IOWA WORKFORCE DEVELOPMENT
Unemployment Insurance Appeals Section
1000 East Grand—Des Moines, Iowa 50319
DECISION OF THE ADMINISTRATIVE LAW JUDGE
68-0157 (7-97) – 3091078 - EI

Appeal Number: 04A-UI-00470-R
OC: 12/07/03 R: 02
Claimant: Respondent (2)

This Decision Shall Become Final, unless within fifteen (15) days from the date below, you or any interested party appeal to the Employment Appeal Board by submitting either a signed letter or a signed written Notice of Appeal, directly to the ***Employment Appeal Board, 4th Floor—Lucas Building, Des Moines, Iowa 50319***.

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

STATE CLEARLY

1. The name, address and social security number of the claimant.
2. A reference to the decision from which the appeal is taken.
3. That an appeal from such decision is being made and such appeal is signed.
4. The grounds upon which such appeal is based.

YOU MAY REPRESENT yourself in this appeal or you may obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds. It is important that you file your claim as directed, while this appeal is pending, to protect your continuing right to benefits.

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_____
(Administrative Law Judge)

_____
(Decision Dated & Mailed)

Section 96.5-2-a – Discharge for Misconduct
Section 96.3-7 – Recovery of Overpayment of Benefits

STATEMENT OF THE CASE:

The employer, Christopher's Fine Jewelry & Rare Coins Limited, filed a timely appeal from an unemployment insurance decision dated January 8, 2004, reference 01, allowing unemployment insurance benefits to the claimant, Todd D. Huebner. After due notice was issued, an in-person hearing was held in Des Moines, Iowa, on February 19, 2004, with the claimant participating. The claimant was represented by Jeffrey A. Kelso, Attorney at Law. Patricia C. Tottser, testified for the claimant. Christopher L. Seuntjens, President, participated in the hearing for the employer. The employer was represented by Michael J. Burdette, Attorney at Law. Tami Bixby, Bookkeeper, and Heather McCardy, Clerk, testified for the

employer. Both parties had numerous additional witnesses which were available to testify, but were not called because their testimony was unnecessary and would have been repetitive. The administrative law judge did attempt to call Ed Armstrong, a witness for the employer, but was unable to reach Mr. Armstrong by phone and he did not testify. Employer's Exhibits One through Seven and Claimant's Exhibit A were admitted into evidence. Employer's Exhibit Eight was not admitted into evidence. The administrative law judge takes official notice of Iowa Workforce Development Department unemployment insurance records for the claimant.

On February 3, 2004 at 4:16 p.m., the administrative law judge spoke to Michael J. Burdette, Attorney for the employer, who requested that testimony of some witnesses be taken by telephone because they needed to remain at the business to keep the business open. The administrative law judge consented to that request providing witnesses did appear in person. Witnesses for the employer did appear in person and no witnesses testified by telephone at the hearing. Because of the large number of witnesses that appeared for both sides at the hearing, the administrative law judge called a prehearing conference on his own motion without appropriate notice as authorized by 871 IAC 26.12. Neither party objected. The administrative law judge began the prehearing conference with the party's attorneys at 8:46 a.m. and it was completed at 9:05 a.m. The administrative law judge determined to sequester all witnesses except for the claimant and one representative for the employer. The parties made no objections. The administrative law judge explained the issues presented in this matter and restricted the evidence to matters relevant to those issues. The administrative law judge agreed to take two employer's witnesses out of order, Tami Bixby and Heather McCardy, to accommodate their conflicts later in the morning. The hearing then began when the record was opened at 9:19 a.m. and ended when the record was closed at 1:16 p.m. The hearing was in-person at the request of the employer.

