BEFORE THE
EMPLOYMENT APPEAL BOARD
Lucas State Office Building
Fourth floor
Des Moines, Iowa 50319

LETICIA ROBLES HILERIO	:	
	:	**HEARING NUMBER:** 16B-UI-08822
Claimant	:	
and	:	**EMPLOYMENT APPEAL BOARD DECISION**
KOHL'S DEPARTMENT STORES INC	:	
Employer		

N O T I C E

THIS DECISION BECOMES FINAL unless (1) a **request for a REHEARING** is filed with the Employment Appeal Board within **20 days** of the date of the Board's decision or, (2) a **PETITION TO DISTRICT COURT** IS FILED WITHIN **30 days** of the date of the Board's decision.

A REHEARING REQUEST shall state the specific grounds and relief sought. If the rehearing request is denied, a petition may be filed in **DISTRICT COURT** within **30 days** of the date of the denial.

SECTION: 96.5-2-A

D E C I S I O N

UNEMPLOYMENT BENEFITS ARE DENIED

The Employer appealed this case to the Employment Appeal Board. Two members of the Employment Appeal Board reviewed the entire record. The Appeal Board finds it cannot affirm the administrative law judge's decision. The Employment Appeal Board **REVERSES** as set forth below.

FINDINGS OF FACT:

Leticia Robles Hilerio (Claimant) worked for Kohl's Department Stores (Employer), most recently as a full-time supervisor in the shoe department, from September 10, 2014 until she was fired on June 16, 2016. The Claimant signed for receipt of the Employer's policies on September 10, 2014. The Employer's discount policy states that any violation of the discount policy will result in discipline including up to termination. Ex. D-1. The Employer had spoken with the Claimant about unauthorized holding of merchandise and clocking out for breaks.

On June 3, 2016, at 3:25 p.m., while still on the clock, Claimant used a coupon and the employee discount to purchase an item. She should not have been using the coupon and she was not supposed to shop while on the clock. The Claimant was aware of this. Her 3:25 pm coupon resulted in an unauthorized savings of about $18.

After her shift was over at 6:08 p.m. and again at 6:26 p.m. the Claimant made two more purchases using her employee discount and the same coupon. She was not to be using the coupon for these purchases either. Each of these times she saved about $12.60 because of the improper coupon use. The Claimant intentionally went to a recently hired cashier with her repeated use of the coupon and had him give her the discount. The Claimant received $43.34 in discounts that she should not have received.

On June 6, 2016, the Employer discovered the Claimant's purchases. The loss prevention unit at the Employer interviewed the Claimant on June 15, 2016 concerning her activities. (Ex. D-1). The Claimant supplied no excuse for her multiple use of the coupon during the interview. (Ex. D-1). She agreed to pay back the $43.34, and signed a promissory note to that effect. (Ex. D-1).

On June 16, 2016, the Employer terminated the Claimant for discount abuse.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code Section 96.5(2)(a) (2016) provides:

> *Discharge for Misconduct*. If the department finds the individual has been discharged for misconduct in connection with the individual's employment:
>
> The individual shall be disqualified for benefits until the individual has worked in and been paid wages for the insured work equal to ten times the individual's weekly benefit amount, provided the individual is otherwise eligible.

The Division of Job Service defines misconduct at 871 IAC 24.32(1)(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 the 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 is the meaning which has been given the term in other jurisdictions under similar statutes, and we believe it accurately reflects the intent of the legislature." *Huntoon v. Iowa Department of Job Service*, 275 N.W.2d, 445, 448 (Iowa 1979).

The employer has the burden to prove the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law. *Cosper v. Iowa Department of Job Service*, 321 N.W.2d 6 (Iowa 1982). The propriety of a discharge is not at issue in an unemployment insurance case. An employer may be justified in discharging an employee, but the employee's conduct may not amount to misconduct precluding the payment of unemployment compensation. The law limits disqualifying misconduct to substantial and willful wrongdoing or repeated carelessness or negligence that equals willful misconduct in culpability. *Lee v. Employment Appeal Board*, 616 NW2d 661 (Iowa 2000).

