

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

VICTORIA E GRANDINETTI
Claimant

APPEAL NO. 10A-UI-12836-MT

**ADMINISTRATIVE LAW JUDGE
DECISION**

A E OUTFITTERS RETAIL CO
Employer

OC: 07/11/10
Claimant: Respondent (1)

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

STATEMENT OF THE CASE:

Employer filed an appeal from a decision of a representative dated September 2, 2010, reference 01, which held claimant eligible for unemployment insurance benefits. After due notice, a telephone conference hearing was scheduled for and held on October 14, 2010. Claimant participated personally. Employer participated by Jonathan Foreman, Attorney at Law with witnesses Theresa Carrillo, District Manager and Susan Egr, District Manager. Exhibits A and One through Five were admitted into evidence.

ISSUES:

The issues in this matter are whether claimant was discharged for misconduct and is overpaid unemployment insurance benefits.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds: Claimant last worked for the employer July 8, 2010.

Employer discharged claimant on July 8, 2010 because claimant attempted an invalid return of product on June 21, 2010. Claimant returned three items for which receipts could be found. Four other items were not allowed for return. As an employee claimant received a 40 percent discount on merchandise. Claimant then gave the four items to a non employee friend. The friend then returned the items for a full refund. Claimant did not know that her friend returned the items. The customer, non employee, received full credit for the items. The first-hand witness to this event was not made available by employer. The employer took a loss on the items by a return from a non employee. Claimant was aware that she should not allow someone else to return her items because of the employee discount. Claimant did not tell the friend to return the times. Claimant was unaware of the return.

Claimant did not receive a final warning on or about June 2, 2010. Employer had no written proof that claimant was warned. The document memorializing the warning was not signed. Claimant had no prior warnings.

Employer discharged claimant for a series of events. Employer was aware of all of these events days and weeks prior to the final incident of June 21, 2010. Employer allowed claimant to continue working notwithstanding full knowledge of other potentially dischargeable events. Claimant worked about 16 days after employer was aware of the final incident. Claimant could have been discharged for any one of the prior policy violations.

REASONING AND CONCLUSIONS OF LAW:

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.

871 IAC 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.

871 IAC 24.32(4) provides:

(4) Report required. The claimant's statement and the employer's statement must give detailed facts as to the specific reason for the claimant's discharge. Allegations of misconduct or dishonesty without additional evidence shall not be sufficient to result in

disqualification. If the employer is unwilling to furnish available evidence to corroborate the allegation, misconduct cannot be established. In cases where a suspension or disciplinary layoff exists, the claimant is considered as discharged, and the issue of misconduct shall be resolved.

The gravity of the incident, number of policy violations and prior warnings are factors considered when analyzing misconduct. The lack of a current warning may detract from a finding of an intentional policy violation.

The administrative law judge holds that the evidence has not established that claimant was discharged for an act of misconduct when claimant allegedly violated the employer's policy concerning product return. Claimant was not warned concerning this policy.

The last incident, which brought about the discharge fails to constitute misconduct because claimant did not violate employer's return policy thereby causing a loss to the company. Claimant was unaware that her friend returned a gift for store credit. Claimant cannot be held liable for the acts of others without claimant's knowledge or consent. The lack of a prior warning also detracts from a finding of intentional conduct. Even if employer had established a policy violation for improper returns, employer's case would fail because the incident is too stale to constitute a current act of misconduct. Employer was aware of the potential infraction yet allowed claimant to work about 16 days before discipline was invoked. The incidents that happened prior to June 21 are even staler than the final act. A disqualifying act of misconduct must be based on a current event. Where employer issued a prior warning for the event, that incident can no longer be considered a current act. Here, employer sat on its rights far too long to establish a current event for which misconduct can be held. The discharge of an employee and the disqualification for unemployment benefits has different criteria. Employer certainly had many grounds for which to discharge claimant. Employer did not establish the statutory criteria for disqualification of unemployment benefits. Therefore, claimant was not discharged for an act of misconduct and as such, is not disqualified for the receipt of unemployment insurance benefits.

DECISION:

The decision of the representative dated September 2, 2010, reference 01, is affirmed. Unemployment insurance benefits shall be allowed.

Marlon Mormann
Administrative Law Judge

Decision Dated and Mailed

mdm/css