FINDINGS OF FACT:

Having heard the testimony of the witnesses and having examined all of the evidence in the record, including Employer's Exhibits One through Seven and Claimant's Exhibit A, but excluding Employer's Exhibit Eight, the administrative law judge finds: The claimant was employed by the employer, most recently as a full time wholesale manager and general manager when the president of the employer, Christopher L. Seuntjens, was unavailable, from 1998 until he was discharged on December 8, 2003. The claimant was discharged for losing his temper, including and specifically an incident on December 1, 2003, when he used profanity directed at the employer's Vice President and Treasurer Irene Seuntjens, both during and after a telephone conversation with her. The claimant was also discharged for payroll issues including a failure to report his time appropriately and failing to use appropriate time sheets in reporting his time. The claimant was also discharged for providing the telephone number of a supplier or wholesaler inappropriately to a potential customer who was a prior employee, Patricia Tottser. The claimant was discharged in person on December 8, 2003 by Mr. Seuntjens, but at that time was provided no reasons and was informed that he would be given reasons by a telephone call the next morning. At that time, the claimant was told that a letter from the employer's attorney would be sent to the claimant outlining the reasons for his discharge. This letter appears at Employer's Exhibit One.

Concerning the payroll issues and the time reporting, when the claimant was first employed by the employer, the time sheet as shown on the second page of Employer's Exhibit Three was used by the employees. However, a new time sheet form was implemented several years prior to the claimant's discharge. This new time sheet appears at Employer's Exhibit Four. This new time sheet requires that an employee fill out the time sheet reporting arrival times and departure

times. Nevertheless, the claimant did not use the new time sheet form choosing instead to use the old time sheet form because he had copies of that time sheet. Beginning in February 2003, the claimant believed that he had become the store's manager, but did not become involved in the time reporting of any of the employees and continued to use the old time sheet form. At a pre-Christmas meeting on November 4, 2003, referred to by the witnesses as the "Christmas meeting," the hours worked by the employees and the proper reporting of their hours and time, was discussed as shown at Employer's Exhibit Two, which was an outline for the matters, covered at the meeting. The claimant was, at all material times hereto, paid by the hour and was expected to prepare a time sheet. After the meeting, the claimant continued to use the old time sheet although all of the other employees used the new time sheet. On December 1, 2003, the claimant's old time sheet was returned to him with a note from Irene Seuntjens, Vice President and Treasurer, instructing the claimant to fill out a correct time sheet that included start and end hours as shown at Employer's Exhibit Three. This note led to the telephone conversation discussed below. The claimant refused to prepare a new time sheet for the pay period completed, November 15, 2003 through November 28, 2003. The claimant did begin to use the new time sheet for the next pay period but had only completed a portion of that time sheet when he was discharged.

The claimant was supposed to work a 40-hour week. His hours generally were from 9:30 a.m. to 4:30 p.m. for a seven-hour day with an unpaid lunch period of 30 minutes setting out a six and one half hour day. However, the claimant often worked past 4:30 p.m. when other employees were gone or when he was with a customer and did not want to leave a customer. Occasionally, especially beginning in January 2003, the claimant took no lunch break and would add that 30 minutes to his time sheet since he worked instead of taking the lunch break. Also, the claimant was entitled to two 15-minute breaks, one in the morning and one in the afternoon, which was paid. The employer's custom was that if an employee did not take one or both of the breaks, they would get a portion or all of their lunch break paid. However, the claimant also added these breaks to his time when they were not taken. The claimant would not complete his time sheet every day for that particular day, but would, at least on occasion, miss one, two, or more days and then at the end of the week reconstruct the time that he had spent and complete several days of time reporting. If the claimant worked more than eight hours on a day, he could reduce his time in later days in that pay period so as to come out with a 40-hour week or an 80-hour week in the pay period without causing the employer to pay overtime. A work schedule was prepared for all of the employees, the most recent of which appear at Employer's Exhibit Seven. Generally, the claimant's scheduled time was for seven hours. There were times, however, when the claimant would be gone during his scheduled hours. This was noticed by the Employer's Bookkeeper Tami Bixby, and one of the employer's witnesses, who informed Mr. Seuntjens of this on October 17, 2003. Sometime during the week following October 24, 2003, Mr. Seuntjens discussed with the claimant his time and in order to get in an eight-hour day required that the claimant begin arriving at 9:15 a.m. and leaving at 5:15 p.m. Reporting more time than work was discussed at this meeting. On December 1, 2003, the claimant was specifically informed by Mr. Seuntjens to do his time on the new time sheet specifically recording his arrival and departure times and lunch breaks. Because Mr. Seuntjens was concerned about the claimant reporting more time than he worked, he had Tim Johnson perform a review of the claimant's scheduled hours and the claimant's time sheets. Mr. Johnson did the review and his reports appear at Employer's Exhibit Five and Six indicating that the claimant's adjusted hours or hours worked were less than the hours reported consistently. This was also confirmed by the ADT Security Report determined from the activation and deactivation of the night security system, which is timed.

