

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**TETYANA A ZATSARINNA**  
Claimant

**APPEAL NO. 10A-UI-05114-HT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**DILLARD'S INC**  
Employer

**OC: 02/21/10**  
**Claimant: Respondent (2-R)**

Section 96.5(2)a – Discharge

**STATEMENT OF THE CASE:**

The employer, Dillard's, filed an appeal from a decision dated March 23, 2010, reference 01. The decision allowed benefits to the claimant, Tetyana Zatsarinna. After due notice was issued a hearing was held by telephone conference call on June 22, 2010. The claimant participated on her own behalf, with witness Natasha Borisemko and Maria Cochran acted as interpreter. The employer participated by Assistant Store Manager Lori Flahive.

**ISSUE:**

The issue is whether the claimant was discharged for misconduct sufficient to warrant a denial of unemployment benefits.

**FINDINGS OF FACT:**

Tetyana Zatsarinna was employed by Dillard's from September 5, 2007 until February 4, 2010 as a full-time sales associate. She received a copy of the employer's policies at the time of hire. One of the policies forbids employees to "hold" items to purchase for themselves or to use their employee discount to purchase items for other people. Ms. Zatsarinna had been given a first and final written warning October 3, 2008, for "holding" items, doing returns at a register other than customer service and using a scanner while not on duty. She was advised that any further policy violations would result in discharge. The claimant wrote a response in the "comments" section on the second page of the warning and signed it, also acknowledging she understood the policy.

On January 30, 2010, Assistant Store Manager Lori Flahive was working at customer service and saw Ms. Zatsarinna on the sales floor. A customer was shopping on the floor and had gathered several items which she then took to a register. After she placed these items on the counter by the register, and a manager had come to check her out, Ms. Zatsarinna approached the customer from behind and said something softly in her ear. The two of them then took the items, left the register counter and went to another department, where the claimant purchased the items.

Ms. Flahive reviewed the incident on a surveillance camera and then discussed the situation with Store Manager Jason Wolff. The decision was made to discharge the claimant for either using her discount to purchase items for someone else or having the items held for her by the customer so she could purchase them for herself. Ms. Zatsarinna maintained the customer was a friend who had gathered the items and then decided not to purchase them because only three of the five items were on 30 percent off sale. The claimant then decided to buy them for herself. The employer found the claimant's explanation unacceptable and discharged her for violation of the store policy.

Tetyana Zatsarinna has received unemployment benefits since filing a claim with an effective date of February 21, 2010.

### **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.

The employer discharged the claimant for violating the policy prohibiting associates from "holding" items or using the employee discount to purchase items for other people. The employer did not accept Ms. Zatsarinna's explanation of the events and neither does the administrative law judge. This is a matter of credibility which is decided in favor of the employer.

The claimant's credibility is impaired first of all by her assertion she was forbidden by the store manager from reading the warning in October 2008. But she could not explain how she was

able to write a statement in the “comments” section without knowing what the document said. Or how, once the document was in her hands to write the comment, she could have been prevented from reading it.

In addition, the claimant did not dispute Ms. Flahive’s testimony that the customer had already put the merchandise on the register counter preparatory to buying it, and only after Ms. Zatsarinna made a soft comment in the customer’s ear, did she remove it. If indeed the claimant intended to purchase these when the customer allegedly changed her mind, she could have continued with the transaction at the register where the manager had come to ring up the customer’s items. Instead the two of them went to another department where the claimant purchased the items, away from the view of the manager.

The issue of credibility being resolved in favor of the employer the administrative law judge considers the claimant’s actions to be in violation of the store policies. Ms. Zatsarinna either had the items “held” for her by the customer or else purchased the items for the customer using her employee discount. Both of these are clearly prohibited and constitute a violation of the duties and responsibilities the employer has the right to expect of an employee and is conduct not in the best interests of the employer. The claimant is disqualified.

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 claimant has received unemployment benefits to which she is not entitled. The question of whether the claimant must repay these benefits is remanded to the UIS division.

**DECISION:**

The representative's decision of March 23, 2010, reference 01, is reversed. Tetyana Zatsarinna is disqualified and benefits are withheld until she has earned ten times her weekly benefit amount, provided she is otherwise eligible. The issue of whether the claimant must repay the unemployment benefits is remanded to UIS division for determination.

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Bonny G. Hendricksmeier  
Administrative Law Judge

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Decision Dated and Mailed

bgh/pjs