IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

KELIN E SHOOP Claimant	**APPEAL NO: 15A-UI-02343-ET**
	ADMINISTRATIVE LAW JUDGE DECISION
KOHL'S DEPARTMENT STORES INC Employer	
	OC: 02/01/15 **Claimant: Appellant (2)**

Section 96.5-2-a – Discharge/Misconduct

STATEMENT OF THE CASE:

The claimant filed a timely appeal from the February 13, 2015, reference 01, decision that denied benefits. After due notice was issued, a hearing was held by telephone conference call before Administrative Law Judge Julie Elder on April 15, 2015. The claimant participated in the hearing. Tenille Borstad, District Loss Prevention Manager, participated in the hearing on behalf of the employer.

ISSUE:

The issue is whether the employer discharged the claimant for work-connected misconduct.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed as a full-time loss prevention supervisor for Kohl's Department Stores from August 9, 2002 to February 2, 2015. He was discharged for failing to follow the employer's no-pursuit of shoplifters' policy January 25, 2015.

The employer's no-pursuit policy is in place to protect employees and customers. Loss prevention associates are not allowed to pursue a shoplifter who flees after loss prevention makes its initial approach. The loss prevention associate may engage the shoplifter within 100 feet of the store's entrance but not beyond that point. The loss prevention associate is then expected to call local police officers or District Loss Prevention Manager Tenille Borstad to continue the investigation, mostly relying on the employer's video surveillance of the store and parking lot where the camera can often pick up license plate numbers if the loss prevention employee is in the office and can zoom in on the plates.

On January 25, 2015, the claimant was watching the cameras from the loss prevention office and received a call from an associate about two known shoplifters who had Levi jeans and Nike shoes in their possession. The claimant watched them and notified the manager on duty, Karen Dittemore, of the situation. The claimant then contacted the West Des Moines Police Department to inform it he would be stopping the two shoplifters. The dispatcher stated they would send officers to the scene and instructed the claimant to let the police know when the

shoplifters left the store. As the shoplifters exited the store the claimant left the office and notified Ms. Dittemore by radio that he was going to make a stop of the shoplifters, and the claimant and Ms. Dittemore both came out of the store from different doors. The claimant approached the shoplifters and started to identify himself but they began running toward a car in the parking lot. The claimant told Ms. Dittemore he was getting their license plate number and began quickly walking toward the car the shoplifters were running toward. While going toward the car the claimant called the West Des Moines Police Department back to notify the police which way they were going and to describe the car. The claimant testified he cannot run due to a bad ankle. The employer maintains the video shows the claimant running through the parking lot. The claimant got halfway through the parking lot, near the car he thought they were running to, and the shoplifters started running past the car and through the parking lot. One went toward a Chick Fil A restaurant that borders the back of the employer's parking lot and the other ran toward Mills Civic Parkway. The shoplifter that went to Chick Fil A tried to get in but the restaurant was closed because it was Sunday. The claimant thought he saw that shoplifter put the stolen merchandise in the trash at the restaurant before running toward his friend who had crossed Mills Civic Parkway. The claimant had remained on the phone with the police dispatcher and was told to keep his eyes on the shoplifters as long as he could and that the police had one of the shoplifters in view on a traffic camera on Mills Civic Parkway. After the shoplifter who stopped at Chick Fil A crossed Mills Civic the claimant told Ms. Dittemore that he believed that shoplifter had dropped some of the stolen merchandise by the restaurant and he was going to check. The claimant walked over to the trash can but there was no merchandise there. The police dispatcher told the claimant they had officers in the area and he returned to the store.

The claimant sent Ms. Borstad an email January 25, 2015, stating "Remember the Levi/Nike group that was hitting me all spring? Well after an associate's tip, short jog, one is in the back of a cop car. The other was last seen running down the street with two cop cars behind him. Both had Levis and Converse shoes." Ms. Borstad told the claimant he did a good job on three occasions after he sent the email but after considering the claimant's use of the words "short jog" Ms. Borstad began a further investigation into the incident because she determined "short job" may have meant pursuit of the shoplifters. Consequently, she viewed the video and submitted her findings to the corporate human resources department.

