

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

ARTHUR J MILLER
Claimant

APPEAL NO. 11A-UI-02642-VST

**ADMINISTRATIVE LAW JUDGE
DECISION**

SAMUELS JEWELERS INC
Employer

**OC: 1/23/11
Claimant: Respondent (2-R)**

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

STATEMENT OF THE CASE:

The employer filed an appeal from a representative's decision dated February 23, 2011, reference 01, which held the claimant eligible for unemployment insurance benefits. After due notice, a telephone conference hearing was scheduled for and held on March 24, 2011. The claimant participated. The claimant was represented by Kevin Fors, attorney at law. The employer participated by Ed Lemon, regional loss prevention coordinator, and Liz Stowbaugh, human resources director. The record consists of the testimony of Liz Stowbaugh; the testimony of Ed Lemon; the testimony of Arthur Miller; Claimant's Exhibit A; and Employer's Exhibits 1 through 6.

ISSUES:

Whether the claimant was discharged for misconduct; and

Whether the claimant has been overpaid unemployment insurance benefits.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony of the witnesses and having considered all of the evidence in the record, makes the following findings of fact:

The employer owns and operates a retail jewelry store in Jordan Creek Mall in West Des Moines, Iowa. The claimant was hired on September 23, 2009. He was hired to be the store manager. The claimant's last day of work was January 19, 2011. He was suspended that day after the employer received a complaint from a prior employee concerning improprieties at the store. The claimant was terminated following an investigation on January 21, 2011.

The investigation done by the employer disclosed that a .94pt VTW diamond had been lost. The claimant did not report this lost diamond to the employer. The claimant did prepare an exchange for a customer named Wade Thompson on January 1, 2011, concerning this missing diamond. The transaction, which was done with the claimant's personal password, showed that Mr. Thompson purchased the diamond. At the time, Mr. Thompson was serving in Iraq and this

exchange was done without his knowledge or consent. When asked about this transaction by Mr. Lemon, the claimant first stated that he had purchased the diamond. When Mr. Lemon challenged this statement, the claimant said that Mr. Thompson had paid for the diamond. This statement was also not correct. Mr. Thompson had purchase another diamond prior to going to Iraq. Store surveillance for January 1, 2011, was disabled by someone and could not be viewed by Mr. Lemon.

The second incident that led to the claimant's termination concerned a .1ct princess cut VTW diamond that had been purchased by an individual named Cody Pettit. The value of this diamond was approximately \$8,500.00. When the ring came back from the jeweler, the claimant noticed a flaw in the diamond, which meant that the wrong stone had been put in the ring. The claimant was required by employer policy to notify corporate of the mistake. The claimant elected to prepare a work order that indicated that the stone had been lost by the customer. Under the employer's warranty, the stone would have been replaced for free for the customer. The claimant knew the diamond had been mistakenly sent to another store and sold because he had called the store where the diamond had been sent. The claimant hid the stone that had been mistakenly put in Mr. Pettit's ring and only produced it after being questioned by Mr. Lemon. The stone had been put in layaway.

The final incident concerned a jewelry steamer, which was valued at approximately \$700.00. Mr. Lemon investigated the missing steamer and was told by other associates that the claimant had said he sold it to a jeweler. There was no evidence of a transaction for a steamer. The steamer was returned to the store. Mr. Lemon did not find out how the steamer was returned.

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.

Misconduct that disqualifies an individual from receiving unemployment insurance benefits occurs when there are deliberate acts or omissions that constitute a material breach of the worker's duty to the employer. One of the most fundamental duties owed by the worker to the employer is honesty. An employer can reasonably expect that an employee will be truthful concerning work matters and will respond honestly when questioned by the employer. The employer has the burden of proof to establish misconduct.

The greater weight of the evidence in this case shows that the claimant, in an effort to hide errors he made while selling diamonds, was less than truthful with his employer when questioned about those transactions. In this first instance, the claimant lost a diamond. That loss should have been reported to the employer when it was discovered. The claimant did not report the loss and attempted to cover up the loss by making a bogus exchange, using a customer named Wade Thompson. Mr. Thompson had purchased a diamond in July 2010 and at one point had attempted to get his money back. The claimant decided he could hide the missing diamond by creating a transaction that showed Mr. Thompson had purchased the diamond. The transaction was done on January 1, 2011, and was done with the claimant's password. Although the claimant testified that someone else did this transaction, this testimony is not credible. No one else should have known his password and there was no motive for anyone else, other than the claimant, to create the transaction.

The claimant compounded the situation by being untruthful when asked about the transaction by Mr. Lemon. First, the claimant said that he had purchased the diamond. He later said Mr. Thompson purchased the diamond. The difficulty with the claimant's explanation is that Mr. Thompson was in Iraq and knew nothing about this transaction. The most reasonable inference from the evidence is that the claimant attempted to hide the fact that he lost a diamond and then lied to his employer about the circumstances concerning the lost diamond.

The second incident involved an error on a diamond. The claimant could have easily reported the problem with the diamond and the correct stone would have been sold to the customer. The claimant instead processed a phony work order that stated that the stone had been lost by the customer. Again, when asked about this by Mr. Lemon, he was less than truthful about what had happened.

The administrative law judge concludes that the claimant's attempted cover-ups concerning the two diamonds are misconduct. The claimant breached his most fundamental duty to the employer: the duty of honesty. The claimant's initial errors should have been reported as required by written company policy. He did not do so. He then committed misconduct by giving inconsistent and untrue accounts of what happened to the stones. Since misconduct is established, benefits are denied.

The next issue is overpayment of benefits.

Iowa Code section 96.3-7, as amended in 2008, provides:

7. Recovery of overpayment of benefits.

a. If an individual receives benefits for which the individual is subsequently determined to be ineligible, even though the individual acts in good faith and is not otherwise at fault, the benefits shall be recovered. The department in its discretion may recover the overpayment of benefits either by having a sum equal to the overpayment deducted from any future benefits payable to the individual or by having the individual pay to the department a sum equal to the overpayment.

b. (1) If the department determines that an overpayment has been made, the charge for the overpayment against the employer's account shall be removed and the account shall be credited with an amount equal to the overpayment from the unemployment compensation trust fund and this credit shall include both contributory and reimbursable employers, notwithstanding section 96.8, subsection 5. However, provided the benefits were not received as the result of fraud or willful misrepresentation by the individual, benefits shall not be recovered from an individual if the employer did not participate in the initial determination to award benefits pursuant to section 96.6, subsection 2, and an overpayment occurred because of a subsequent reversal on appeal regarding the issue of the individual's separation from employment. The employer shall not be charged with the benefits.

(2) An accounting firm, agent, unemployment insurance accounting firm, or other entity that represents an employer in unemployment claim matters and demonstrates a continuous pattern of failing to participate in the initial determinations to award benefits, as determined and defined by rule by the department, shall be denied permission by the department to represent any employers in unemployment insurance matters. This subparagraph does not apply to attorneys or counselors admitted to practice in the courts of this state pursuant to section 602.10101.

The overpayment issue is remanded to the Claims Section for determination.

DECISION:

The representative's decision dated February 23, 2011, reference 01, is reversed. Unemployment insurance benefits shall be withheld until the claimant has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible. The overpayment issue is remanded to the Claims Section for determination.

Vicki L. Seeck
Administrative Law Judge

Decision Dated and Mailed

vls/kjw