

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

RACHEL M KIRBY
Claimant

THEISENS INC
Employer

APPEAL 16A-UI-02641-NM-T
**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 02/07/16
Claimant: Appellant (2)

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Admin. Code r. 871-24.32(1)a – Discharge for Misconduct

STATEMENT OF THE CASE:

The claimant filed an appeal from the February 24, 2016 (reference 01) unemployment insurance decision that denied benefits based upon her discharge for misconduct. The parties were properly notified of the hearing. A telephone hearing was held on March 25, 2016. The claimant, Rachel Kirby, participated and testified. The employer, Theisens, Inc., participated through store manager Charlie Isaacs and human resource manager Heidi Bergfeld. Employer's Exhibits One through Six were received into evidence.

ISSUE:

Was the claimant discharged for disqualifying job-related misconduct?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed full time as a sales associate from June 24, 2014 until this employment ended on February 5, 2016; when she was discharged.

The employer has a policy in place which allows employees up to a 20 percent discount on purchases (Employer's Exhibit One). The actual discount rate varies depending on the profit margin for the item being purchased. This policy does not address discounts given for clearance items. Generally, there is no discount for products already priced at cost.

On January 30, 2016, floor supervisor, Kris Ward, noticed claimant made a large purchase. Ward felt that something did not seem right and investigated the purchase. The investigation showed that no employee number was entered for the purchase, so security footage was reviewed. The footage confirmed that claimant was the individual making the large purchase. When the purchase was reviewed, it was found that several clothing items were entered at 75 percent clearance (Employer's Exhibit Two). The maximum allowable clearance for clothing items is 50 percent, as reducing those lower puts the purchase price below cost.

On February 1, 2016, a meeting was held with claimant where she admitted to making the purchases and applying the discounts (Employer's Exhibit Four). The registers had a function where the cashiers could apply discounts at either 25, 50, or 75 percent for clearance items, depending on how discounts were marked. Claimant informed management that the items in question were marked at 50 percent clearance. Claimant believed she was allowed to mark the items at 75 percent clearance to account for her employee discount. Claimant testified that employees had been told in several meetings by members of management that they could apply an additional 25 percent off clearance items to account for their employee discount, since the registers did not automatically apply the discount for clearance items.

Initially, Isaacs testified that employees do not get an additional discount for clearance items marked more than 20 percent off. Later in his testimony Isaacs stated that claimant's recollection of the policy regarding clearance items was correct but only if applying the extra discount did not reduce the item to a price below cost. If the price was reduced below cost, manager approval was needed to process the sale. Isaacs testified sales associates are not aware of what the cost for individual product are but that clothing is never to be discounted below 50 percent. Isaacs testified the policy regarding clothing in common knowledge but could not specifically state how employees are made aware of this policy, other than noting he believed it was common knowledge. Claimant denied being aware of this policy until the time of her termination and believed she had applied the appropriate discount, since the clothing she was purchasing was on clearance up to 50 percent off.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment due to job-related misconduct. Benefits are denied.

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.

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).

The employer has the burden of proof in establishing disqualifying job misconduct. *Cosper v. Iowa Dep't of Job Serv.*, 321 N.W.2d 6 (Iowa 1982). The issue is not whether the employer made a correct decision in separating claimant, but whether the claimant is entitled to unemployment insurance benefits. *Infante v. Iowa Dep't of Job Serv.*, 364 N.W.2d 262 (Iowa Ct. App. 1984). Misconduct must be "substantial" to warrant a denial of job insurance benefits. *Newman v. Iowa Dep't of Job Serv.*, 351 N.W.2d 806 (Iowa Ct. App. 1984). Negligence does not constitute misconduct unless recurrent in nature; a single act is not disqualifying unless indicative of a deliberate disregard of the employer's interests. *Henry v. Iowa Dep't of Job Serv.*, 391 N.W.2d 731 (Iowa Ct. App. 1986).

The claimant has argued she did not knowingly violate the employer's policy as she misunderstood the policy regarding employee discounts for clearance items and specifically, clothing. It is the duty of the administrative law judge as the trier of fact in this case, to determine the credibility of witnesses, weigh the evidence and decide the facts in issue. *Arndt v. City of LeClaire*, 728 N.W.2d 389, 394-395 (Iowa 2007). The administrative law judge may believe all, part or none of any witness's testimony. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996). In assessing the credibility of witnesses, the administrative law judge should consider the evidence using his or her own observations, common sense and experience. *Id.* In determining the facts, and deciding what testimony to believe, the fact finder may consider the following factors: whether the testimony is reasonable and consistent with other believable evidence; whether a witness has made inconsistent statements; the witness's appearance, conduct, age, intelligence, memory and knowledge of the facts; and the witness's interest in the trial, their motive, candor, bias and prejudice. *Id.*

After assessing the credibility of the witnesses who testified during the hearing, considering the applicable factors listed above, and using her own common sense and experience, the administrative law judge finds the claimant credible. During his testimony, Isaacs first claimed that employees do not get an additional discount on clearance items. Isaacs later testified that employees did get a discount on clearance items and that the discount was entered through the clearance function on the register in 25 percent increments. Isaacs also testified that employees were not allowed to reduce the price of items below cost, but admitted sales associates are not made aware of the cost of items.

Applying an unauthorized discount is theft from the employer. Theft from an employer is generally disqualifying misconduct. *Ringland Johnson, Inc. v. Hunecke*, 585 N.W.2d 269, 272 (Iowa 1998). In *Ringland*, the Court found a single attempted theft to be misconduct as a matter of law. In this case, the claimant did not knowingly or deliberately disregard the employee discount policy. Claimant believed she was following the policy as it had been explained to her by management. When testifying about the policy during the hearing, Isaac was contradictory to his own testimony, making it entirely believable that claimant misunderstood the policy. The employer has not shown that claimant deliberately violated their policy. Inasmuch as employer has not met the burden of proof to establish that claimant acted deliberately or with recurrent negligence in violation of company policy, procedure, or prior warning, benefits are allowed.

DECISION:

The February 24, 2016 (reference 01) unemployment insurance decision is reversed. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided she is otherwise eligible. Any benefits claimed and withheld on this basis shall be paid.

Nicole Merrill
Administrative Law Judge

Decision Dated and Mailed

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