The claimant's time reporting and other matters came to a head on December 1, 2003. The claimant received the note from Ms. Seuntjens about his time sheet and then had a telephone conversation with her. The claimant was angry at being required to use a new time sheet. Ms. Seuntjens requested that the claimant prepare the new time sheet for the previous payroll period, but the claimant refused because he could not recreate the departure and arrival times. Ms. Seuntjens told the claimant that he would not get a paycheck unless he recreated the time sheet. The claimant became loud in his conversation with Ms. Seuntjens and asked to speak with Mr. Seuntjens, but Ms. Seuntjens refused. At some point, either during or after the conversation, the claimant made some reference to his check using the profane word, "fuck" or a derivation thereof. After the conversation, the claimant made some disparaging remark about Ms. Seuntjens, including "hate her" and "kill her." This phone conversation and the disparaging remarks thereafter were made in the presence of three other employees. The claimant later apologized for his comments. Occasionally, the claimant would also lose his temper with other employees or would talk down to them. When the claimant was otherwise engaged in some matter he would lose his temper when an employee would come to him for a question. Employees complained to the employer about the claimant's behavior. On one occasion, while trying to straighten out some tangled jewelry, the claimant took the tangled jewelry and dumped it onto the counter rather than removing it with his hands and placing it on the counter gently. The claimant received a warning for his temper in 2000.

Sometime prior to November 26, 2003, a former employee, Patricia Tottser was in the employer's store at the same time that a supplier or wholesaler, Chuck Shedlin, was at the store. Mr. Shedlin showed Ms. Tottser a bracelet but she did not buy the bracelet. Such sales at the store from a supplier to a customer would be run through the employer's store with an appropriate mark up for the employer's profit. Mr. Shedlin informed the claimant to call him if she changed her mind. Later, on or about November 26, 2003, Ms. Tottser called the employer's store and spoke to the claimant. She asked him for the telephone number for Mr. Shedlin. The claimant obtained the number from Mr. Seuntjens and provided it to Ms. Tottser. Ms. Tottser called Mr. Shedlin, but ultimately did not purchase the bracelet. Mr. Shedlin called Mr. Seuntjens and explained that he had been contacted by a customer, Ms. Tottser, about purchasing from him a bracelet.

Pursuant to his claim for unemployment insurance benefits filed effective December 7, 2003, the claimant has received unemployment insurance benefits in the amount of $2,940.00 as follows: $240.00 for benefit week ending December 13, 2003 (earnings $135.00) and $300.00 per week for nine weeks from benefit week ending December 20, 2003 to benefit week ending February 14, 2004 in the amount of $2,700.00.

REASONING AND CONCLUSIONS OF LAW:

The questions presented by this appeal are as follows:

1. Whether the claimant's separation from employment was a disqualifying event. It was.

2. Whether the claimant is overpaid unemployment insurance benefits. He is.

In order to be disqualified to receive unemployment insurance benefits pursuant to a discharge, the claimant must have been discharged for disqualifying misconduct. The administrative law judge concludes that the employer has met its burden of proof to demonstrate by a preponderance of the evidence that the claimant was discharged for disqualifying misconduct. The evidence establishes that the claimant was hired full time to work a 40-hour week, or 8

