IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

MELISSA A BARNHOLTZ Claimant **GOODWILL INDUSTRIES OF NE IA INC** Employer	**APPEAL 17A-UI-08317-NM-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 07/23/17** **Claimant: Respondent (1)**

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Code § 96.3(7) – Recovery of Benefit Overpayment
Iowa Admin. Code r. 871-24.10 – Employer/Representative Participation Fact-finding Interview

STATEMENT OF THE CASE:

The employer filed an appeal from the August 9, 2017, (reference 01) unemployment insurance decision that allowed benefits. The parties were properly notified of the hearing. A telephone hearing was held on September 1, 2017. The claimant participated and testified. The employer participated through hearing representative Marcy Schneider and witness Michele Peters. Employer's Exhibits 1 through 5 were received into evidence. Official notice was taken of the fact-finding documents.

ISSUES:

Was the claimant discharged for disqualifying job-related misconduct?
Has the claimant been overpaid any unemployment insurance benefits, and if so, can the repayment of those benefits to the agency be waived?
Can any charges to the employer's account be waived?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed part time as a sales associate from August 9, 2014, until this employment ended on July 21, 2017, when she was discharged.

On July 13, 2017, it came to the employer's attention that on July 8, 2017, claimant was involved in a transaction where a customer was able to leave with merchandise she had not paid for. An investigation began, which included reviewing receipts and security footage from the date in question. (Exhibits 3 and 5). The footage shows a customer approaching the register with a shopping cart full of items. The customer began placing the items on the counter for claimant to ring up. Claimant can be seen going back a forth between taking clothing off hangers, folding the items, entering things into the cash register, and bagging the items. During this same time the customer is continuingly placing large amounts of merchandise on the counter where claimant is completing the transactions. Several times throughout the

transaction, the customer also appears to be requesting to see items in locked cases and continues to place merchandise on the counter while claimant retrieves the items. The entire transaction occurs over a nearly 15 minute period of time.

After viewing the transaction, the employer determined ten clothing items and three pairs of shoes were not rung in. The employer concluded that claimant had deliberately failed to ring in these items and decided to terminate her employment under the theft policy. (Exhibits 2 and 4). This conclusion was based on the fact that claimant did not seem rushed, that she bagged all the items, and that she appeared very friendly with the customer, as though she might have known her. The employer also conceded, however, that claimant had strong customer service skills. The investigation did not include an interview of the claimant, but at the time of her termination, she denied the allegations made against her.

During the hearing, claimant admitted she might have made a mistake by failing to ring items in, but denied it was done deliberately. Claimant also testified, that due to a contest the store was having at the time, the one transaction was also split into three separate purchases, which may have led to her becoming confused as to what she had rung in and what she had not. Claimant further testified she only knew the customer as a regular customer of the store and did not know her outside of the store. Claimant had no prior disciplinary action.

The claimant filed a new claim for unemployment insurance benefits with an effective date of July 23, 2017. The claimant filed for and received a total of $940.00 in unemployment insurance benefits for the weeks between July 23 and August 26, 2017. The employer did not participate in the fact finding interview regarding the separation on August 8, 2017. The fact finder determined claimant qualified for benefits.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes claimant was discharged from employment for no disqualifying reason.

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.
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> 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 employer has the burden of proof in establishing disqualifying job misconduct. *Cosper v. Iowa Dep't of Job Serv.*, 321 N.W.2d 6 (Iowa 1982). The issue is not whether the employer made a correct decision in separating claimant, but whether the claimant is entitled to unemployment insurance benefits. *Infante v. Iowa Dep't of Job Serv.*, 364 N.W.2d 262 (Iowa Ct. App. 1984). Misconduct must be "substantial" to warrant a denial of job insurance benefits. *Newman v. Iowa Dep't of Job Serv.*, 351 N.W.2d 806 (Iowa Ct. App. 1984).

In an at-will employment environment an employer may discharge an employee for any number of reasons or no reason at all if it is not contrary to public policy, but if it fails to meet its burden of proof to establish job related misconduct as the reason for the separation, it incurs potential liability for unemployment insurance benefits related to that separation. A determination as to whether an employee's act is misconduct does not rest solely on the interpretation or application of the employer's policy or rule. A violation is not necessarily disqualifying misconduct even if the employer was fully within its rights to impose discipline up to or including discharge for the incident under its policy.

The conduct for which claimant was discharged was an isolated incident of poor judgment. The manner in which the claimant is completing the transaction does appear to be very disorganized and haphazard. The claimant also appears to be distracted both by her conversation with the customer and the customer's requests to see other merchandise. However, claimant can also be seen going back and forth ringing items in before she bags and folds them. The security footage does not conclusively show claimant's conduct was deliberate rather than extreme carelessness. The employer's testimony that claimant appeared to know the customer, based on their friendly interaction, is also not convincing, as it acknowledged claimant had strong customer service skills.

The employer has only shown that claimant was negligent. "[M]ere negligence is not enough to constitute misconduct." *Lee v. Employment Appeal Board*, 616 N.W.2d 661, 666 (Iowa 2000). A claimant will not be disqualified if the employer shows only "inadvertencies or ordinary negligence in isolated instances." 871 IAC 24.32(1)(a). When looking at an alleged pattern of negligence, previous incidents are considered when deciding whether a "degree of recurrence" indicates culpability. Claimant was careless, but the carelessness does not indicate "such degree of recurrence as to manifest equal culpability, wrongful intent or evil design" such that it could accurately be called misconduct. Iowa Admin. Code r. 871-24.32(1)(a); *Greenwell v. Emp't Appeal Bd.*, No. 15-0154 (Iowa Ct. App. Mar. 23, 2016). Ordinary negligence is all that is proven here.

An employee is entitled to fair warning that the employer will no longer tolerate certain performance and conduct. Without fair warning, an employee has no reasonable way of knowing that there are changes that need be made in order to preserve the employment. If an employer expects an employee to conform to certain expectations or face discharge, appropriate (preferably written), detailed, and reasonable notice should be given. Training or general notice to staff about a policy is not considered a disciplinary warning. Inasmuch as employer had not previously warned claimant about the careless or disorganized manner in which she was ringing large transactions, it has not met the burden of proof to establish that claimant acted deliberately or with recurrent negligence in violation of company policy, procedure, or prior warning. As benefits are allowed, the issues of overpayment and participation are moot.

DECISION:

The August 9, 2017, (reference 01) unemployment insurance decision is affirmed. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided she is otherwise eligible. Any benefits claimed and withheld on this basis shall be paid. The issues of overpayment and participation are moot.

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Nicole Merrill
Administrative Law Judge

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Decision Dated and Mailed

nm/rvs