

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

MELISSA DAVIES

Claimant

APPEAL NO: 14A-UI-09317-ET

**ADMINISTRATIVE LAW JUDGE
DECISION**

**GOODWILL INDUSTRIES OF
THE HEARTLAND**

Employer

OC: 08/17/14

Claimant: Respondent (2)

Section 96.5-2-a – Discharge/Misconduct
Section 96.3-7 – Recovery of Benefit Overpayment

STATEMENT OF THE CASE:

The employer filed a timely appeal from the September 4, 2014, reference 01, decision that allowed benefits to the claimant. After due notice was issued, a hearing was held by telephone conference call before Administrative Law Judge Julie Elder on October 16, 2014. The claimant participated in the hearing. Kelle Aiken, Store Manager and Barbara Buss, Hearing Representative, participated in the hearing on behalf of the employer.

ISSUE:

The issue is whether the employer discharged the claimant for work-connected misconduct.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed as a full-time production clerk for Goodwill Industries from March 17, 2014 to August 18, 2014. She was discharged for violating the employer's purchase policy.

The employer has a strict purchase policy which states employees cannot shop at the store they work in any day they are scheduled to work and cannot ask anyone else, be it customers, off-duty co-workers or family/friends, to purchase items for them. Employees receive a 31 percent discount. The policy is in place because the employer believes the public has a perception that Goodwill employees buy all of the "good stuff," the better items that come into the store, before customers have a chance to see the merchandise and buy it. The employer stated that employees who fail to follow the policy affect the overall profit of the company and it considers those actions to be theft.

On August 15, 2014, store employee Jill reported to Store Manager Kelle Aiken that she was in the store on her day off August 14, 2014, and the claimant asked her if she would purchase a designer handbag for her. Jill told the claimant she would not do so and that it was a violation of the employer's policy.

A copy of the policy is provided to employees at the time of hire, is covered again in a one-week training session and the store manager goes over it again when the employee begins working in the store to which they are assigned. The manager also goes through a 12 item checklist with employees at the time they begin working and asks if they understand the purchase policy. The claimant indicated she understood the policy.

On August 18, 2014, the employer met with the claimant about the August 14, 2014, incident and asked her if she understood the purchase policy and the claimant said she did. The employer asked her if she had asked anyone to purchase something for her and the claimant said no. The employer asked the claimant if she had asked a customer to buy something for her and the claimant said no. The employer then told the claimant she had a report that the claimant asked a co-worker to purchase an item for her and the claimant admitted that was true. The employer explained the process it would go through in determining what disciplinary action to take against the claimant and the claimant asked if the employer thought she would keep her job. The employer told her she had never had an employee who violated the purchase policy keep their job. After notifying the corporate office of the outcome of the meeting, the decision was made to discharge the claimant's employment and the employer notified her that her employment was terminated August 18, 2014.

The claimant testified that Jill came into the store while she was putting merchandise out that had just been priced and she thought some of the items, including the designer handbags, were underpriced. She believed the employee doing the pricing often underpriced items and approached Jill to show her the prices of the purses. While talking to Jill the claimant asked her if she would "get her something." The claimant stated she did not ask for anything specific but wanted to know if Jill would buy her something because her birthday was coming up in a few weeks. While the claimant and Jill were friendly at work and had talked on the phone a few times while off work, they were not close friends. Jill's birthday occurred during the claimant's tenure with the employer but the claimant did not get Jill a gift. The claimant said she thought asking another employee to buy her a gift was "maybe a gray area". She denies asking Jill to purchase one of the designer handbags for her. Jill said she would not buy her anything as it was against the rules. The claimant did not tell the employer she asked Jill to make a purchase for her upcoming birthday during the investigation into her actions. The employer's policy states employees cannot ask anyone else to purchase merchandise on their behalf or for them.

The claimant has claimed and received unemployment insurance benefits in the amount of \$1977 since her separation from this employer.

The employer participated in the hearing personally through Rafael Escoto, who also provided written documentation.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment for disqualifying job misconduct.

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.

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).

The employer has the burden of proving disqualifying misconduct. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). The claimant's statements in regard to asking Jill to "buy her something" because her birthday was coming up were not persuasive. They may have been friendly at work but the evidence does not establish they were close enough to buy each other birthday gifts and it is more likely the claimant asked Jill to buy her one of the designer handbags she was holding that were underpriced. The claimant did not make the "birthday gift" assertion to the employer during its investigation but did admit she asked a co-worker to "buy something" for her. The claimant was aware of the employer's purchase policy and that the policy specifically prohibits asking anyone else to make a purchase from the store on a day the employee is working. The claimant's actions were a blatant and knowing violation of that policy.

Under these circumstances, the administrative law judge concludes the claimant's conduct demonstrated a willful disregard of the standards of behavior the employer has the right to expect of employees and shows an intentional and substantial disregard of the employer's interests and the employee's duties and obligations to the employer. The employer has met its burden of proving disqualifying job misconduct. Cosper v. IDJS, 321 N.W.2d 6 (Iowa 1982). Therefore, benefits are denied.

