**IOWA WORKFORCE DEVELOPMENT**
**UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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| **KODY R COCKRUM**<br>Claimant<br><br>**THE PLANNERS TAX & ACCOUNTING INC**<br>Employer | **APPEAL 16A-UI-13797-JP**<br><br>**ADMINISTRATIVE LAW JUDGE DECISION**<br><br>**OC: 12/04/16**<br>**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 December 27, 2016, (reference 01) unemployment insurance decision that allowed benefits. The parties were properly notified about the hearing. An in-person hearing was held on January 24, 2017, at 1000 East Grand Avenue in Des Moines, Iowa. Claimant participated. Employer participated through attorney Patrick White, general manager Richard Siron, store manager Chris Blong, and subpoenaed witness Beverly Murphy. The employer subpoenaed Robyn Murphy, but she did not testify. The employer made a motion to sequester the witnesses, the motion was granted, and the witnesses were sequestered; Mr. Siron was allowed to remain with attorney Patrick White during the hearing as the employer's representative. Employer Exhibits A, B, C, D, E, and F were admitted into evidence with no objection. Claimant Exhibit 1 was offered into evidence. The employer objected to Claimant Exhibit 1 because it contained hearsay evidence. The employer's objection was overruled and Claimant Exhibit 1 was admitted into evidence.

**ISSUES:**

Was the claimant discharged for disqualifying job-related misconduct?

Has the claimant been overpaid unemployment insurance benefits, and if so, can the repayment of those benefits to the agency be waived?

Can 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 full-time as a truck driver from June 26, 2010, and was ultimately separated from employment on November 30, 2016, when he was discharged for violating the employer purchase policy, taking proceeds from checks made payable to the employer, and violating the truck driver employee handbook.

After an audit report was released to the employer in August 2016, the employer instituted a new employee purchase policy on September 2, 2016. Employer Exhibit B. Claimant was aware of the new employee purchase policy. The employer also has a truck driver employee handbook. Employer Exhibit E. The truck driver employee handbook requires the truck driver to not operate the employer's vehicle in reverse unless the truck driver's helper is outside the vehicle to help guide the truck driver. Employer Exhibit E. Claimant was aware of the truck driver employee handbook.

On September 21, 2016, claimant worked his scheduled shift. Around 8:21 a.m., claimant took a table and chairs and loaded them onto the employer's truck. Employees are not allowed to use the employer's truck for personal use. Employer Exhibit E. On September 21, 2016, an undated furniture ticket was placed on a bulletin board with claimant's signature for a table with a price of $99.95. Employer Exhibits C, D, and F. The employer discovered the incident on September 21, 2016. The employer reviewed the security video and did not see claimant approach the cash register to pay for the table and chairs. The employer determined claimant had violated the employee purchase policy by not paying for the merchandise prior to removing the items.

In early October 2016, claimant was driving an employer vehicle when he backed into a mailbox, causing damage to the mailbox. The employer had to pay the mailbox owner for the damages to the mailbox. The employer determined claimant backed the vehicle up without having his helper outside the vehicle to guide him, in violation of the truck driver employee handbook.

On October 17, 2016, claimant worked his scheduled shift. The employer has some tools that had not been priced yet outside of the store. Claimant sorted out some tools that he wanted to purchase and carried them to the employer's truck. The employer observed claimant removing the tools on video. Mr. Blong observed claimant paying for the tools, but he was not sure where claimant got the value of the tools. The employer determined claimant's purchase of the tools violated the employee purchase policy.

Around October 20, 2016, the employer had a meeting with the truck driver manager, the truck drivers, the helpers, and store management (except Beverly Murphy). The employer established what all the policies were and discussed the video footage. The employer gave all the employees in the meeting a verbal warning about the truck driving policies. The employer gave claimant a verbal warning for violating the employee purchase policy on September 21, 2016 and October 17, 2016. The employer did not warn claimant his job was in jeopardy. On October 24, 2016, Beverly Murphy paid $19.95 for claimant's table. Employer Exhibit A.

