

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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**TINA M POLLOCK**  
Claimant

**NPC INTERNATIONAL INC**  
Employer

**APPEAL 16A-UI-11736-SC-T**  
**ADMINISTRATIVE LAW JUDGE  
DECISION**

**OC: 09/18/16**  
**Claimant: Respondent (2)**

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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:**

NPC International, Inc. (employer) filed an appeal from the October 21, 2016, (reference 01) unemployment insurance decision that allowed benefits based upon the determination Tina M. Pollock (claimant) was not discharged for willful or deliberate misconduct. The parties were properly notified about the hearing. A telephone hearing was held on November 14, 2016. The claimant did not follow the instructions on the hearing notice and register a phone number for the hearing. She did not participate. The employer participated through Tyka Johnston of Equifax and Area General Manager Cheryl Demaris. Employer's Exhibit 1 was received.

**ISSUES:**

Was the claimant discharged for disqualifying job-related misconduct?

Has the claimant been overpaid unemployment insurance benefits?

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: The claimant was employed full-time as a Restaurant Manager beginning on December 10, 2014, and was separated from employment on September 8, 2016, when she was discharged. The employer requires its managers to conduct a physical inventory each week. The claimant was aware of this requirement.

At the end of August 2016, the employer's accounting department flagged the claimant's weekly inventory report for potential issues. It notified Area General Manager Cheryl Demaris that she needed to conduct an audit of the restaurant. On September 1, 2016, Demaris notified the claimant that she would be audited at the end of the week. She also asked the claimant if she

was completing her inventory each week. The claimant acknowledged she was not doing a physical inventory and was putting inaccurate information on the inventory reports. She also stated she did it because she wanted a higher bonus based on store performance.

On September 6, 2016, Demaris and the claimant completed the physical inventory for the week as part of the audit. The information was sent to the employer's accounting department. The accounting department determined there was a \$4,500.00 discrepancy between the inventory the claimant was reporting and the inventory in the restaurant. The claimant was discharged on September 8, 2016 for falsifying company records and dishonesty.

The administrative record reflects that claimant has received unemployment benefits in the amount of \$3,576.00, since filing a claim with an effective date of September 18, 2016, for the eight weeks ending November 12, 2016. Tyka Johnston of Equifax participated in the fact-finding on behalf of the employer. She did not submit any written documentation for the fact-finding interview. She did not provide any dates on which the incidents occurred. She was not a first hand-witness and did not make one available for rebuttal. The administrative record establishes that she told the fact-finder that the claimant had falsified records and did so in order to get a larger bonus.

#### **REASONING AND CONCLUSIONS OF LAW:**

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment due to job-related misconduct. Benefits based upon wages credited from this employer's account are denied.

Iowa law disqualifies individuals who are discharged from employment for misconduct from receiving unemployment insurance benefits. Iowa Code § 96.5(2)a. They remain disqualified until such time as they requalify for benefits by working and earning insured wages ten times their weekly benefit amount. *Id.* Iowa regulations define misconduct:

"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.

Iowa Admin. Code r. 871-24.32(1)a. 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 proof in establishing disqualifying job misconduct. *Cosper v. Iowa Dep't of Job Serv.*, 321 N.W.2d 6 (Iowa 1982). The issue is not whether the employer made a correct decision in separating the claimant, but whether the claimant is entitled to

unemployment insurance benefits. *Infante v. Iowa Dep't of Job Serv.*, 364 N.W.2d 262 (Iowa Ct. App. 1984). 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). 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).

The claimant did not adequately inventory her store and falsified company records when she submitted her weekly inventory report. She had a discrepancy of \$4,500.00 in the amount of inventory she had versus what she was reporting. The employer has an interest in maintaining an accurate inventory count in each of its restaurants. The claimant's conduct was a deliberate disregard of the employer's interests and is misconduct without prior warning. Accordingly, benefits are denied.

Iowa Code § 96.7 provides, in relevant part:

7. Recovery of overpayment of benefits.

a. 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.

b. (1) (a) 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 employer shall not be relieved of charges if benefits are paid because the employer or an agent of the employer failed to respond timely or adequately to the department's request for information relating to the payment of benefits. This prohibition against relief of charges shall apply to both contributory and reimbursable employers.

(b) However, provided the benefits were not received as the result of fraud or willful misrepresentation by the individual, benefits shall not be recovered from an individual if the employer did not participate in the initial determination to award benefits pursuant to section 96.6, subsection 2, and an overpayment occurred because of a subsequent reversal on appeal regarding the issue of the individual's separation from employment.

Iowa Admin. Code r. 871-24.10 provides, in relevant part:

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 un rebutted 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.

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

Because the claimant's separation was disqualifying, benefits were paid to which she was not entitled. 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. The employer will not be charged for benefits if it is determined that they did participate in the fact-finding interview. Iowa Code § 96.3(7), Iowa Admin. Code r. 871-24.10.

In this case, the claimant has received benefits but was not eligible for those benefits. At the fact-finding interview, the employer did not provide a witness with firsthand information or the contact information for such person. It did not provide documents with specific dates or incidents and it did not provide a copy of the rule the claimant had violated. The employer did not participate in the fact-finding interview. Additionally, there has been no evidence provided to indicate the claimant engaged in fraud or will misrepresentation. Since the employer did not participate in the fact-finding interview the claimant is not obligated to repay to the agency the benefits she received and the employer's account shall be charged.

**DECISION:**

The October 21, 2016, (reference 01) unemployment insurance 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 been overpaid unemployment insurance benefits in the amount of \$3,576.00, but she is not obligated to repay the agency those benefits. The employer did not participate in the fact-finding interview and its account shall be charged.

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Stephanie R. Callahan  
Administrative Law Judge

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Decision Dated and Mailed

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