

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

LETICIA ROBLES HILERIO
Claimant

APPEAL NO. 16A-UI-08822-S1-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

KOHL'S DEPARTMENT STORES INC
Employer

OC: 07/03/16
Claimant: Respondent (1)

Section 96.5-2-a – Discharge for Misconduct

STATEMENT OF THE CASE:

Kohl's Department Stores (employer) appealed a representative's August 2, 2016, decision (reference 02) that concluded Leticia Robles Hilerio (claimant) was eligible to receive unemployment insurance benefits. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was scheduled for August 31, 2016. The claimant participated personally through David Morante, interpreter. The employer participated by Amy Farley, Store Manager. Exhibit D-1 was received into evidence. The employer offered and Exhibit One was received into evidence.

ISSUE:

The issue is whether the claimant was separated from employment for any disqualifying reason.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds that: The claimant was hired on September 10, 2014, and at the end of her employment she was as a full-time supervisor in the shoe department. The claimant signed for receipt of the employer's policies on September 10, 2014. The employer talked to the claimant about unauthorized holding of merchandise and clocking out for breaks. It did not issue her any written warnings or tell her she could be terminated for such behavior. The claimant frequently did not get a lunch break because she had to work while her subordinates took their breaks.

On June 3, 2016, the claimant worked from 9:28 a.m. to 6:04 p.m. The manager saw a coupon the claimant had on her phone. She told the claimant she used the same coupon and her employee discount to purchase items. When it was time for the claimant's lunch break the claimant could only take fifteen minutes because she had to work for her subordinates. She did not clock out. At 3:25 p.m. the claimant took fifteen more minutes of her lunch break and did not clock out. The claimant used the coupon and the employee discount to purchase an item at 3:25 p.m.

After her shift was over at 6:08 p.m. and 6:26 p.m. the claimant made two more purchases using her employee discount and the coupon. On June 6, 2016, the employer discovered the claimant's purchases. It believed the claimant received \$43.60 in discounts that she should not have received. The claimant continued to work until June 16, 2016. On June 16, 2016, the employer terminated the claimant for discount abuse.

The claimant filed for unemployment insurance benefits with an effective date of July 3, 2016. The employer participated personally at the fact-finding interview on August 1, 2016, by Amy Farley.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow the administrative law judge concludes the claimant was not discharged for misconduct.

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).

Iowa Admin. Code r. 871-24.32(8) provides:

(8) Past acts of misconduct. While past acts and warnings can be used to determine the magnitude of a current act of misconduct, a discharge for misconduct cannot be based on such past act or acts. The termination of employment must be based on a current act.

The employer has the burden of proof in establishing disqualifying job misconduct. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). If a party has the power to produce more explicit and direct evidence than it chooses to do, it may be fairly inferred that other evidence would lay open deficiencies in that party's case. Crosser v. Iowa Department of Public Safety, 240 N.W.2d 682 (Iowa 1976). The employer had the power to present testimony of the cashier, the manager, or the person who did the investigation but chose not to do so. The employer did not provide first-hand testimony at the hearing and, therefore, did not provide sufficient eye witness evidence of job-related misconduct to rebut the claimant's denial of said conduct.

The employer must establish not only misconduct but that there was a final incident of misconduct which precipitated the discharge. The last incident provided by the employer occurred on June 6, 2016. The claimant was not discharged until June 16, 2016. The employer has failed to provide any evidence of willful and deliberate misconduct which was the final incident leading to the discharge and disqualification may not be imposed.

DECISION:

The representative's August 2, 2016, decision (reference 02) is affirmed. The employer has not met its burden of proof to establish job related misconduct. Benefits are allowed, provided claimant is otherwise eligible.

Beth A. Scheetz
Administrative Law Judge

Decision Dated and Mailed

bas/pjs