

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

NICOLE DALTON
Claimant

VICTORIAS SECRET STORES LLC
Employer

APPEAL 17A-UI-05109-NM-T
**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 04/09/17
Claimant: Respondent (4R)

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 May 4, 2017, (reference 01) unemployment insurance decision that allowed benefits on the basis that the dismissal was not for a current act. The parties were properly notified of the hearing. A telephone hearing was held on June 1, 2017. The claimant did not participate. The employer participated through Hearing Representative Edward Wright and Assistant Store Manager Kyra Blecker. Employer's Exhibit 1 was received into evidence. Official notice was taken of the administrative record.

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 and support generalist from April 13, 2015, until this employment ended on January 7, 2017, when she was discharged.

On December 29, 2016, the employer's loss prevention department detected some suspicious activity involving claimant on December 20 and 21, 2016. An investigation showed on these dates claimant had rung up \$2,655.00 in merchandise for her friends, but did a price override in the system to bring the cost of the merchandise down to nothing. This conduct is considered theft under the employer's policies and is grounds for termination. On January 7, 2017, a meeting was held where claimant was asked about the activity that occurred in December. Claimant admitted to the theft in a written statement and agreed to reimburse the store. Claimant was immediately discharged.

A computer printout of the incident report lists the date of the report as December 29, 2016. Several of the documents signed by claimant have a date of January 7, 2016, though other documents related to the same incident have a date of January 7, 2017. The documents and testimony consistently state claimant was immediately discharged upon admitting to the theft. Claimant's wage records show she was an employee of this employer throughout 2016 and into the first quarter of 2017.

The claimant filed a new claim for unemployment insurance benefits with an effective date of April 9, 2017. The claimant filed for and received a total of \$1,522.00 in unemployment insurance benefits for the weeks between April 9 and May 27, 2017. The employer participated in a fact finding interview regarding the separation on May 3, 2017. The fact finder determined claimant qualified for benefits. The administrative record reflects that the claimant has not requalified for benefits and had other base period wages but the record is unclear as to whether she is otherwise monetarily eligible.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment due to job-related misconduct. Benefits are denied.

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.

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).

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.

A lapse of 11 days from the final act until discharge when claimant was notified on the fourth day that his conduct was grounds for dismissal did not make the final act a “past act.” Where an employer gives seven days’ notice to the employee that it will consider discharging him, the date of that notice is used to measure whether the act complained of is current. *Greene v. Emp’t Appeal Bd.*, 426 N.W.2d 659 (Iowa Ct. App. 1988). 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). In reviewing past acts as influencing a current act of misconduct, the ALJ should look at the course of conduct in general, not whether each such past act would constitute disqualifying job misconduct in and of itself. *Attwood v. Iowa Dep’t of Job Serv.*, No. ____, (Iowa Ct. App. filed ____, 1986).

Here, the employer discovered the suspected theft on December 29, 2016. An investigation immediately began. Several of the documents related to the investigation include a handwritten date of January 7, 2016. Other documents include a handwritten date of January 7, 2017. A computer generated incident report gives the date of the report as December 29, 2016. Claimant’s wage records indicate she earned wages with the employer throughout 2016 and into the first quarter of 2017. The testimony and evidence consistently states that claimant was immediately discharged upon admitting to the theft. In looking at the totality of the evidence it is reasonable to assume the handwritten dates of January 7, 2016 were written in error, as the new year had just begun and it would not have been possible to discharge claimant in January 2016 for a theft that did not occur until December 2016. Claimant was discharged on January 7, 2017 for a theft that was discovered on December 29, 2016, making it 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). 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). Negligence does not constitute misconduct unless recurrent in nature; a single act is not disqualifying unless indicative of a deliberate disregard of the employer’s interests. *Henry v. Iowa Dep’t of Job Serv.*, 391 N.W.2d 731 (Iowa Ct. App. 1986).

Assisting one’s friends in taking merchandise without paying for it is theft from the employer. Theft from an employer is generally disqualifying misconduct. *Ringland Johnson, Inc. v. Hunecke*, 585 N.W.2d 269, 272 (Iowa 1998). In *Ringland*, the Court found a single attempted theft to be misconduct as a matter of law. In this case, the claimant deliberately disregarded the employer’s interest and knowingly violated a company policy. The claimant engaged in disqualifying misconduct even without previous warning. The separation is disqualifying. The

claimant has not requalified for benefits since the separation but may be otherwise monetarily eligible according to base period wages.

One of the documents provided in Exhibit 1 was a statement written by claimant in which she admitted to the theft in the amount of \$2,655.00. Based on this information, the issue of whether claimant engaged in gross misconduct must be remanded for initial investigation and determined.

The issue of whether claimant has been overpaid benefits cannot be determined until the issues involving her monetary eligibility and possible gross misconduct are resolved. Accordingly, the issue of overpayment is reserved pending the resolution of the above mentioned questions and will not be further addressed in this decision.

DECISION:

The May 4, 2017, (reference 01) unemployment insurance decision is modified in favor of the appellant. The claimant was discharged from her part-time employment for disqualifying misconduct and has not requalified for benefits but may be otherwise monetarily eligible. Benefits are allowed, provided the claimant is otherwise eligible. The employer's account (339776-000) shall not be charged. The issue of claimant's overpayment is reserved until such time as the issues remanded to the Benefits Bureau of Iowa Workforce Development are resolved.

REMAND:

The claimant's monetary eligibility after the discharge from this part-time employment (employer account number 339776-000) as delineated in the findings of fact is remanded to the Benefits Bureau of Iowa Workforce Development for an initial investigation and determination. The issue of whether claimant's discharge involved gross misconduct is also remanded to the Benefits Bureau of Iowa Workforce Development for an initial investigation and determination.

Nicole Merrill
Administrative Law Judge

Decision Dated and Mailed

nm/rvs