hours per day, and he frequently did not do so, but reported that he had. The evidence establishes that the claimant was, throughout most of his employment, scheduled to work from 9:30 a.m. until 4:30 p.m. The claimant testified and the administrative law judge concludes that this testimony was credible, that he worked often after 4:30 p.m. The claimant also testified credibly that he skipped lunches occasionally beginning in January 2003. However, the claimant never denied shorting the employer time, but only testified that he tried to report his time as best he could. The employer's evidence including Employer's Exhibits Five and Six are compelling that the claimant consistently shorted his time. Any testimony of the claimant to the contrary is not credible. The claimant first testified that he often came to work before 9:30 a.m. but later recanted that and stated only that he worked after 4:30 p.m. Starting at 9:30 a.m. is consistent with the schedule for the employees at Employer's Exhibit Seven. Further eroding the credibility of the claimant is simply the time periods involved. The claimant was scheduled from 9:30 a.m. to 4:30 p.m., which was seven hours if no lunch break was taken. Even assuming that the claimant never took a lunch break, he still had another hour to work to get to eight hours. The claimant also testified that he might skip his two 15-minute breaks and add that to his hours, but in fact this was suppose to be a paid lunch break. Even assuming that it was not a paid lunch break, the claimant would add only 30 minutes more on to his time. If the claimant took no lunch breaks and no 15-minute breaks, at most he would have seven and one-half hours a day unless he worked later. The administrative law judge concludes that the claimant probably did work later frequently, but not in sufficient amounts to offset the shortage of time. Further, the administrative law judge concludes that the analysis by Tim Johnson at Employer's Exhibit Five and Six are compelling and establish that the claimant did short his time.

The shortage of the claimant's time came up no later than the week following October 24, 2003, when his hours were increased from 9:15 a.m. to 5:15 a.m. Even the claimant concedes that time shorting was discussed and to ensure eight hours his time was increased. The claimant testified that he thought this was for Christmas hours, but this is not credible in view of the other evidence including the testimony of Mr. Seuntjens. By then, the claimant should have known that the employer was concerned about his time reporting. Nevertheless, the claimant continued to use the old time sheet without arrival and departure times and just reported gross hours. The claimant testified that he was not told until December 1, 2003 that he needed to use the new time sheet. The administrative law judge does not believe that this is credible. The claimant testified that he believed he was the manager beginning in February 2003, but then testified that he had no idea about the reporting of the other employees or the hours worked by the other employees. The claimant testified that he did not know when the time sheet was implemented but did concede that a new time sheet was implemented. However, he continued to use the old time sheets because he still had some available. The claimant was aware of the new time sheets and should have been aware that the other employees were using them, but he chose not to use them. Further casting doubt on the claimant's credibility is his phone conversation on December 1, 2003, with Ms. Seuntjens. Ms. Seuntjens asked the claimant to recreate the past payroll period from November 15, 2003 to November 28, 2003, using the new time sheet form requiring arrival and departure dates. The claimant testified that he refused because he could not recreate such time. However, the claimant also testified that he did not even complete the old time sheet every day and would go back and recreate it after several days of failing to report his time on a daily basis. The administrative law judge does not understand how the claimant can recreate his time sheets under the old time sheets but not under the new time sheets. The claimant also testified that he was not informed that he needed to use the new time sheets until December 1, 2003 when he began doing so. This also is not credible because the new time sheets were discussed at the meeting on November 4, 2003. The claimant denies that any time sheet was specified at that meeting, but concedes that at the

meeting discussions were held on doing time sheets correctly. The claimant denies any references made to arrival or departure times. The administrative law judge does not understand how discussion of correctly reporting time could be held without discussing arrival and departure times and a particular time sheet.

Accordingly, for the reasons set out above, the administrative law judge concludes that claimant's failure to report his time accurately or shorting his time, and further, his failure to use the new time sheets were deliberate acts or omissions constituting a material breach of his duties and obligations arising out of his worker's contract of employment and evince willful or wanton disregard of the employer's interests and at the very least are carelessness or negligence in such a degree of recurrence as to establish disqualifying misconduct.

