

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**HUNTER B COOK**  
Claimant

**APPEAL NO. 07A-UI-04224-JTT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**SCHULTZE, RICHARD M ET AL**  
**BEST BUY STORES LP**  
Employer

**OC: 04/01/07 R: 04**  
**Claimant: Respondent (2)**

Iowa Code section 96.5(2)(a) – Discharge for Misconduct  
Iowa Code section 96.5(2)(b) - Gross Misconduct  
Iowa Code section 96.3(7) - Overpayment

**STATEMENT OF THE CASE:**

Best Buy filed a timely appeal from the April 18, 2007, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on May 10, 2007. Claimant Hunter Cook did not respond to the hearing notice instructions to provide a telephone number for the hearing and did not participate. Product Process Manager Jamie Fah represented the employer. The administrative law judge took official notice of the Agency's record of benefits disbursed to the claimant, which records indicate that no benefits have been disbursed to the claimant. Employers Exhibit One was received into evidence.

**ISSUES:**

Whether the claimant was discharged for misconduct in connection with the employment that disqualifies him for unemployment insurance benefits.  
Whether the claimant was discharged for gross misconduct.  
Whether the claimant has been overpaid benefits.

**FINDINGS OF FACT:**

Having reviewed all of the evidence in the record, the administrative law judge finds: Hunter Cook was employed by Best Buy as a full-time Inventory Specialist from October 3, 2006 until February 18, 2007, when Product Process Manager Jamie Fah suspended him for theft. The employer subsequently discharged Mr. Cook on March 6, 2007. On February 15, 2007, Mr. Cook removed six iPods from a freight shipment. Mr. Cook removed three iPods from their packaging and concealed the packaging under a storage shelf in the employer's warehouse. Mr. Cook then removed these three iPods from the employer's property without paying for them and with the intent to permanently deprive the employer of the items. Each iPod was valued at \$150.00. The total value of the items removed from the employer's property was \$450.00. Mr. Cook concealed the other three iPods in the employer's warehouse in preparation for removing those items from the employer's premises without paying for them and with the intent to permanently deprive the employer of the items. The total value of the concealed items was

\$450.00. On February 16, an employee was sweeping under a low-lying shelf in the employer's warehouse and discovered the discarded iPod packaging and the three additional iPods Mr. Cook had concealed. This employee immediately reported the matter to the store management. On February 18, the employer interviewed Mr. Cook. Mr. Cook admitted to removing the three iPods from the store without paying for them and to concealing the additional three iPods. Mr. Cook told the employer that he had sold the three iPods he had removed from the store. Mr. Cook provided a written statement in which he admitted removing the three iPods from the store. The employer summoned law enforcement, who arrested Mr. Cook. The employer told Mr. Cook that he was suspended pending management review of the matter and probable termination of the employment. On March 6, the employer's human resources department formally discharged Mr. Cook from the employment.

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

Disciplinary suspensions are treated as discharges for purposes of determining eligibility for unemployment insurance benefits. See 871 IAC 24.32(4).

Iowa Code section 96.5(2) provides as follows:

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.
  - b. Provided further, if gross misconduct is established, the department shall cancel the individual's wage credits earned, prior to the date of discharge, from all employers.
  - c. Gross misconduct is deemed to have occurred after a claimant loses employment as a result of an act constituting an indictable offense in connection with the claimant's employment, provided the claimant is duly convicted thereof or has signed a statement admitting the commission of such an act. Determinations regarding a benefit claim may be redetermined within five years from the effective date of the claim. Any benefits paid to a claimant prior to a determination that the claimant has lost employment as a result of such act shall not be considered to have been accepted by the claimant in good faith.

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).

Iowa Workforce Development rule 871 IAC 24.32(3) provides as follows.

24.32(3) Gross misconduct.

a. For the purposes of these rules gross misconduct shall be defined as misconduct involving an indictable offense in connection with the claimant's employment, provided that such claimant is duly convicted thereof or has signed a statement admitting that such claimant has committed such act.

b. An indictable offense means a common law or statutory offense presented on indictment or on county attorney's information, and includes all felonies and all indictable misdemeanors punishable by a fine of more than \$500 or by imprisonment in the county jail for more than 30 days.

