

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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

**NICOLETTE DEAN**  
Claimant

**APPEAL NO. 18A-UI-01654-S1-T**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**VON MAUR INC**  
Employer

**OC: 01/07/18**  
**Claimant: Respondent (1)**

Section 96.5-2-a – Discharge for Misconduct  
Section 96.3-7 – Overpayment

**STATEMENT OF THE CASE:**

Von Maur (employer) appealed a representative's January 25, 2018, decision (reference 01) that concluded Nicolette Dean (claimant) was eligible to receive unemployment insurance benefits. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was scheduled for March 2, 2018. The claimant did not provide a telephone number for the hearing and, therefore, did not participate. The employer participated by Brooke White, Floor Manager. Exhibit D-1 was received into evidence.

**ISSUE:**

The issue is whether the claimant was separated from employment for any disqualifying reason.

**FINDINGS OF FACT:**

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds that: The claimant was hired on October 2, 2017, as a part-time sales associate in the women's shoe department. She signed that she read the employer's handbook on October 4, 2017. The handbook states that a selling associate who has accumulated seven incidents of tardiness "[o]n or before the end of the employee's third full CSIP" (Customer Service Improvement Program) will be terminated. The employer did not issue the claimant any warnings during her employment.

The claimant's first CSIP ended on November 4, 2017. She was tardy on October 15 and 18, 2017. Her second CSIP ended on December 2, 2017. She was tardy on November 15, 20, 25, and 27, 2017. The employer knew she had six incidents of tardiness on December 2, 2017. Her third CSIP ended on December 30, 2017, but the employer instructed managers not to do the reports near the holidays. The employer wanted associates focused on customers. She was tardy on December 3, 4, 7, and 8, 2017. The claimant was never tardy again. She continued to work through January 6, 2018.

The claimant filed for unemployment insurance benefits with an effective date of January 7, 2018. The employer participated at the fact finding interview on January 24, 2018, by providing

documentation. The fact finder tried three times but an employee with firsthand information could not be contacted for rebuttal.

### **REASONING AND CONCLUSIONS OF LAW:**

For the reasons that follow the administrative law judge concludes the claimant was not discharged for misconduct.

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).

Iowa Admin. Code r.871-24.32(8) provides:

(8) Past acts of misconduct. While past acts and warnings can be used to determine the magnitude of a current act of misconduct, a discharge for misconduct cannot be based on such past act or acts. The termination of employment must be based on a current act.

The employer has the burden of proof in establishing disqualifying job misconduct. *Cosper v. Iowa Department of Job Service*, 321 N.W.2d 6 (Iowa 1982). The employer must establish not only misconduct but that there was a final incident of misconduct which precipitated the discharge. The last incident provided by the employer occurred on December 8, 2017. The

claimant was not discharged until January 6, 2018. The handbook seems to indicate that the employer knows the number of absences without running the CSIP. The employer should have known that the claimant's seventh through tenth occurrences happened early in December 2017.

Knowing the claimant was near termination level for tardiness, the employer did nothing to warn her. Inasmuch as the employer had not previously warned the claimant about any of the issues leading to the separation, it has not met the burden of proof to establish the claimant acted deliberately or negligently in violation of company policy, procedure, or prior warning. If an employer expects an employee to conform to certain expectations or face discharge, appropriate (preferably written), detailed, and reasonable notice should be given. The employer has failed to provide any evidence of willful or deliberate misconduct which was the final incident leading to the discharge and disqualification may not be imposed. Benefits are allowed, provided the claimant is otherwise eligible.

**DECISION:**

The representative's January 25, 2018, decision (reference 01) is affirmed. The employer has not met its burden of proof to establish job related misconduct. Benefits are allowed, provided the claimant is otherwise eligible.

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Beth A. Scheetz  
Administrative Law Judge

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Decision Dated and Mailed

bas/rvs