

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

ANTHONY J DUFAUCHARD
Claimant

THE BON-TON DEPARTMENT STORES INC
Employer

APPEAL 17A-UI-02671-JP-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

**OC: 10/30/16
Claimant: Respondent (4-R)**

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Code § 96.3(7) – Recovery of Benefit Overpayment
Iowa Admin. Code r. 871-24.10 – Employer/Representative Participation Fact-finding Interview

STATEMENT OF THE CASE:

The employer filed an appeal from the February 28, 2017, (reference 03) unemployment insurance decision that allowed benefits. The parties were properly notified about the hearing. A telephone hearing was held on April 3, 2017. Claimant did not participate. Employer participated through assistant store manager Shelley Jepson and loss prevention manager Jackie Carroll. Employer exhibit one was admitted into evidence with no objection. Official notice was taken of the administrative record of claimant's benefit payment history, claimant's wage history, and the fact-finding documents, with no objection.

ISSUES:

Was the claimant discharged for disqualifying job-related misconduct?

Has the claimant been overpaid unemployment insurance benefits, and if so, can the repayment of those benefits to the agency be waived?

Can charges to the employer's account be waived?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed part-time as a shoes sales associate from November 21, 2016, and was separated from employment on December 16, 2016, when he was discharged.

The employer has a policy that prohibits employees from processing their own sales and returns. Claimant was aware of the policy. Employer Exhibit One.

On December 11, 2016, Ms. Carroll was notified about a merchandise credit involving claimant. When a customer makes a return without a receipt, the employer provides that customer with a merchandise credit, not cash. Once Ms. Carroll was notified about claimant's merchandise credit, she started an investigation.

On December 12, 2016, during claimant's shift, the employer observed him make a fraudulent return. Claimant processed merchandise as a return, without a receipt, even though there was not a customer present when was returning the merchandise. Claimant had taken boxes of shoes that were for sale on the sales floor and processed them as a return. Claimant then kept the merchandise credit. The value of this merchandise credit was \$621.13. Also on December 12, 2016, claimant passed merchandise to a customer without taking payment for the merchandise from the customer. The value of the merchandise claimant gave away to the customer was \$392.00. The employer observed both transactions through surveillance video. Ms. Carroll discovered during her investigation that from December 9, 2016 through December 12, 2016 claimant had seven fraudulent merchandise credits, including the December 12, 2016 merchandise credit. The total value of the seven merchandise credits and the merchandise claimant gave away on December 12, 2016, was \$5607.03.

On December 13, 2016, Ms. Carroll and Ms. Jepson interviewed claimant about the incidents from December 9, 2016 through December 12, 2016. Claimant admitted to the incidents. Claimant provided the employer with a written statement acknowledging the total value of the merchandise was \$5607.03. Employer Exhibit One. Claimant was suspended on December 13, 2016 pending further investigation. Claimant requested to use the restroom and another loss prevention officer escorted him to the restroom. After claimant used the restroom, he ran from the employer's building. A law enforcement officer then arrived and took a report from the employer. The employer discharged claimant on December 16, 2016.

The administrative record reflects that claimant has not received unemployment benefits since filing a claim with an effective date of October 30, 2016. The administrative record also establishes that the employer did participate in the fact-finding interview by providing written documentation that, without rebuttal, would have resulted in disqualification. The administrative record reflects that claimant has not requalified for benefits and had other base period wages but the record is unclear as to whether he is otherwise monetarily eligible.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes claimant was discharged from employment due to job-related misconduct, but has not requalified and the record is unclear as to whether claimant is otherwise monetarily eligible after removal of these wage credits.

Iowa Code § 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.

Iowa Admin. Code r. 871-24.32(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 Dep't of Job Serv.*, 275 N.W.2d 445, 448 (Iowa 1979).

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). When based on carelessness, the carelessness must actually indicate a "wrongful intent" to be disqualifying in nature. *Id.* Negligence does not constitute misconduct unless recurrent in nature; a single act is not disqualifying unless indicative of a deliberate disregard of the employer's interests. *Henry v. Iowa Dep't of Job Serv.*, 391 N.W.2d 731 (Iowa Ct. App. 1986). Poor work performance is not misconduct in the absence of evidence of intent. *Miller v. Emp't Appeal Bd.*, 423 N.W.2d 211 (Iowa Ct. App. 1988).

The employer has presented substantial and credible evidence that claimant performed multiple fraudulent returns and received merchandise credits for those returns. The employer has also presented credible evidence that claimant passed merchandise to a customer without taking payment for the merchandise. The total value from the merchandise credits claimant received and the merchandise he passed to a customer was \$5607.03. Claimant's conduct was contrary to the best interests of the employer. Claimant's conduct was disqualifying job misconduct even without prior warning.

Inasmuch as claimant was discharged from employment due to job-related misconduct, the separation is disqualifying. However, "[w]orkers who are disqualified from part-time work based on the nature of the separation may be eligible to receive reduced unemployment insurance benefits, provided they have sufficient wage credits from other employers to be monetarily eligible and provided they are otherwise eligible." *Rieck and Wise Motels Inc.*, Emp. App. Bd. Hrg. No. 17B-UI-11765, at *1 (Emp. App. Bd. pub. January 24, 2017); *Irving v. EAB*, 883 N.W.2d 179 (Iowa 2016). Claimant has wages from another employer in his base period. Claimant has not requalified for benefits since the separation but may be otherwise monetarily eligible according to base period wages.

Claimant has not received any benefits since filing a claim with an effective date of October 30, 2016.

DECISION:

The February 28, 2017, (reference 03) unemployment insurance decision is modified in favor of the appellant. Claimant was discharged from employment due to job-related misconduct and

has not requalified for benefits but may be otherwise monetarily eligible. Claimant may be eligible for benefits, provided the he is otherwise eligible. The employer's account (employer account number 358669-000 (THE BON-TON DEPARTMENT STORES INC)) shall not be charged.

REMAND: The issue of whether claimant is otherwise monetarily eligible for benefits based on other wage credits, and if so then for a recalculation of any benefits that may still be due based on such credits after the discharge from this part-time employment (employer account number 358669-000 (THE BON-TON DEPARTMENT STORES INC)) as delineated in the findings of fact is remanded to the Benefits Bureau of Iowa Workforce Development for determination.

Jeremy Peterson
Administrative Law Judge

Decision Dated and Mailed

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