We recognize the Employer relies in part on hearsay evidence, and we have taken this into account. We closely examine hearsay evidence in light of the entire record. *Schmitz v. IDHS*, 461 N.W.2d 603, 607 (Iowa App. 1990). Both the quality and the quantity of the evidence must be evaluated to see whether it rises to the necessary levels of trustworthiness, credibility, and accuracy required by a reasonably prudent person in the conduct of serious affairs. See, Iowa Code § 17A.14 Here the Employer testified about business records such as the purchase records, and about the Employer's own policies. Also the Employer submitted records containing the interview with the Claimant and her own admissions. The Claimant's statements made to loss prevention are not hearsay, and the loss prevention documents we find to be reliable. We do not rely on factual assertions made in the fact finding, in the protest, or in the appeal letters. We find that the other hearsay offered by the Employer is the sort of information that reasonably prudent persons are accustomed to relying on for the conduct of their serious affairs. It is thus admissible.

Even where hearsay is sufficiently reliable to be admissible under 17A.14, the weight to give the evidence must be determined. "[T]he proper weight to be given to hearsay evidence in such a hearing will depend upon a myriad of factors--the circumstances of the case, the credibility of the witness, the credibility of the declarant, the circumstances in which the statement was made, the consistency of the statement with other corroborating evidence, and other factors as well." *Walthart v. Board of Directors of Edgewood-Colesburg Community School*, 694 N.W.2d 740, 744-45 (Iowa 2005). Among the other factors is the opinion of the Administrative Law Judge. We note that the Administrative Law Judge conducted a telephone hearing and so did not personally observe the demeanor of the witnesses. While we always give appropriate weight to the credibility call of the Administrative Law Judge that weight is correspondingly greater in in-person hearings, a factor not here present. It is the duty of the Board as the ultimate trier of fact in this case, to determine the credibility of witnesses, weigh the evidence and decide the facts in issue. *Arndt v. City of LeClaire*, 728 N.W.2d 389, 394-395 (Iowa 2007). The Board, as the finder of fact, may believe all, part or none of any witness's testimony. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996). In assessing the credibility of witnesses, as well as the weight to give other evidence, a Board member should consider the evidence using his or her own observations, common sense and experience. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996). In determining the facts, and deciding what evidence to believe, the fact finder may consider the following factors: whether the testimony is reasonable and consistent with other evidence the Board believes; whether a witness has made inconsistent statements; the witness's conduct, age, intelligence, memory and knowledge of the facts; and the witness's interest in the trial, their motive, candor, bias and prejudice. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996). The Board also gives weight to the opinion of the Administrative Law Judge concerning credibility and weight of evidence, particularly where the hearing is in-person, although the Board is not bound by that opinion. Iowa Code §17A.10(3); *Iowa State Fairgrounds Security v. Iowa Civil Rights Commission*, 322 N.W.2d 293, 294 (Iowa 1982). The findings of fact show how we have resolved the disputed factual issues in this case. We have carefully weighed the credibility of the witnesses and the reliability of the evidence considering the applicable factors

listed above, and the Board's collective common sense and experience. We have found credible the evidence from the Employer that the Claimant used coupons contrary to the Employer policy for the purpose of saving money she knew she should not have, that she approached the same new cashier all three times, and that she had no explanation when confronted by the Employer for her coupon misuse.

Theft from an employer is generally disqualifying misconduct. *Ringland Johnson Inc. v. Employment Appeal Board*, 585 N.W.2d 269 (Iowa 1998). In *Ringland* the Court found a single attempted theft to be misconduct as a matter of law. Even the theft of a item of negligible value a single time can be misconduct. Instructive on this point is the case of *Tompkins-Kutcher v. EAB*, No. 11-0149 (Iowa App. 2011). In that case a claimant took home for her use some wasted soup and was disqualified for it. The soup was out of date and could not be sold. She was instructed to take the soup to the dumpster and instead she took it to her car. On appeal she argued that this was no great loss to Casey's, and that what she was doing made common sense, yet she lost. The reason was that Ms. Tompkins-Kutcher violated Casey's policy: "However, the agency's decision did not turn on whether or not the soup was garbage. The agency's decision was based on Tompkins-Kutcher's violation of the company's policy that all items removed from the store, regardless of whether the item is outdated, must be paid for." *Tompkins-Kutcher*, slip op. at 6. Just so the Claimant here engaged in similar intentional infractions, and so we disqualify her for misconduct. As in *Thompkins-Kutcher* we do not base our decision on whether or not the savings had much value, rather we base our decision on the Claimant's knowing violation of the company's policy

<u>*Current Act:*</u>

The law limits disqualification to current acts of misconduct:

> *Past acts of misconduct*. While past acts and warning 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.

