IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

GINA L ROBINSON
Claimant

THE BON-TON DEPARTMENT STORES INC
Employer

APPEAL NO: 13A-UI-02040-DT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 01/20/13
Claimant: Appellant (2)

Section 96.5-2-a – Discharge

STATEMENT OF THE CASE:

Gina L. Robinson (claimant) appealed a representative's February 15, 2013 decision (reference 01) that concluded she was not qualified to receive unemployment insurance benefits after a separation from employment with The Bon-Ton Department Stores, Inc. (employer). After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on March 19, 2013. The claimant participated in the hearing. The employer failed to respond to the hearing notice and provide a telephone number at which a witness or representative could be reached for the hearing and did not participate in the hearing. Based on the evidence, the arguments of the claimant, 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?

OUTCOME:

Reversed. Benefits allowed.

FINDINGS OF FACT:

The claimant started working for the employer on February 15, 2011. Since about September 2012 she worked full time as a cosmetic counter manager at the employer's West Des Moines, Iowa store. Her last day of work was January 12, 2013. The employer discharged her on that date. The reason asserted for the discharge was excessive tardiness.

The claimant had previously had an initial and a second warning for tardiness; however, by September 2012 the claimant understood that at least one of those warnings had dropped off and that she had a fresh start, thus enabling her to be given the promotion to the cosmetic counter manager. The claimant then had a tardy in December. On December 28 the employer gave the claimant a warning that was captioned as being a "final warning." The claimant protested, indicating that it should not be a final warning, as she was supposed to be "starting fresh" on the attendance issues after September. The employer's representative who was

giving her the warning agreed with the claimant but told her to go ahead and sign it, that everything would be alright, so the claimant did sign it.

On December 29 the claimant had a family friend who was going to drive her to work. However, when it came time to leave, the friend discovered that the car had been towed. The claimant immediately called a taxi; she did report for work about 15 minutes late. She expressed concern to her department manager and the human resources manager, asking what this would mean, and she was assured that there would not be a problem. However, on January 12 the employer informed the claimant that she was being discharged due to the December 29 tardy after the December 28 "final warning."

REASONING AND CONCLUSIONS OF LAW:

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 § 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). The question 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 matters. *Pierce v. IDJS*, 425 N.W.2d 679 (Iowa App. 1988).

In order to establish misconduct such as to disqualify a former employee from benefits an employer must establish the employee was responsible for a deliberate act or omission which was a material breach of the duties and obligations owed by the employee to the employer. 871 IAC 24.32(1)a; *Huntoon v. Iowa Department of Job Service*, 275 N.W.2d 445 (Iowa 1979); *Henry v. Iowa Department of Job Service*, 391 N.W.2d 731, 735 (Iowa App. 1986). The conduct must show a 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. 871 IAC 24.32(1)a; *Huntoon*, supra; *Henry*, supra. In contrast, 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. 871 IAC 24.32(1)a; *Huntoon*, supra; *Newman v. Iowa Department of Job Service*, 351 N.W.2d 806 (Iowa App. 1984).

The reason cited by the employer for discharging the claimant on January 12, 2013 is the assertion she had a tardy on December 29 after a December 28 "final warning." However, there is no current act of misconduct as required to establish work-connected misconduct. 871 IAC 24.32(8); *Greene v. Employment Appeal Board*, 426 N.W.2d 659 (Iowa App. 1988). The most recent incident in question occurred two weeks prior to the employer's discharge of the claimant. Further, while excessive unexcused absences or tardiness can constitute misconduct, in order to establish the necessary element of intent, the final incident must have occurred despite the claimant's knowledge that the occurrence could result in the loss of her job. *Cosper*, supra; *Higgins v. IDJS*, 350 N.W.2d 187 (Iowa 1984). Here, the claimant had been explicitly told that the December 28 "final warning" did not mean that her job was in jeopardy. 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.

DECISION:

The representative's February 15, 2013 decision (reference 01) is reversed. 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.

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Lynette A. F. Donner
Administrative Law Judge

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Decision Dated and Mailed

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