

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

DONNA M HERSHBERGER
1409 – 8TH
ROCK ISLAND IL 61204

J C PENNEY COMPANY
M/S 1201
PO BOX 650486
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NUNC PRO TUNC
04A-UI-01013-DT
Appeal Number:
OC: 12/28/03 R: 04
Claimant: Respondent (1)

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.

(Administrative Law Judge)

(Decision Dated & Mailed)

Section 96.5-2-a – Discharge
Section 96.7-2-a(2) – Charges Against Employer's Account

STATEMENT OF THE CASE:

J. C. Penney Company (employer) appealed a representative's January 22, 2004 decision (reference 01) that concluded Donna M. Hershberger (claimant) was qualified to receive unemployment insurance benefits after a separation from employment. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on February 19, 2004. The claimant participated in the hearing. Tim Buley appeared on the employer's behalf and presented testimony from one other witness, Kip Melin. Based on the evidence, the arguments of the parties, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUE:

Was the claimant discharged for work-connected misconduct?

FINDINGS OF FACT:

The claimant started working for the employer on October 13, 2003. She worked full time as a loss prevention officer in the employer's Davenport, Iowa store. Her last day of work was December 30, 2003. The employer discharged her on that date. The reason asserted for the discharge was she had made a second "bad stop" on December 29.

A "stop" is when a loss prevention officer suspects a customer has shoplifted, stops them and requires them to have their bags inspected. A "bad stop" is when the stop proves to be unfounded. The claimant had had a bad stop in early November, after which she went through three weeks of retraining. She was advised that an additional "bad stop" would result in her discharge.

On December 29 the claimant was observing a youth shopping and was concerned about the way he had positioned a shopping bag against some merchandise. She was not sure he had actually put any merchandise into the bag, and so did not stop him as he left the store, but she continued to follow him after he left the store into the mall area. She understood that once he left the store, she could no longer "stop" him, even if she subsequently observed that he had taken some merchandise; but consistent with her training with other loss prevention officers, she was seeking to make additional observations in order to be better prepared should the youth return to the employer's store in the future.

The youth went into another store and the claimant followed. The youth was aware that the claimant was following him, and confronted her. When he asked why she was following him, she explained she was concerned that he may have taken merchandise. He then opened his bag and showed that he did not have the merchandise. The claimant then returned to the employer's store, completed her shift, and left. After the claimant had left, the youth and his parents returned to the store and filed a complaint. As a result, the claimant was discharged.

The claimant established a claim for unemployment insurance benefits effective December 30, 2003.

REASONING AND CONCLUSIONS OF LAW:

The issue in this case is whether the employer discharged the claimant for reasons establishing work-connected misconduct as defined by the unemployment insurance law. The issue is not whether the employer was right to terminate the claimant's employment, but whether the claimant is entitled to unemployment insurance benefits. Infante v. IDJS, 364 N.W.2d 262 (Iowa App. 1984). What constitutes misconduct justifying termination of an employee and what is misconduct that warrants denial of unemployment insurance benefits are two separate questions. Pierce v. IDJS, 425 N.W.2d 679 (Iowa App. 1988).

A claimant is not qualified to receive unemployment insurance benefits if an employer has discharged the claimant for reasons constituting work-connected misconduct. Iowa Code Section 96.5-2-a. Before a claimant can be denied unemployment insurance benefits, the employer has the burden to establish the claimant was discharged for work-connected misconduct. Cosper v. IDJS, 321 N.W.2d 6 (Iowa 1982).

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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. Huntoon v. Iowa Department of Job Service, 275 N.W.2d 445, 448 (Iowa 1979).

The focus of the definition of misconduct is on acts or omissions by a claimant that "rise to the level of being deliberate, intentional or culpable." Henry v. Iowa Department of Job Service, 391 N.W.2d 731, 735 (Iowa App. 1986). The acts must show:

1. Willful and wanton disregard of an employer's interest, such as found in:
 - a. Deliberate violation of standards of behavior that the employer has the right to expect of its employees, or
 - b. Deliberate disregard of standards of behavior the employer has the right to expect of its employees; or
2. Carelessness or negligence of such degree of recurrence as to:
 - a. Manifest equal culpability, wrongful intent or evil design; or
 - b. Show an intentional and substantial disregard of:
 1. The employer's interest, or
 2. The employee's duties and obligations to the employer.

Henry, supra. The reason cited by the employer for discharging the claimant is the conclusion that she had made a second “bad stop.” The claimant had not required the youth to open his bag and so this was not a “stop.” Further, her following the youth to gain information for future reference was consistent with the practices and training she had received. Under the circumstances of this case, the claimant’s conduct was at worst the result of inefficiency, unsatisfactory conduct, inadvertence, or ordinary negligence in an isolated instance, and was a good faith error in judgment or discretion. The employer has not met its burden to show disqualifying misconduct. Cosper, supra. Based upon the evidence provided, the claimant’s actions were not misconduct within the meaning of the statute, and the claimant is not disqualified from benefits.

The final issue is whether the employer’s account is subject to charge. An employer’s account is only chargeable if the employer is a base period employer. Iowa Code Section 96.7. The base period is “the period beginning with the first day of the five completed calendar quarters immediately preceding the first day of an individual’s benefit year and ending with the last day of the next to the last completed calendar quarter immediately preceding the date on which the individual filed a valid claim.” Iowa Code Section 96.19-3. The claimant’s base period began July 1, 2002 and ended June 30, 2003. The employer did not employ the claimant during this time, and therefore the employer is not currently a base period employer and its account is not currently chargeable for benefits paid to the claimant.

DECISION:

The representative’s January 22, 2004 decision (reference 01) is affirmed. The employer did discharge the claimant but not for disqualifying reasons. The claimant is qualified to receive unemployment insurance benefits, if she is otherwise eligible. The employer’s account is not subject to charge in the current benefit year.

ld/b/b