

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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**DONITA J CREES**  
Claimant

**ZALES**  
Employer

**APPEAL 15R-UI-10923-EC-T**  
**ADMINISTRATIVE LAW JUDGE  
DECISION**

**OC: 04/19/15**  
**Claimant: Respondent (1)**

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Iowa Code § 96.5(2)a – Discharge for Misconduct  
Iowa Admin. Code r. 871-24.32(1)(a) – Misconduct Defined  
Iowa Code § 96.3(7) – Overpayment  
Iowa Admin. Code r. 871-24.10 – Employer Participation in Fact-Finding Process

**STATEMENT OF THE CASE:**

The employer, Zales, filed an appeal from the May 6, 2015, (reference 01) unemployment insurance decision that allowed benefits based upon insufficient evidence to show disqualifying misconduct as the reason for the separation from employment. The parties were properly notified of the hearing. A telephone hearing was initially scheduled on July 6, 2015 at 2:00 p.m. The hearing was continued and rescheduled on July 14, 2015 at 3:00 p.m. The hearing was then rescheduled for July 29, 2015 at 3:00 p.m. The claimant, Donita Crees, participated and testified. Her attorney, Katrina Phillips, appeared on her behalf. The employer, Zales, participated through RoxAnne Rose of ADP, hearing representative; and Mike Skrypek and Eric Hanson. Mr. Skrypek and Mr. Hanson testified.

On August 4, 2015, the administrative law judge (ALJ) assigned to this hearing, James Timberland, issued a decision in Appeal No. 15A-UI-05838-JTT. ALJ Timberland dismissed the employer's appeal based on his conclusion that the employer failed to provide a complete and good faith response to the subpoena requested by the claimant's attorney. This ALJ did not make a decision on the merits of the employer's appeal.

The employer appealed ALJ Timberland's decision to the Employment Appeal Board (EAB). On September 30, 2015, the EAB issued a decision, specifically remanding the matter for a decision based on the record made before the agency. The EAB found that the employer made a significant effort to comply with the subpoena. The EAB specifically concluded "that the record as it stands is sufficient for the administrative law judge to issue a decision on the merits of this case." In accordance with the Employment Appeal Board's explicit direction, this decision is based on the record submitted to the agency, Iowa Workforce Development, by Emily Gould Chafa, UI Appeals Bureau Manager.

Per the EAB's explicit direction, this is a decision on the merits, based on the documents in the agency file. The record includes the following documents which are part of the record submitted to Iowa Workforce Development UI Appeals Bureau: the initial IWD decision issued on May 6, 2015, which allowed benefits; the employer's appeal, dated May 18, 2015; exhibits submitted by

the claimant's attorney; a letter from the claimant's attorney, dated June 25, 2015, and attachments; a letter dated July 27, 2015, from the employer's representative, with attachments; the IWD fact-finding worksheet for misconduct, along with a letter from the employer's representative; and other documents relating to the claim.

**ISSUES:**

Was the separation from employment a disqualifying discharge for misconduct?

Was the claimant overpaid benefits?

Should the claimant repay benefits and/or charge the employer due to employer participation in the fact finding process?

**FINDINGS OF FACT:**

Having reviewed all of the evidence in the record, as directed by the Employment Appeal Board, the administrative law judge makes the following findings of facts: The claimant, Donita Crees, was employed full time as a jewelry consultant with this employer beginning on September 1, 2007. Her employment ended on April 23, 2015, when she was terminated for a company policy violation, specifically, for discounting several transactions in the amount of \$7000 - \$8000, and because of missing funds and missing merchandise.

The claimant immediately applied for unemployment insurance benefits. The employer filed a protest via the SIDES system. A fact-finding interview was scheduled and held on or about May 5, 2015. The employer participated in the fact-finding interview, through Eric Hanson, District Manager.

The initial IWD decision, issued on May 6, 2015, allowed benefits, stating that the claimant was dismissed from work on April 23, 2015, for alleged misconduct, but added as its explanation, "the employer did not furnish sufficient evidence to show misconduct."

The employer appealed from the decision which allowed benefits. The employer's representatives stated that the claimant was discharged for the unauthorized removal of company property and/or funds. At about the same time, the employer also learned that the claimant gave unauthorized discounts of thousands of dollars.

The claimant admitted giving discounts, but stated that a supervisor approved each discount. She did this to make her sales goals. She stated that four deposits and merchandise were missing. The claimant stated that she did not knowingly break company policy.

In 2009, the claimant signed a document entitled "Zale Corporation Code of Business Conduct and Ethics Certificate of Compliance." In addition to acknowledging that she read and understood the Code of Business Conduct and Ethics, the claimant acknowledged that her employment could be terminated at any time, for any reason or no reason.

In March of 2015, the claimant received an evaluation related to sales and profit goals and success measurement. The total weighted value of the evaluation was 2.3 on a 1 to 4 scale. The commentary includes this statement: "Has a lot of trouble arriving to work on time. Also needs to work on security." This evaluation did not mention discounts.

The claimant was aware of the employer's specific markdown and discounts policy and process. She was aware of the applicable commission rates for her position as a jewelry consultant. The claimant's monthly results, goals, and performance feedback for May 2014 and July 2014 reflected specific sales areas.

No documents specifically relating to the claimant's termination or the reasons for her termination were submitted as part of the record in this matter.

#### **REASONING AND CONCLUSIONS OF LAW:**

For the reasons that follow, the administrative law judge concludes the employer failed to meet its burden of proof to show that claimant was discharged from employment due to disqualifying job-related misconduct. Benefits are allowed.

Iowa Code § 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.

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

Iowa Admin. Code r. 871-24.32(4) provides:

(4) Report required. The claimant's statement and the employer's statement must give detailed facts as to the specific reason for the claimant's discharge. Allegations of

misconduct or dishonesty without additional evidence shall not be sufficient to result in disqualification. If the employer is unwilling to furnish available evidence to corroborate the allegation, misconduct cannot be established. In cases where a suspension or disciplinary layoff exists, the claimant is considered as discharged, and the issue of misconduct shall be resolved.

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). When based on carelessness, the carelessness must actually indicate a "wrongful intent" to be disqualifying in nature. *Id.* 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). Poor work performance is not misconduct in the absence of evidence of intent. *Miller v. Emp't Appeal Bd.*, 423 N.W.2d 211 (Iowa Ct. App. 1988).

The Iowa Supreme Court ruled that if a party has the power to produce more explicit and direct evidence than it chooses to present, the administrative law judge may infer that evidence not presented would reveal deficiencies in the party's case. *Crosser v. Iowa Dep't of Pub. Safety*, 240 N.W.2d 682 (Iowa 1976). In this case, the employer did not submit any documents listing specific reasons for the termination. The employer stated that the claimant violated company policy, and stated that she gave unauthorized discounts, but did not provide details of when, where and how she violated any company policies. The employer did not provide any details relating to unauthorized discounts. The claimant rebutted the employer's basic reason for the separation, stating that all discounts were approved by a manager.

The employer did not meet its burden of proof to establish that claimant acted deliberately or with recurrent negligence in violation of company policy, procedure, or prior warning. 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. No evidence was submitted to show that this claimant received any warning regarding unauthorized discounts.

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.

Furthermore, the determination of whether or not an employee's act constitutes 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.

#### **DECISION:**

The May 6, 2015, (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 employer participated in the fact-finding process. The claimant was not overpaid benefits.

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Emily Gould Chafa  
Administrative Law Judge

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Decision Dated and Mailed

ec/css