**IOWA WORKFORCE DEVELOPMENT**
**UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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| **KYLE J LITTLE**<br>Claimant<br><br>**CASEY'S MARKETING COMPANY**<br>Employer | **APPEAL 17A-UI-11847-JP**<br><br>**ADMINISTRATIVE LAW JUDGE DECISION**<br><br>**OC: 10/15/17**<br>**Claimant: Appellant (2)** |

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

**STATEMENT OF THE CASE:**

The claimant filed an appeal from the November 14, 2017, (reference 01) unemployment insurance decision that denied benefits. The parties were properly notified about the hearing. An in-person hearing was held on March 20, 2018 at 3420 University Avenue, Suite A, in Waterloo, Iowa. Claimant participated. Employer participated through store manager Kimberly Frost and supervisor Teresa Zuke. Employer Exhibit 1 was admitted into evidence with no objection. Official notice was taken of the administrative record, including claimant's benefit payment history and claimant's wage history, with no objection.

**ISSUE:**

Was the claimant discharged for disqualifying job-related misconduct?

**FINDINGS OF FACT:**

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed part-time as a store employee from December 2016, and was separated from employment on October 11, 2017, when he was discharged.

The employer has a written policy that requires employees to repay the full amount, including any applicable fees, of any returned check the employee wrote to the employer within thirty days after they are notified about the returned check. The policy provides that if the check is not repaid within thirty days, the employee will be discharged. If an employee writes multiple checks to the employer that are returned for non-payment, then the policy provides the employee will be automatically discharged. The policy also provides that if the employer discovers a newly hired employee has checks that were returned for non-payment before they were employed by the employer, the employee must repay the checks within thirty days. The employer allows employees to utilize a payroll deduction to repay the check amount. Claimant was aware of the policy. The employer uses a third party company to collect repayment for returned checks.

Between November 15 and 17, 2016, claimant wrote five checks to the employer, which were returned to the employer due to insufficient funds. Employer Exhibit 1. The check amounts were $3.59, $15.28, $24.42, $13.33, and $20.46. Employer Exhibit 1. Claimant was not an employee when he wrote the five insufficient fund checks.

On July 24, 2017, Ms. Zuke sent Ms. Frost an e-mail informing Ms. Frost that claimant needed to make arrangements to pay back the five returned checks as soon as possible. Employer Exhibit 1. Ms. Zuke gave Ms. Frost the amount claimant owed for each check. Employer Exhibit 1. On July 24, 2017, Ms. Frost showed claimant the e-mail she had received from Ms. Zuke. Ms. Frost also gave claimant an 800-number for the employer's third party company that handles the employer's returned checks. Employer Exhibit 1. Ms. Frost told claimant he had thirty days to repay the returned checks. Ms. Frost told claimant if he did not repay the employer for the returned checks, he would be discharged. The employer did not offer claimant the option of using a payroll deduction to repay the returned checks.

A couple of days after July 24, 2017, claimant called the 800-number Ms. Frost had given him. The third party company told claimant it only had four returned checks, not five. Each returned check has a $40.00 fee. The third party company informed claimant it would contact the employer to determine what the correct amount was and either the third party company or the employer would get back to him on the correct amount to repay. The third party company did not contact claimant about the correct amount. The employer did not contact claimant to clarify the correct amount. Claimant did not follow up with the employer or the third party company about the correct amount.

Approximately two weeks after July 24, 2017, Ms. Frost asked claimant if he had taken care of the issue. Claimant told Ms. Frost that the amounts did not match and he was going to follow up on it. After July 24, 2017, Ms. Frost did not follow up with the employer or the employer's third party company to confirm whether claimant had repaid the employer for the five returned checks.

On October 11, 2017, Ms. Zuke e-mailed Ms. Frost that claimant had not taken care of the returned checks. Employer Exhibit 1. Ms. Zuke told Ms. Frost that the employer's "policy states that if an employee has been on the list 2 months and not resolved the issue they are to be terminated." Employer Exhibit 1. Ms. Frost then told claimant that he had not repaid the employer for the returned checks and he was discharged. Claimant did not have any prior disciplinary warnings for not repaying the employer for returned checks.

