

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

EMILY MARTIN

Claimant

APPEAL NO: 09A-UI-11162-ET

**ADMINISTRATIVE LAW JUDGE
DECISION**

SEARS ROEBUCK & CO

Employer

OC: 05-31-09

Claimant: Respondent (2R)

Section 96.5-2-a - Discharge/Misconduct
Section 96.3-7 - Recovery of Benefit Overpayment

STATEMENT OF THE CASE:

The claimant filed a timely appeal from the July 29, 2009, reference 03, decision that allowed benefits. After due notice was issued, a hearing was held by telephone conference call before Administrative Law Judge Julie Elder on August 19, 2009, and continued on August 24, 2009. The claimant participated in the hearing. Bridget Clark, Human Resources Manager and Brynn Chubb, Team Manager, participated in the hearing on behalf of the employer. Employer's Exhibits One through Seven were admitted into evidence.

ISSUE:

The issue is whether the employer discharged the claimant for work-connected misconduct.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed as a full-time retail solutions associate for Sears Roebuck & Company from March 4, 2009 through June 3, 2009. The employer has a policy regarding associate arrests and convictions and the claimant signed for this policy March 4, 2009. The policy requires employees to report a felony or misdemeanor arrest or conviction within five days to the employer and states that failure to do so could result in termination. Once the employer becomes aware of an arrest, the employer will determine whether or not the associate's continued employment poses an unacceptable risk. The employer has an additional policy which requires associates to report to their human resources generalist if they are arrested on a charge of possession or use of drugs outside the workplace. Human Resource Compliance is then consulted regarding what steps should be taken while legal action is pending. The claimant was arrested March 27, 2009, and told her manager March 28, 2009. She claimed she was arrested because her license plates were registered in her name and they show she did not have a driver's license. It was her second offense. The employer advised her it needed paperwork regarding the details of the arrest. On March 30, 2009, the claimant provided the employer with a Polk County Sheriff's Office Claim for Reimbursement showing the claimant's arrest and release date. The employer asked the claimant for additional information because the document revealed nothing about the arrest. The claimant submitted a written statement

April 13, 2009, claiming the same general reason for her arrest. The employer again asked the claimant for specific detailed documentation. She sent the employer an e-mail April 29, 2009, stating that she had not yet gone to court and her lawyer told her that she would not have to go at all. The employer sent the claimant an e-mail May 12, 2009, asking for updates and the claimant responded May 13, 2009, that her new court date was June 11, 2009. The claimant provided the employer with a copy of a letter from her attorney, which stated her pretrial date was June 11, 2009, and the trial was set for July 15, 2009. The claimant had still not provided the employer with any more information regarding her arrest despite the fact the employer continued to ask for it. The claimant sent another e-mail to the employer May 20, 2009, stating that she tried to contact her attorney but he was in trial. She sent an e-mail June 3, 2009, which stated that she did not have any paperwork to give to the employer and she felt she was being harassed. The claimant requested all further contact with her be done through her attorney and provided his name and address. She also provided her case number and said it was public record. The employer looked up the case number and discovered the claimant was arrested for possession of a controlled substance. The employer subsequently questioned the claimant as to the missing information and she simply said she left out some of it. The claimant's actions were a violation of the employer's policy and her employment was terminated.

The claimant has claimed and received unemployment insurance benefits since his separation from this employer.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment for job-related misconduct.

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.

The employer has the burden of proving disqualifying misconduct. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). The claimant was discharged June 3, 2009, for violation of company policy by failing to notify the employer she was arrested for possession of a controlled substance. She provided false information as to why she was arrested and refused to provide the paperwork to the employer for three months. When a person willfully and deliberately provides false information, even by omission, to an employer regarding a criminal arrest or conviction, such falsification shall be an act of misconduct in connection with the employer. The statement need not be written and an omission of a pertinent fact would have the same effect. Consequently, the administrative law judge concludes the employer has met its burden of proving disqualifying job misconduct. Therefore, benefits are denied.

The unemployment insurance law provides that benefits must be recovered from a claimant who receives benefits and is later determined to be ineligible for benefits, even though the claimant acted in good faith and was not otherwise at fault. However, the overpayment will not be recovered when it is based on a reversal on appeal of an initial determination to award benefits on an issue regarding the claimant's employment separation if: (1) the benefits were not received due to any fraud or willful misrepresentation by the claimant and (2) the employer did not participate in the initial proceeding to award benefits. The employer will not be charged for benefits whether or not the overpayment is recovered. Iowa Code section 96.3-7. In this case, the claimant has received benefits but was not eligible for those benefits. The matter of determining the amount of the overpayment and whether the overpayment should be recovered under Iowa Code section 96.3-7-b is remanded to the Agency.

DECISION:

The July 29, 2009, reference 03, decision is reversed. The claimant was discharged from employment due to job-related misconduct. Benefits are withheld until such time as she has worked in and been paid wages for insured work equal to ten times her weekly benefit amount, provided she is otherwise eligible. The claimant has received benefits but was not eligible for those benefits. The matter of determining the amount of the overpayment and whether the overpayment should be recovered under Iowa Code section 96.3-7-b is remanded to the Agency.

Julie Elder
Administrative Law Judge

Decision Dated and Mailed

je/css