

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

KYLA J KIMREY
Claimant

APPEAL NO. 09A-UI-01609-S2T

**ADMINISTRATIVE LAW JUDGE
DECISION**

TARGET CORPORATION
Employer

OC: 11/23/08 R: 02
Claimant: Respondent (1)

Section 96.5-2-a – Discharge for Misconduct

STATEMENT OF THE CASE:

Target Corporation (employer) appealed a representative's January 21, 2009 decision (reference 01) that concluded Kyla Kimrey (claimant) was discharged and there was no evidence of willful or deliberate misconduct. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was scheduled for February 27, 2009. The claimant participated personally. The employer participated by Ali Batenhorst, Executive Team Leader of Human Resources, and Brooke Richardson, Executive Team Lead of Asset Protection. The Employer offered and Exhibit One was received into evidence.

ISSUE:

The issue is whether the claimant was discharged for misconduct.

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 September 4, 2002, as a full-time backroom team member. The claimant signed for receipt of the "Welcome to Team Target" handbook and the "Business Conduct Guide" on September 4, 2002. The claimant understood she was not to purchase or ring up a street dated item until the opening of the store at 8:00 a.m. unless previously authorized by a member of management. The claimant received one written warning during her employment for her attitude to co-workers.

On November 13, 2008, the game "World of War Craft" was to be released for sale at midnight. A co-worker and friend called the claimant as she drove into the employer's parking lot and discussed the release of the game. The claimant proceeded to work in the backroom. The co-worker arrived in the backroom at approximately 7:40 a.m. The claimant walked and talked with the co-worker as he went to electronics, took the game off the shelf and went to a checkout lane. No cashiers were available so the claimant went to the register. The Executive Team Lead of Asset Protection was standing nearby while the claimant rang up the sale. The claimant thought the employer must have allowed pre-opening sales. Two other sales had been rung up for the game by other cashiers. No prompt appeared on her register about selling the game at 7:43 a.m. prior to opening. This was confirmation to the claimant that the ban had

been lifted. The Executive Team Lead of Asset Protection told her she did a good job and the co-worker left with the game. At 8:00 a.m. when the store opened, no "World of War Craft" was available for sale because employees purchased all games prior to store opening.

On November 20, 2008, the employer terminated the claimant for violation of "Team Member Purchase Guidelines" and aiding and abetting a co-workers' violations. All purchasers of the game were terminated. The claimant was the only one of three cashiers that was terminated.

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:

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 of proof in establishing disqualifying job misconduct. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). Misconduct serious enough to warrant discharge is not necessarily serious enough to warrant a denial of job insurance benefits. Such misconduct must be "substantial." Newman v. Iowa Department of Job Service, 351 N.W.2d 806 (Iowa App. 1984). Repeated failure to follow an employer's instructions in the performance of duties is misconduct. Gilliam v. Atlantic Bottling Company, 453 N.W.2d 230 (Iowa App. 1990). The employer did not provide sufficient evidence of job-related misconduct that was different from the other two cashiers who were not terminated. The claimant could not

follow the employer's instructions if the instructions were contradictory. The claimant knew not to sell the item unless the ban had been lifted. The employer lifted the ban in the register system. The claimant sold the item just like the other two cashiers. The employer did not meet its burden of proof to show misconduct. Benefits are allowed.

DECISION:

The representative's January 21, 2009 decision (reference 01) is affirmed. The employer has not met its proof to establish job related misconduct. Benefits are allowed.

Beth A. Scheetz
Administrative Law Judge

Decision Dated and Mailed

bas/pjs