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

THOMAS J WINGFIELD Claimant and **AUTOZONERS LLC** Employer	:	**HEARING NUMBER:** 18BUI-09475 **EMPLOYMENT APPEAL BOARD DECISION**

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. The 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:

The Employer adopts the Administrative Law Judge's findings of fact as its own. The Board finds in addition that the initial tip concerning the fictitious account came just a couple days before the June 20 conversation between Jason Steffen, Regional Loss Prevention Manager, and the Claimant concerning the report.

REASONING AND CONCLUSIONS OF LAW:

Misconduct:

Iowa Code Section 96.5(2)(a) (2018) 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).

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. *Tompkins-Kutcher v. EAB*, No. 11-0149 (Iowa App. 2011).

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 testimony of the Employer and its evidence showing that the Claimant engaged in a scheme of purchasing parts using a fictitious commercial account which provided deep discounts and also allowed his sons and friends to do so as well.

We concur with the Administrative Law Judge in her weighing of the evidence in favor of the Employer. We also concur in her conclusion that the proven actions of the Claimant are effectively theft. Misuse of discounts that is of this magnitude, and that involves such a sustained and substantial deception, is a willful or wanton disregard of an employer's interest and is a deliberate disregard of the standards of behavior which the employer has the right to expect of employees.

The alleged involvement of a manager does not change anything. The Claimant does not get off the hook because higher-ups also may have been involved. In *Crane v. Iowa Dept. of Job Service*, 412 N.W.2d 194 (Iowa App. 1987) the Court refused to excuse the "mooning" of a co-worker even though the whole thing was a supervisor's idea. The Court found no apparent authority, even given the planning and participation on the part of Mr. Crane's own superior, to engage in misconduct. "The mere fact a foreman instigates and approves of egregious conduct does not mean it is reasonable to believe the employer has consented to this approval." *Crane* at 197. Here the creation and use of the fictitious corporate account, which included use by the Claimant's family members, was so outside what was permitted that it was not "reasonable to believe the employer has consented to this approval" by the Claimant's store manager – even crediting the Claimant's evidence of such approval. We therefore conclude that the Claimant was terminated for disqualifying misconduct.

Current Act:

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. Where the misconduct is not flagrantly obvious a reasonable amount of time, which necessarily depends on the circumstances of each case, must be allowed the Employer to investigate the matter and to deliberate its response, if any.

Here there are three reasons each one of which is sufficient by itself to make us conclude that the termination was current: (1) the Claimant was aware of the pending investigation and possible discipline in a timely fashion, (2) the investigation took a reasonable amount of time given its complexity and scope, and (3) the delay between the termination and the tip was substantially lengthened by the Claimant's own lack of candor.

On the first point, the Claimant was aware on June 20 that he was under investigation and that this could lead to serious consequences for him. He had a conversation with the Regional Loss Prevention Manager concerning misuse of discounts, and so would be aware just how serious things were. In *Greene* the Employer delayed taking any action because managers were on vacation. During this delay, however, Mr. Greene was told that there were grounds for discipline and that a meeting would be held to determine what to do. *Greene* at 662. Because of this the Court held that it would disregard the delay caused by the vacations and found that Greene was terminated for a current act. *Greene v. EAB*, 426 N.W.2d 659, 662 (Iowa App. 1988)(using date notice of disciplinary meeting first given). In *Milligan* the Court counted the date of the initial interview with Ms. Milligan to be the date that should be used for determining the amount of delay. The Court noted that "[a]lthough Wells Fargo may not have explicitly told Milligan her actions were grounds for dismissal, the gravity of the matter should have been evident to her…" Slip op. at 9. The same applies here. The Claimant was aware of the on-going investigation back on June 20, and as in *Milligan* the gravity of the matter was apparent. The June 20 interview was only a couple days after the Employer first became aware of the situation. The delay *since* June 20 is not counted against the Employer under *Greene* and *Milligan*. So the termination was current because the Claimant was aware of the pending investigation on his actions for purpose of determining possible discipline early on in that process, and because the evidence does not suggest that the Employer had an improper purpose in taking as long as it did to investigate.

Second, the Employer had to engage in a detailed investigation. By its nature the investigation was going to take time. Numerous people needed to be interviewed, and financial records had to be reviewed. The Employer was not delaying to exploit the Claimant 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 for taking termination seriously. The delay is not too long to investigate the full scope of the scheme, to review the decision on whether to discharge, and then to go through normal levels of decision making. The current act doctrine does not require precipitous decisions. We think a current act of misconduct has been shown because the investigation did not take an unreasonable amount of time.

Third, the investigation would have been much shorter if the Claimant had come clean at the first. His lack of candor with the Employer was an important reason the investigation took so long. He cannot now benefit from that lack of candor by claiming the investigation which he himself could have cut short by being forthcoming, took too long.

Overpayment:

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 October 4, 2018 is **REVERSED**. The Employment Appeal Board concludes that the claimant was discharged for disqualifying misconduct. Accordingly, he 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

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James M. Strohman

RRA/fnv