871 IAC 24.10 provides:

Employer and employer representative participation in fact-finding interviews.

(1) "Participate," as the term is used for employers in the context of the initial determination to award benefits pursuant to Iowa Code section 96.6, subsection 2, means submitting detailed factual information of the quantity and quality that if

unrebutted would be sufficient to result in a decision favorable to the employer. The most effective means to participate is to provide live testimony at the interview from a witness with firsthand knowledge of the events leading to the separation. If no live testimony is provided, the employer must provide the name and telephone number of an employee with firsthand information who may be contacted, if necessary, for rebuttal. A party may also participate by providing detailed written statements or documents that provide detailed factual information of the events leading to separation. At a minimum, the information provided by the employer or the employer's representative must identify the dates and particular circumstances of the incident or incidents, including, in the case of discharge, the act or omissions of the claimant or, in the event of a voluntary separation, the stated reason for the quit. The specific rule or policy must be submitted if the claimant was discharged for violating such rule or policy. In the case of discharge for attendance violations, the information must include the circumstances of all incidents the employer or the employer's representative contends meet the definition of unexcused absences as set forth in 871—subrule 24.32(7). On the other hand, written or oral statements or general conclusions without supporting detailed factual information and information submitted after the fact-finding decision has been issued are not considered participation within the meaning of the statute.

(2) "A continuous pattern of nonparticipation in the initial determination to award benefits," pursuant to Iowa Code section 96.6, subsection 2, as the term is used for an entity representing employers, means on 25 or more occasions in a calendar quarter beginning with the first calendar quarter of 2009, the entity files appeals after failing to participate. Appeals filed but withdrawn before the day of the contested case hearing will not be considered in determining if a continuous pattern of nonparticipation exists. The division administrator shall notify the employer's representative in writing after each such appeal.

(3) If the division administrator finds that an entity representing employers as defined in Iowa Code section 96.6, subsection 2, has engaged in a continuous pattern of nonparticipation, the division administrator shall suspend said representative for a period of up to six months on the first occasion, up to one year on the second occasion and up to ten years on the third or subsequent occasion. Suspension by the division administrator constitutes final agency action and may be appealed pursuant to Iowa Code section 17A.19.

(4) "Fraud or willful misrepresentation by the individual," as the term is used for claimants in the context of the initial determination to award benefits pursuant to Iowa Code section 96.6, subsection 2, means providing knowingly false statements or knowingly false denials of material facts for the purpose of obtaining unemployment insurance benefits. Statements or denials may be either oral or written by the claimant. Inadvertent misstatements or mistakes made in good faith are not considered fraud or willful misrepresentation.

This rule is intended to implement Iowa Code section 96.3(7)"b" as amended by 2008 Iowa Acts, Senate File 2160.

The unemployment insurance law requires benefits be recovered from a claimant who receives benefits and is later denied benefits even if the claimant acted in good faith and was not at fault. However, a claimant will not have to repay an overpayment when an initial decision to award benefits on an employment separation issue is reversed on appeal if two conditions are met: (1) the claimant did not receive the benefits due to fraud or willful misrepresentation, and (2) the

employer failed to participate in the initial proceeding that awarded benefits. In addition, if a claimant is not required to repay an overpayment because the employer failed to participate in the initial proceeding, the employer's account will be charged for the overpaid benefits. Iowa Code section 96.3(7)a, b.

The claimant received benefits but has been denied benefits as a result of this decision. The claimant, therefore, was overpaid benefits.

Because the employer participated in the fact-finding interview, the claimant is required to repay the overpayment and the employer will not be charged for benefits paid.

The unemployment insurance law provides that benefits must be recovered from a claimant who receives benefits and is later determined to be ineligible for benefits, even though the claimant acted in good faith and was not otherwise at fault. However, the overpayment will not be recovered when it is based on a reversal on appeal of an initial determination to award benefits on an issue regarding the claimant's employment separation if: (1) the benefits were not received due to any fraud or willful misrepresentation by the claimant and (2) the employer did not participate in the initial proceeding to award benefits. In this case, the claimant has received benefits but was not eligible for those benefits. While there is no evidence the claimant received benefits due to fraud or willful misrepresentation, the employer participated in the fact-finding interview personally through the statements of Rafael Escoto. Consequently, the claimant's overpayment of benefits cannot be waived and she is overpaid benefits in the amount of \$1977.

DECISION:

The September 4, 2014, reference 01, decision is reversed. The claimant was discharged from employment due to job-related misconduct. Benefits are withheld until such time as she has worked in and been paid wages for insured work equal to ten times her weekly benefit amount, provided she is otherwise eligible. The claimant has received benefits but was not eligible for those benefits. The employer participated in the fact-finding interview personally through the statements of Rafael Escoto. Consequently, the claimant's overpayment of benefits cannot be waived. Therefore, the claimant is overpaid benefits in the amount of 1977.

Julie Elder
Administrative Law Judge

Decision Dated and Mailed

je/css