The administrative law judge further concludes that the claimant's behavior and language on December 1, 2003 was also disqualifying misconduct. This is a closer question. The claimant denied using the word, "fuck" or a derivation, but his denial is offset by the direct testimony of Tami Bixby, Bookkeeper, who was present and testified that she heard the claimant use that word. Further, Heather McCardy, Clerk, although somewhat more equivocal than Ms. Bixby, testified that she thought she heard the claimant use that word. Finally, there was hearsay evidence that another employee, Ed Armstrong, overheard the conversation and was appalled by the claimant's language and behavior. The administrative law judge must conclude that the claimant did use the word, "fuck" either during or after his conversation on December 1, 2003 with Ms. Seuntjens. Further, and for the same reasons, the administrative law judge concludes that the claimant made disparaging remarks about Ms. Seuntjens including stating that he hated her and that he would kill her. Even the claimant conceded that he was very angry and the claimant did not deny using the disparaging words, but only denied using the word, "fuck" or a derivation. The claimant must have been concerned about his language because he later apologized. In Myers v. Employment Appeal Board, 462 N.W.2d 734, 738 (Iowa App. 1990), the Iowa Court of Appeals provided that the use of profanity or offensive language in a confrontational, disrespectful or name-calling context may be recognized as misconduct, even in the case of isolated incidents or situations in which the target of abusive name-calling is not present. The administrative law judge concludes that the claimant did use profanity or offensive language in a confrontational or disrespectful context and this would be disqualifying misconduct even if it was an isolated incident which it appears as here because it is severe, and even if Ms. Seuntjens was not on the line at the time. It is true that whether such language is disqualifying misconduct must be considered with other relevant factors including the general work environment. Here, the general work environment was a jewelry store and the administrative law judge concludes that such language is inappropriate in the context and in the general work environment where the claimant used such language. Accordingly, and for all the reasons set out above, the administrative law judge concludes that claimant's language on December 1, 2003, was also a deliberate act or omission constituting a material breach of his duties and obligations arising out of his worker's contract of employment and evinces willful or wanton disregard of the employer's interest and is disqualifying misconduct. The claimant received a warning about his temper in early 2000 and should have been alerted to his temper. Further, there was evidence that the claimant had demonstrated his temper on other occasions both to employees and on one occasion when he was attempting to untangle jewelry. This further corroborates the conclusions about the December 1, 2003 incident.

Concerning the incident in which the claimant provided the telephone number of a supplier or wholesaler to a customer, the administrative law judge concludes that this was also a deliberate act or omission constituting a material breach of his duties and obligations arising out of his worker's contract of employment and evinces willful or wanton disregard of the employer's

interests. It is uncontested that the claimant provided the telephone number of a supplier or wholesaler to a customer so that the customer could then contact the wholesaler or supplier directly. The claimant testified that he believed that nevertheless the sale would be run through the employer, but this is not credible. The administrative law judge can understand how, at the employer's store, if a wholesaler or supplier would demonstrate products to a customer that that transaction could be run through the store and the claimant's assumption of that would be accurate. However, the administrative law judge does not understand how such a sale could be run through the employer when the claimant set up the potential sale between a customer and a wholesaler or supplier outside of the store and basically unrelated to the store. The administrative law judge does not believe that it is justification for the claimant's actions that the supplier or wholesaler told the customer to call him if she changed her mind about buying the item after being in the store. What finally convinces the administrative law judge that this was inappropriate is the evidence that the wholesaler or supplier called the employer and indicated that he thought this was unusual. Further damaging the claimant's credibility and that of Ms. Tottser, was the claimant's testimony that he stopped taking lunch breaks in January 2003 but Ms. Tottser said that for a long time the claimant did not take lunch breaks.

Accordingly, in summary, and for all the reasons set out above, the administrative law judge concludes that the claimant's behavior and acts were disqualifying misconduct and, as a consequence, he is disqualified to receive unemployment insurance benefits. Unemployment insurance benefits are denied to the claimant until or unless he requalifies for such benefits.

Iowa Code Section 96.3-7 provides:

> 7. Recovery of overpayment of benefits. 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.
>
> 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.

The administrative law judge concludes that the claimant has received unemployment insurance benefits in the amount of $2,940.00 since separating from the employer herein on or about December 8, 2003 and filing for such benefits effective December 7, 2003, to which he is not entitled and for which he is overpaid. The administrative law judge further concludes that these benefits must be recovered in accordance with the provisions of Iowa law.

DECISION:

The representative's decision of January 8, 2004, reference 01, is reversed. The claimant, Todd D. Huebner, is not entitled to receive unemployment insurance benefits until or unless he requalifies for such benefits. He has been overpaid unemployment insurance benefits in the amount of $2,940.00.

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