The claimant received one written warning, in the last three to five years, for a "non-productive incident" where he question a subject regarding merchandise that was not stolen, was already paid for, or not in the subject's possession at the time of the questioning.

The employer's non-pursuit policy states that a violation of that policy "may result in disciplinary action which may include termination." The corporate human resources department found the claimant's actions were a safety risk because it felt the claimant chased the juvenile shoplifters into a busy street and his actions were not in the best interest of the employer because he disregarded his safety as well as that of the shoplifters. Consequently, the employer made the decision to terminate the claimant's employment effective February 2, 2015.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment for no disqualifying reason.

Iowa Code § 96.5-2-a provides:

> An individual shall be disqualified for benefits:
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> 2. Discharge for misconduct. If the department finds that the individual has been discharged for misconduct in connection with the individual's employment:
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> 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.
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> (1) Definition.
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> 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.
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> 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 employer has the burden of proving disqualifying misconduct. Cosper v. Iowa Department of Job Service, 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. 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 Board, 616 N.W.2d 661, 665 (Iowa 2000).

The claimant was notified two shoplifters were preparing to leave the store January 25, 2015. As a loss prevention supervisor, it was the claimant's responsibility to try to prevent shoplifters from leaving the premises, including the parking lot, with the employer's merchandise. The claimant pursued the two shoplifters beyond the 100 feet allowed outside the store after he initially approached them outside the entrance to the store and they ran toward what the claimant believed was their vehicle. Instead of going to a vehicle, however, the shoplifters ran, one across Mills Civic Parkway and the other to Chick Fil-A, which was closed, and then across

Mills Civic Parkway, a heavily travelled street. The claimant followed them on foot to the end of the parking lot, while talking to police who instructed him to "keep his eyes on them." After both shoplifters crossed Mills Civic Parkway, the claimant radioed Ms. Dittemore he was going to Chick Fil-A to see if the suspect who tried to enter the restaurant had dumped the employer's merchandise in the trash.

While the claimant denies that he ran after the shoplifters and stated he cannot run because he has a bad ankle, the employer's witness testified the video showed the claimant running until the video stopped near where the employer's property ends. The claimant was aware he was not to pursue a shoplifter beyond 100 feet and could only verbally engage them within 100 feet after the initial approach, he estimated the depth of the parking lot to be between 100 to 200 feet. The employer estimated it to be 500 feet before the video lost sight of the area beyond the employer's property. If a party has the power to produce more explicit and direct evidence than it chooses to do, it may be fairly inferred that other evidence would lay open deficiencies in that party's case. Crosser v. Iowa Department of Public Safety, 240 N.W.2d 682 (Iowa 1976). In this case, the only other first-hand witness beside the claimant was Ms. Dittemore, the assistant store manager who came out the other exit door when the claimant came out of the first set of doors. Ms. Dittemore could have testified about whether the claimant was running after the shoplifters after his initial approach, how far he ran after the shoplifters if he was running, and how deep the parking lot is. Instead, the employer only presented the testimony of a witness who saw the video, without submitting the video as evidence, and the claimant disputes what the employer's witness stated occurred on the video.

Even if the claimant was actively pursuing the repeat shoplifters after his initial approach beyond the distance allowed by the employer's policy, this was at worst an isolated incident of poor judgment on the part of the claimant as he had not received any warnings for any policy violations for several years. Additionally, the evidence provided by the employer does not establish disqualifying job misconduct. Consequently, the administrative law judge concludes the claimant's actions do not rise to the level of disqualifying job misconduct as that term is defined by Iowa law. Therefore, benefits are allowed.

DECISION:

The February 13, 2015, reference 01, decision is reversed. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided the claimant is otherwise eligible.

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Julie Elder
Administrative Law Judge

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Decision Dated and Mailed

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