

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**JANELLE A DAVIS**

Claimant

**APPEAL NO. 09A-UI-06342-JTT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**SEARS ROEBUCK & CO**

Employer

**OC: 03/22/09**

**Claimant: Respondent (2-R)**

Iowa Code Section 96.5(2)(a) – Discharge for Misconduct

**STATEMENT OF THE CASE:**

The employer filed a timely appeal from the April 13, 2009, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on May 20, 2009. The claimant did not respond to the hearing notice instructions to provide a telephone number for the hearing and did not participate. Kurt Schmalried, Multi Unit Loss Prevention Manager, represented the employer. Exhibits One through Four were received into evidence.

**ISSUE:**

Whether the claimant was discharged for misconduct in connection with the employment that disqualifies the claimant for unemployment insurance benefits.

**FINDINGS OF FACT:**

Having reviewed all of the evidence in the record, the administrative law judge finds: Janelle Davis was employed by Sears, Roebuck & Company as a part-times sales associate from October 23, 2006 until March 27, 2009, when Kurt Schmalried, Multi Unit Loss Prevention Manager, discharged her for employee theft. On March 22, 2009, Ms. Davis removed a purse and wallet from display on the sales floor and placed it under the counter at her assigned cash register. On March 23, Ms. Davis initiated a sales transaction on her assigned register concerning the purse and wallet. Ms. Davis was the person purchasing the merchandise. The employer's written work rules prohibited employees from ringing up their own purchases. Ms. Davis was aware of the rule. During the transaction, Ms. Davis entered her employee discount information. Ms. Davis also entered a further, unauthorized markdown of the merchandise. At the time Ms. Davis engaged in this activity she did so with full knowledge that the conduct was prohibited. The conduct resulted in a small financial loss to the company.

Mr. Schmalried observed Ms. Davis' conduct through closed circuit television and a covert camera. Mr. Schmalried's surveillance of Ms. Davis' conduct occurred because the employer suspected Ms. Davis of misappropriating other merchandise.

## 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 has the burden of proof in a discharge matter. See Iowa Code section 96.6(2). Misconduct must be substantial in order to justify a denial of unemployment benefits. Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of unemployment benefits. See Lee v. Employment Appeal Board, 616 N.W.2d 661 (Iowa 2000). The focus is on deliberate, intentional, or culpable acts by the employee. See Gimbel v. Employment Appeal Board, 489 N.W.2d 36, 39 (Iowa Ct. App. 1992).

The evidence in the record indicates that Ms. Davis acted in a willful and wanton disregard of the employer's interests when she removed merchandise from the sales floor for personal ends without immediately purchasing it, when she rang up her own sale, and when she took an unauthorized discount. Ms. Davis' conduct constituted theft. Though the documented financial loss was small, the conduct wholly undermined the trust relationship between Ms. Davis and the employer. The weight of the evidence indicates that Ms. Davis was at all times aware that her conduct was contrary to the interests of the employer and contrary to her duties as a sales associate.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Ms. Davis was discharged for misconduct. Accordingly, Ms. Davis is disqualified for benefits until 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 employer's account shall not be charged for benefits paid to Ms. Davis.

Iowa Code section 96.3(7) 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. The overpayment recovery law was updated in 2008. See Iowa Code section 96.3(7)(b). Under the revised law, a claimant will not be required to repay an overpayment of benefits if all of the following factors are met. First, the prior award of benefits must have been made in connection with a decision regarding the claimant's separation from a particular employment. Second, the claimant must not have engaged in fraud or willful misrepresentation to obtain the benefits or in connection with the Agency's initial decision to award benefits. Third, the employer must not have participated at the initial fact-finding proceeding that resulted in the initial decision to award benefits. If Workforce Development determines there has been an overpayment of benefits, the employer will not be charged for the benefits, regardless of whether the claimant is required to repay the benefits.

Because the claimant has been deemed ineligible for benefits, any benefits the claimant has received would constitute an overpayment. Accordingly, the administrative law judge will remand the matter to the Claims Division for determination of whether there has been an overpayment, the amount of the overpayment, and whether the claimant will have to repay the benefits.

**DECISION:**

The Agency representative's April 13, 2009, reference 01 decision is reversed. The claimant was discharged for misconduct. The claimant is disqualified for unemployment benefits until she has worked in and been paid wages for insured work equal to ten times her weekly benefit allowance, provided she meets all other eligibility requirements. The employer will be relieved of liability for benefits paid to the claimant.

This matter is remanded to the Claims Division for determination of whether there has been an overpayment, the amount of the overpayment, and whether the claimant will have to repay the benefits.

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James E. Timberland  
Administrative Law Judge

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Decision Dated and Mailed

jet/pjs