

**IOWA WORKFORCE DEVELOPMENT  
Unemployment Insurance Appeals Section  
1000 East Grand—Des Moines, Iowa 50319  
DECISION OF THE ADMINISTRATIVE LAW JUDGE  
68-0157 (7-97) – 3091078 - EI**

**BONNIE THORESON  
255 PRAIRIE VIEW DR #11113  
WEST DES MOINES IA 50266**

**PARISIAN VIRGINIA LLC  
c/o FRICK UC EXPRESS  
PO BOX 283  
ST LOUIS MO 63166-0283**

**Appeal Number: 04A-UI-03601-ET  
OC: 02-29-04 R: 02  
Claimant: Respondent (1)**

**This Decision Shall Become Final**, unless within fifteen (15) days from the date below, you or any interested party appeal to the Employment Appeal Board by submitting either a signed letter or a signed written Notice of Appeal, directly to the **Employment Appeal Board, 4<sup>th</sup> Floor—Lucas Building, Des Moines, Iowa 50319.**

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

STATE CLEARLY

1. The name, address and social security number of the claimant.
2. A reference to the decision from which the appeal is taken.
3. That an appeal from such decision is being made and such appeal is signed.
4. The grounds upon which such appeal is based.

YOU MAY REPRESENT yourself in this appeal or you may obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds. It is important that you file your claim as directed, while this appeal is pending, to protect your continuing right to benefits.

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(Administrative Law Judge)

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(Decision Dated & Mailed)

Section 96.5-2-a – Discharge/Misconduct

STATEMENT OF THE CASE:

The employer filed a timely appeal from the March 23, 2004, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held by telephone conference call before Administrative Law Judge Julie Elder on May 6, 2004. The claimant participated in the hearing. Carla Severson, Regional Director of Human Resources, Jackie Carroll, Regional Loss Prevention and Investigation Manager and Beverly Lamb, Employer's Representative, participated in the hearing on behalf of the employer.

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 store manager for Younkers from October 21, 1996 to February 20, 2004. On December 2003, the claimant used approximately \$300.00 worth of merchandise for a raffle held for a long-term employee who needed a lung transplant. The claimant forgot to make sure it was marked out of stock and no accounting was done on the merchandise. On December 4, 2003, the claimant marked \$534.00 worth of merchandise out of stock to use as employee Christmas gifts at the Christmas party. On December 17, 2003, the claimant took two Intimate Essential flannel pajama bottoms, marked at \$9.98 each, off the sales floor for herself and another manager because they worked an event and other people that worked the event received a free pair of pajamas. Usually merchandise that was written as "out of stock" was damaged, perishable, dirty or a return that had obviously been used, but the merchandise the claimant used was good and she marked it as out of stock. An employee reported the claimant's actions to the employer on a tip hotline January 6, 2004. The employer investigated the incidents and interviewed the claimant February 18, 2004. The claimant admitted she should have obtained authorization but stated she did not intend to do anything wrong. She was discharged February 20, 2004.

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 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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. Huntoon v. Iowa Department of Job Service, 275 N.W.2d 445, 448 (Iowa 1979).

The employer has the burden of proving disqualifying job misconduct. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). While the claimant may have made some errors in judgment, she credibly testified that many of the situations cited by the employer had traditionally been done in the past and with the exception of the pajama bottoms she did not profit from her actions. The claimant further testified that these incidents helped build employee morale and were not intended to violate the employer's policy. The claimant was discharged February 20, 2004, for three incidents that occurred in December 2003. Although the employer was not aware of the incidents until January 6, 2004, it failed to take action for six weeks after initially receiving the information. 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. 871 IAC 24.32(8). Consequently, the administrative law judge concludes the employer has not established a current act of misconduct. Benefits are allowed.

DECISION:

The March 23, 2004, reference 01, decision is affirmed. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided the claimant is otherwise eligible.

je/kjf