On October 25, 2016, Mr. Siron met with Beverly Murphy, Robyn Murphy, Mr. Blong, Allison (an assistant general manager), and claimant. At the beginning of the meeting, Beverly Murphy presented the October 24, 2016 receipt for claimant's table and chairs. Employer Exhibit A. During the meeting, claimant then explained his process of taking the employer's scrap metal to Alter Metal. Claimant would load up the employer's scrap metal and take it to Alter Metal. Alter Metal would then give claimant a check written out to the employer. Claimant would bring the check back to the employer. Claimant would then receive cash from the cash register for the amount of the check and the employer would keep the check. The most recent time this occurred was on October 7, 2016. From October 2014 to October 7, 2016, claimant did this thirty-five to forty times for a total value of $1574.00. October 25, 2016 was the first time Mr. Siron became aware of this process. After October 25, 2016, employees were required to provide the Alter Metal checks to Mr. Siron for deposit and claimant was no longer allowed to get cash for the checks. The meeting ended with no warnings issued.

On October 26, 2016, Mr. Siron presented claimant a letter that he was being discharged because of the violations of the employee purchase policy on September 21, 2016 and October 17, 2016, the accident in October 2016 that violated the truck driver employee handbook, and the Alter Metal checks (taking proceeds from checks made payable to the employer). Beverly Murphy and Robyn Murphy were present when claimant was discharged. After Mr. Siron told claimant he was discharged, claimant got upset, Robyn Murphy stated if he is gone, I am gone, and Beverly Murphy went out on the store floor and tried to get the other employees to take her side and walk out, which would have shut down the store for a period of time. Mr. Siron answers to a Board of Trustees and was concerned about all the employees were leaving. Less than an hour after telling claimant he was discharged, Mr. Siron decided to rehire/allow claimant to continue working for the employer. Mr. Siron told claimant that Mr. Siron would be watching him close. After October 26, 2016, claimant had no further violations of the employer purchase policy or truck driver handbook. After October 26, 2016, claimant did not take proceeds from checks made payable to the employer. The employer did not warn claimant his job was in jeopardy after he was rehired/allowed to continue to work.

Mr. Siron called a special meeting with the Board of Trustees on November 4, 2017. The Trustees felt there were enough discrepancies involving claimant, that it authorized for Mr. Siron to put a plan in place to discharge claimant, Beverly Murphy, and Robyn Murphy on November 30, 2016. Claimant was not informed he was going to be discharged until November 30, 2016. The employer did not present any evidence of misconduct committed by claimant after October 26, 2016. On November 30, 2016, the employer discharged claimant because of the same incidents he was discharged/disciplined for on October 26, 2016.

**REASONING AND CONCLUSIONS OF LAW:**

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

Iowa Code § 96.5-2-a provides:

> An individual shall be disqualified for benefits:
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> 2. Discharge for misconduct. If the department finds that the individual has been discharged for misconduct in connection with the individual's employment:
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> 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.

Iowa Admin. Code r. 871-24.32(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 Dep't of Job Serv.,* 275 N.W.2d 445, 448 (Iowa 1979).

Iowa Admin. Code r. 871-24.32(8) provides:

> (8) Past acts of misconduct. While past acts and warnings 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.

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). What constitutes misconduct justifying termination of an employee and what misconduct warrants denial of unemployment insurance benefits are two separate decisions. *Pierce v. Iowa Dep't of Job Serv.*, 425 N.W.2d 679 (Iowa Ct. App. 1988). Misconduct serious enough to warrant discharge is not necessarily serious enough to warrant a denial of job insurance benefits. Such misconduct must be "substantial." *Newman v. Iowa Dep't of Job Serv.*, 351 N.W.2d 806 (Iowa Ct. App. 1984).

Iowa Admin. Code r. 871-24.32(8) provides:

> (8) Past acts of misconduct. While past acts and warnings 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.

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. An unpublished decision held informally that two calendar weeks or up to ten work days from the final incident to the discharge may be considered a current act. *Milligan v. Emp't Appeal Bd.*, No. 10-2098 (Iowa Ct. App. filed June 15, 2011). Inasmuch as the employer had warned claimant about the final incidents on October 26, 2016, when the employer temporarily discharged claimant for less an hour, but then allowed claimant to continue to work, and there were no incidents of alleged misconduct thereafter, it has not met the burden of proof to establish that claimant acted deliberately or negligently after the most recent warning. The employer has not established a current or final act of misconduct, and, without such, the history of other incidents need not be examined. Accordingly, benefits are allowed.

As benefits are allowed, the issues of overpayment, repayment, and the chargeability of the employer's account are moot.

**DECISION:**

The December 27, 2016, (reference 01) unemployment insurance decision is affirmed. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided claimant is otherwise eligible. Any benefits claimed and withheld on this basis shall be paid.

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Jeremy Peterson
Administrative Law Judge

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Decision Dated and Mailed

jp/rvs