

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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**JENNIFER N TOPHAM**  
Claimant

**DM SERVICES INC**  
Employer

**APPEAL 18A-UI-00413-NM-T**  
**ADMINISTRATIVE LAW JUDGE**  
**DECISION**

**OC: 12/17/17**  
**Claimant: Appellant (2)**

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Iowa Code § 96.5(2)a – Discharge for Misconduct

**STATEMENT OF THE CASE:**

The claimant filed an appeal from the January 3, 2018, (reference 0<sup>1</sup>) unemployment insurance decision that denied benefits based on her discharge for conduct not in the best interest of the employer. The parties were properly notified of the hearing. A telephone hearing was held on February 2, 2018. The claimant participated and testified. The employer participated through Assistant Human Resource Manager Rachael Leonard.

**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 credit specialist from October 11, 2006, until this employment ended on December 19, 2017, when she was discharged.

On December 13, 2017, the employer received a report that several employees, including claimant, had been observed taking company merchandise out the back door of the warehouse. A review of surveillance footage from December 13 and the week prior confirmed the report. On December 15, 2017, a meeting was held with the claimant. Claimant admitted to taking the items, but explained she had intended to pay for them. Another employee, who had been employed the longest at the facility and directed the work of claimant and several others, had told the other employees that if they wanted to purchase any merchandise it was okay to take it home and they pay for it any time within the next two weeks, or 30 days at the latest. Leonard testified this is not the employer's policy and it expects people to pay for merchandise at the time it is removed from the warehouse. The employer did not have any written policies, so the claimant assumed this was acceptable to the employer based on what she had been told by the senior employee who oversaw her work. Because the employer could not confirm whether the claimant in fact did intend to pay for the merchandise, it separated her from employment.

Leonard testified claimant was able to produce a receipt for a previous purchase after she was separated from employment. Claimant testified she was not able to produce additional receipts because the employer had a no return policy and she therefore did not keep her receipts. Claimant further testified she always tracked what she had purchased and paid for all the items within two weeks to 30 days, as directed.

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

For the reasons that follow, the administrative law judge concludes 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 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).

In an at-will employment environment an employer may discharge an employee for any number of reasons or no reason at all if it is not contrary to public policy, but if it fails to meet its burden of proof to establish job related misconduct as the reason for the separation, it incurs potential liability for unemployment insurance benefits related to that separation. A determination as to whether an employee’s act is misconduct does not rest solely on the interpretation or application of the employer’s policy or rule. A violation is not necessarily disqualifying misconduct even if the employer was fully within its rights to impose discipline up to or including discharge for the incident under its policy.

The claimant was discharged after the employer learned she had left with company merchandise prior to paying for it. Claimant provided credible testimony that she intended to pay for the merchandise and believed it was acceptable to the employer to take the merchandise and then pay for it at a later date. While such a practice may not be typical, the claimant’s was not unreasonable in assuming the information she was given was correct, given that the employer had no written policies and the directive came from a long-term employee who was responsible for overseeing her work. Claimant’s conduct was based on a good-faith, albeit mistaken, belief regarding the employer’s policy on purchasing company merchandise.

The conduct for which claimant was discharged was merely an isolated incident of poor judgment. An employee is entitled to fair warning that the employer will no longer tolerate certain performance and conduct. Without fair warning, an employee has no reasonable way of knowing that there are changes that need be made in order to preserve the employment. If an employer expects an employee to conform to certain expectations or face discharge, appropriate (preferably written), detailed, and reasonable notice should be given. Training or general notice to staff about a policy is not considered a disciplinary warning. Inasmuch as employer had not previously warned claimant about the issue leading to the separation, it 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.

**DECISION:**

The January 3, 2018, (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.

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Nicole Merrill  
Administrative Law Judge

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Decision Dated and Mailed

nm/rvs