The employer has the burden of proof in this matter. See Iowa Code section 96.6(2). Misconduct must be substantial in order to justify a denial of unemployment benefits. Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of unemployment benefits. See Lee v. Employment Appeal Board, 616 N.W.2d 661 (Iowa 2000). The focus is on deliberate, intentional, or culpable acts by the employee. See Gimbel v. Employment Appeal Board, 489 N.W.2d 36, 39 (Iowa Ct. App. 1992).

While past acts and warnings can be used to determine the magnitude of the current act of misconduct, a discharge for misconduct cannot be based on such past act(s). The termination of employment must be based on a current act. See 871 IAC 24.32(8). In determining whether the conduct that prompted the discharge constituted a "current act," the administrative law judge considers the date on which the conduct came to the attention of the employer and the date on which the employer notified the claimant that the conduct subjected the claimant to possible discharge. See also Greene v. EAB, 426 N.W.2d 659, 662 (Iowa App. 1988).

Iowa Code section 714.1(1) and (2) provide as follows:

714.1 Theft defined.

A person commits theft when the person does any of the following:

1. Takes possession or control of the property of another, or property in the possession of another, with the intent to deprive the other thereof.
2. Misappropriates property which the person has in trust, or property of another which the person has in the person's possession or control, whether such possession or control is lawful or unlawful, by using or disposing of it in a manner which is inconsistent with or a denial of the trust or of the owner's rights in such property, or conceals found property, or appropriates such property to the person's own use, when the owner of such property is known to the person.

Iowa Code section 714.2 (3) and (4) provide As follows:

3. The theft of property exceeding five hundred dollars but not exceeding one thousand dollars in value, or the theft of any property not exceeding five hundred dollars in value by one who has before been twice convicted of theft, is theft in the third degree. Theft in the third degree is an aggravated misdemeanor.

4. The theft of property exceeding two hundred dollars in value but not exceeding five hundred dollars in value is theft in the fourth degree. Theft in the fourth degree is a serious misdemeanor.

The fact that a person has concealed unpurchased property of a store or other mercantile establishment, either on the premises or outside the premises, is material evidence of intent to deprive the owner, and if the person conceals or causes to be concealed unpurchased property among the belongings of another, the finding of the concealed property is also material evidence of intent to deprive on the part of the person concealing the goods. See Iowa Code section 714.5.

The penalty for a serious misdemeanor is a fine of at least three hundred fifteen dollars but not to exceed one thousand eight hundred seventy-five dollars. In addition, the court may also order imprisonment not to exceed one year. Iowa Code section 903.1(1)(b).

The evidence in the record establishes that Mr. Cook was suspended and discharged for gross misconduct. The evidence indicates that Mr. Cook committed serious misdemeanor theft by misappropriating and then removing three iPods from the employer's warehouse with the intent to probably deprive the employer of the merchandise. Mr. Cook provided a written admission to this theft. Though the evidence indicates that Mr. Cook also committed a second serious misdemeanor theft offense by concealing three additional iPods in the employer's warehouse, Mr. Cook's written admission did not address that conduct. Accordingly, the second theft constitutes misconduct, but does not constitute gross misconduct.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Mr. Cook was discharged for misconduct. Accordingly, Mr. Cook is disqualified for benefits until he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible. The employer's account shall not be charged for benefits paid to Mr. Cook. Because the evidence establishes gross misconduct, Iowa Workforce Development shall cancel Mr. Cook's wage credits earned, prior to the date of discharge, from all employers.

Because no benefits were disbursed to Mr. Cook, there is no need to address overpayment of benefits.

**DECISION:**

The claims representative's April 18, 2007, reference 01, decision is reversed. The claimant was discharged for gross misconduct. The claimant is disqualified for unemployment benefits until he has worked in and paid wages for insured work equal to ten times his weekly benefit allowance, provided he meets all other eligibility requirements. Because gross misconduct is

established, Iowa Workforce Development shall cancel the claimant's wage credits earned, prior to the date of discharge, from all employers. No benefits have been disbursed to the claimant and, therefore, there is no overpayment.

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James E. Timberland  
Administrative Law Judge

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Decision Dated and Mailed

jet/pjs