

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

**MITCHELL L MCCRADY
3831 HERITAGE RD
CEDAR FALLS IA 50613-5551**

APPEAL NO. 09A-UI-19623-VST

**ADMINISTRATIVE LAW JUDGE
DECISION**

**TARGET CORPORATION
% BARNETT ASSOCIATES
PO BOX 9445
GARDEN CITY NY 11530-9445**

APPEAL RIGHTS:

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:

***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.

AN APPEAL TO THE BOARD SHALL STATE CLEARLY:

The name, address and social security number of the claimant.

A reference to the decision from which the appeal is taken.

That an appeal from such decision is being made and such appeal is signed.

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.

SERVICE INFORMATION:

A true and correct copy of this decision was mailed to each of the parties listed.

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

MITCHELL MCCRADY
Claimant

APPEAL NO. 09A-UI-19623-VST

**ADMINISTRATIVE LAW JUDGE
DECISION**

TARGET CORPORATION
Employer

OC: 11/29/09
Claimant: Respondent (2R)

Section 96.5-2-a – Misconduct

STATEMENT OF THE CASE:

Employer filed an appeal from a decision of a representative dated December 23, 2009, reference 01, which held claimant eligible for unemployment insurance benefits. After due notice, a telephone conference hearing was scheduled for and held on February 10, 2010. Claimant participated. Employer participated by Ahnna Reicks, asset protection group leader, and Amy Mosley, human resources representative. The record consists of the testimony of Amy Mosley; the testimony of Ahnna Reicks; the testimony of Mitchell McCrady; and Employer's Exhibits 1-9.

ISSUE:

Whether the claimant was discharged for misconduct; and
Whether the claimant has been overpaid unemployment insurance benefits.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony of the witness and having considered all of the evidence in the record, makes the following findings of fact:

The employer is a distribution center for Target Stores that is located in Cedar Falls, Iowa. The claimant was hired on July 8, 2004, as a warehouse worker in what is known as the outbound area. Workers in the outbound area load trucks with products that are ordered by individual Target stores.

The sequence of events that led to the claimant's termination began back on November 19, 2009, when the store in Aberdeen, South Dakota, reported that it was missing a carton of Apple iPod Touches, which is one of the latest versions of the iPod. Ahnna Riecks, who is the asset protection group lead, began to gather information on the carton of iPod Touches. Target has in place security systems that are able to track every single carton and particularly high value items like the iPod Touches. The value of the iPod Touches was \$295.00 each and the carton in which they were packaged was sealed. (Exhibit 7)

A review of the digital video showed that the carton in question was received in the inbound department on November 6, 2009. The carton was seen on the conveyer belt going to the outbound department, where the claimant worked. The conveyer system directed the carton straight to the trailer that was being loaded for the Aberdeen store. It was then loaded onto the truck by another team member on the night of November 6, 2009. That team member left at 2:00 a.m. and at that time, the carton was in the truck that was going to go to Aberdeen.

The next worker to come on duty was the claimant. He arrived at 6:00 a.m. He was assigned to the door set that services the Aberdeen trailer. He went through his start up. When trailers are being loaded, it is required for security reasons to turn on the light to the door. This means that a light is pointed into the trailer so that the inside of the trailer can be seen. The claimant entered the trailer at 6:38 a.m. The IPod carton is still in the trailer. The claimant exits the trailer and then turns the trailer light off. He re-enters a darkened trailer and is in there for 4 ½ minutes. He then comes out of the trailer and gets on a piece of equipment similar to a fork truck. He drives the fork truck over to the break room. A bulge is observed in his black sweatshirt front pocket. (Exhibit 7) This is a break room that he does not customarily use for his breaks.

The claimant is not in camera range during the entire time he is in the break room. However, is seen discarding a carton that looks like the vendor carton used for the IPods. He then leaves the break room and paces for a period of time. He gets on the fork lift and enters another door set. He squats down behind the conveyer belt and conceals himself for about 9 minutes. He is seen peeking out from behind the conveyer belt. He exits that trailer and goes to the restroom for 15 minutes. The rest of the tapes show him entering various trailers and using a small device that appears to be a cell phone. The claimant leaves work at 6:00 p.m.

Live surveillance is then conducted on November 21, 2009; November 23, 2009; November 24, 2009; November 26, 2009; November 30, 2009; and December 1, 2009. No other dishonest behavior was detected. The employer confirmed that no other individual did take or could have taken the IPods, other than the claimant. The matter was reported to law enforcement and the Cedar Falls Police Department also conducted an investigation.

The claimant was interviewed on December 2, 2009. The claimant denied taking anything out of the warehouse. The claimant was terminated for theft, attempted theft and being a security risk. He was also notified that the employer was going to prosecute.

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.

Misconduct that disqualifies an individual from receiving unemployment insurance benefits occurs when there are deliberate acts or omissions that constitute a material breach of the duty a worker owes to the employer. One of the most fundamental duties owed by a worker is honesty. An employer can reasonably expect that an employee will not misappropriate its' property or engage in suspicious behavior that can erode the employer's trust in the worker's integrity. The employer has the burden of proof to show misconduct.

The administrative law judge has carefully reviewed the exhibits and the testimony in the case. The greater weight of the evidence is that the claimant did take a sealed carton of iPod Touches that were supposed to go to Aberdeen, South Dakota. The employer established that the iPods were in a sealed carton on the truck and that claimant engaged in several behaviors that could reasonably be interpreted to indicate that he removed the carton from the truck. For example, the claimant was seen in the truck with the carton visible and the claimant then turned off the lights inside the truck for 4 ½ minutes. The claimant's explanation that he might have accidentally turned off the lights is not credible, especially given his later acts. He was seen on videotape throwing a vendor's carton in the trash shortly after turning off the truck lights and then exiting the truck.

The claimant denies having taken the iPods. He testified that the evidence against him is not conclusive on the matter. Even if that is true, the claimant nevertheless engaged in a series of behaviors that the employer could reasonably interpret as suspicious and that these behaviors made the claimant a security risk. He violated work rules, such as turning off trailer lights while he was inside the trailer. He hid behind equipment and used his cell phone repeatedly. The employer has established misconduct. Benefits are denied.

The next issue is overpayment of benefits.

Iowa Code section 96.3-7, as amended in 2008, provides:

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) 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. 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. The employer shall not be charged with the benefits.

(2) An accounting firm, agent, unemployment insurance accounting firm, or other entity that represents an employer in unemployment claim matters and demonstrates a continuous pattern of failing to participate in the initial determinations to award benefits, as determined and defined by rule by the department, shall be denied permission by the department to represent any employers in unemployment insurance matters. This subparagraph does not apply to attorneys or counselors admitted to practice in the courts of this state pursuant to section 602.10101.

This matter is remanded to the claims section for a determination of the overpayment issue.

DECISION:

The decision of the representative dated December 23, 2009, reference 01, is reversed. Unemployment insurance benefits shall be withheld until claimant has worked in and been paid wages for insured work equal to ten times claimant's weekly benefit amount, provided claimant is otherwise eligible. This matter is remanded to the claims section for the determination of any overpayment of benefits.

Vicki L. Seeck
Administrative Law Judge

Decision Dated and Mailed

vls/pjs