June 28, 2009 and has received benefits after the separation from employment.

REASONING AND CONCLUSIONS OF LAW:

The issue is whether the employer discharged the claimant for work-connected misconduct. A claimant is not qualified to receive unemployment insurance benefits if an employer has discharged the claimant for reasons constituting work-connected misconduct. Iowa Code § 96.5-2-a.

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.

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 to prove the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). The claimant was discharged on May 1, 2009 for multiple policy violations after being warned. She had received two previous warnings about price adjustment violations and then violated the policy again on April 4, 2009. She repurchased two items at a lower sales price six hours after she returned them for the higher purchase price paid several months earlier. Regardless of her intent, her actions were the exact repeat of what she had done on August 18, 2008, which resulted in her written warning on August 21, 2008.

Subsequent to that, the claimant returned three items without a receipt on April 18, 2009 and was paid more money than what she originally paid. She claims she did not know that she was given more money than what she paid for the items. However, the claimant never offered an explanation as to why she would have proceeded with the return when she reportedly had the actual receipts in her other purse. The employer has met its burden. The claimant's repeated policy violations show a willful or wanton disregard of the standard of behavior the employer has the right to expect from an employee, as well as an intentional and substantial disregard of the employer's interests and of the employee's duties and obligations to the employer. Work-connected misconduct as defined by the unemployment insurance law has been established in this case and benefits are denied.

Iowa Code § 96.3(7) provides that benefits must be recovered from a claimant who receives benefits and is later determined to be ineligible for benefits, even though the claimant acted in good faith and was not otherwise at fault. The overpayment recovery law was updated in 2008. See Iowa Code § 96.3(7)(b). Under the revised law, a claimant will not be required to repay an overpayment of benefits if all of the following factors are met. First, the prior award of benefits must have been made in connection with a decision regarding the claimant's separation from a particular employment. Second, the claimant must not have engaged in fraud or willful misrepresentation to obtain the benefits or in connection with the Agency's initial decision to award benefits. Third, the employer must not have participated at the initial fact-finding proceeding that resulted in the initial decision to award benefits. If Workforce Development determines there has been an overpayment of benefits, the employer will not be charged for the benefits, regardless of whether the claimant is required to repay the benefits.

Because the claimant has been deemed ineligible for benefits, any benefits the claimant has received could constitute an overpayment. Accordingly, the administrative law judge will remand the matter to the Claims Division for determination of whether there has been an overpayment, the amount of the overpayment, and whether the claimant will have to repay the benefits.

DECISION:

The unemployment insurance decision dated August 7, 2009, reference 02, is reversed. The claimant is not eligible to receive unemployment insurance benefits because she was discharged from work for misconduct. Benefits are withheld 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 matter is remanded to the Claims Section for investigation and determination of the overpayment issue.

Susan D. Ackerman
Administrative Law Judge

Decision Dated and Mailed

sda/kjw