871 IAC 24.32(8); *accord Ray v. Iowa Dept. of Job Service*, 398 N.W2d 191, 194 (Iowa App. 1986); *Greene v. EAB,* 426 N.W.2d 659 (Iowa App. 1988); *Myers v. IDJS,* 373 N.W.2d 509, 510 (Iowa App. 1985). "[T]he purpose of [the current act] rule is to assure that an employer does not save up acts of misconduct and spring them on an employee when an independent desire to terminate arises. For example, an employer may not convert a lay off into a termination for misconduct by relying on past acts." *Milligan v. EAB,* 10-2098, slip op. at 8 (Iowa App. June 15, 2011). The current act rule also assures that the termination is the result of intentional action. For example, the doctrine assures that an employee who gets sick is not denied benefits simply because he has exceeded the allowable absences under a "point system" for attendance. In determining whether a discharge is for a current act, we apply a rule of reason. We determine the issue of "current act" by looking to the date of the termination, or at least of notice to the employee of possible disciplinary action, and comparing this to the date the misconduct first came to the attention of the Employer. *Greene v. EAB*, 426 N.W.2d 659 (Iowa App. 1988)(using date notice of disciplinary meeting first given); *Milligan v. EAB*, 10-2098 (Iowa App. June 15, 2011).

A requirement of immediate termination does nothing to further the legitimate purposes of the current act rule. Such an approach treats the current act doctrine as some sort of trap for even the moderately thoughtful employer. In *White v. Employment Appeal Board* 487 N.W.2d 342 (Iowa 1992) the Court

emphasize that in unemployment cases the goal of policy is to "strike a proper balance between the underlying policy of the Iowa Employment Security Law, which is to provide benefits for 'persons unemployed through no fault of their own,' Iowa Code Sec. 96.2, and fundamental fairness to the employer, who must ultimately shoulder the financial burden of any benefits paid. See Iowa Code Sec. 96.7." *White* at 345. Under such a balancing the most that could be expected of any employer is to act in a reasonably prudent fashion and to not terminate precipitously. The Employer was not delaying to exploit the Petitioner nor trying to save up misconduct to use in the future. It delayed while it conducted a fair investigation and considered the matter through the usual channels. An employer should be allowed a reasonable amount of time for such actions. A contrary approach punishes employers - especially large ones with multiple decision-making layers - for taking termination seriously. Ten days is not too long to investigate, review the decision on whether to discharge, and then to go through normal levels of decision making. This is particularly so where a separate loss prevention unit is involved, and where the Employer is trying to determine the *scope* of any loss that needs to be investigated. The current act doctrine does not require precipitous decisions. We think a current act of misconduct has been shown.

Finally, since the Administrative Law Judge allowed benefits and in so doing affirmed a decision of the claims representative, the Claimant falls under the double affirmance rule:

> 871 IAC 23.43(3) Rule of two affirmances.
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> a. Whenever an administrative law judge affirms a decision of the representative or the employment appeal board of the Iowa department of inspections and appeals affirms the decision of an administrative law judge, allowing payment of benefits, such benefits shall be paid regardless of any further appeal.
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> b. However, if the decision is subsequently reversed by higher authority:
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> (1) The protesting employer involved shall have all charges removed for all payments made on such claim.
> (2) All payments to the claimant will cease as of the date of the reversed decision unless the claimant is otherwise eligible.
> (3) No overpayment shall accrue to the claimant because of payment made prior to the reversal of the decision.

Thus the Employer's account may not be charged for any benefits paid so far to the Claimant for the weeks in question, but the Claimant will not be required to repay benefits already received.

DECISION:

The administrative law judge's decision dated September 6, 2016 is **REVERSED**. The Employment Appeal Board concludes that the claimant was discharged for disqualifying misconduct. Accordingly, she is denied benefits until such time the Claimant has worked in and has been paid wages for insured work equal to ten times the Claimant's weekly benefit amount, provided the Claimant is otherwise eligible. See, Iowa Code section 96.5(2)"a".

No remand for determination of overpayment need be made under the double affirmance rule, 871 IAC 23.43(3), but still the Employer's account may not be charged.

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Kim D. Schmett

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Ashley R. Koopmans

RRA/fnv