**REASONING AND CONCLUSIONS OF LAW:**

For the reasons that follow, the administrative law judge concludes claimant was discharged from employment for no disqualifying reason. Benefits are allowed.

Iowa Code section 96.5(2)*a* provides:

> An individual shall be disqualified for benefits, regardless of the source of the individual's wage credits:
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> 2. *Discharge for misconduct.* If the department finds that the individual has been discharged for misconduct in connection with the individual's employment:
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> *a.* The disqualification shall continue 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(4) provides:

> **(4)** *Report required.* The claimant's statement and employer's statement must give detailed facts as to the specific reason for the claimant's discharge. Allegations of misconduct or dishonesty without additional evidence shall not be sufficient to result in disqualification. If the employer is unwilling to furnish available evidence to corroborate the allegation, misconduct cannot be established. In cases where a suspension or disciplinary layoff exists, the claimant is considered as discharged, and the issue of misconduct shall be resolved.

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 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 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). What constitutes misconduct justifying termination of an employee and what misconduct warrants denial of unemployment insurance benefits are two separate decisions. *Pierce v. Iowa Dep't of Job Serv.*, 425 N.W.2d 679 (Iowa Ct. App. 1988). Misconduct serious enough to warrant discharge is not necessarily serious enough to warrant a denial of job insurance benefits. Such misconduct must be "substantial." *Newman v. Iowa Dep't of Job Serv.*, 351 N.W.2d 806 (Iowa Ct. App. 1984).

In an at-will employment environment an employer may discharge an employee for any number of reasons or no reason at all if it is not contrary to public policy, but if it fails to meet its burden of proof to establish job related misconduct as the reason for the separation, it incurs potential liability for unemployment insurance benefits related to that separation. A determination as to whether an employee's act is misconduct does not rest solely on the interpretation or application of the employer's policy or rule. A violation is not necessarily disqualifying misconduct even if the employer was fully within its rights to impose discipline up to or including discharge for the incident under its policy.

In November 2016, prior to being hired by the employer, claimant wrote multiple checks to the employer that were returned due to non-payment. The employer was on notice regarding these checks by at least July 24, 2017, when Ms. Zuke e-mailed Ms. Frost. On July 24, 2017, the employer notified claimant he had thirty days to repay the employer for the returned checks. Approximately two weeks later, the employer was on notice that claimant still had not repaid the employer for the returned checks when he informed Ms. Frost there was an issue with the amount. At this point, claimant would have had approximately sixteen days left to repay the employer according to Ms. Frost's instructions on July 24, 2017 and the employer's policy. Claimant did not repay the employer for the returned checks within thirty days of July 24, 2017, but the employer continued to allow him to work for the employer. Thirty days after July 24, 2017, the employer did not conduct any investigation with its corporate headquarters or its third party company to determine whether claimant had repaid the employer. The employer waited until October 11, 2017, before it decided to discharge claimant for not repaying the employer for the returned checks.

Where an employer gives seven days' notice to the employee that it will consider discharging him, the date of that notice is used to measure whether the act complained of is current. *Greene v. Emp't Appeal Bd.*, 426 N.W.2d 659 (Iowa Ct. App. 1988). An unpublished decision held informally that two calendar weeks or up to ten work days from the final incident to the discharge may be considered a current act. *Milligan v. Emp't Appeal Bd.*, No. 10-2098 (Iowa Ct. App. filed June 15, 2011). Although claimant did write five checks to the employer that were returned for non-payment in November 2016, the employer was aware of the incident by July 24, 2017. Inasmuch as the employer advised claimant on July 24, 2017 about the returned checks and informed him he had thirty days to repay the employer, but the employer waited approximately a month and a half after the thirty day deadline expired before it discharged him, the act for which claimant was discharged was no longer current. Because the act for which claimant was discharged was not current and claimant may not be disqualified for past acts of misconduct, benefits are allowed.

**DECISION:**

The November 14, 2017, (reference 01) unemployment insurance decision is reversed. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided claimant is otherwise eligible. Any benefits claimed and withheld on this basis shall be paid.

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Jeremy Peterson
Administrative Law Judge

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Decision Dated and Mailed

jp/rvs