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

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| **KRISTA J STOROY**<br>Claimant<br><br>**BRIDGESTONE RETAIL OPERATIONS LLC**<br>Employer | **APPEAL 15A-UI-12924-JP-T**<br><br>**ADMINISTRATIVE LAW JUDGE DECISION**<br><br>**OC: 10/11/15**<br>**Claimant: Respondent (2)** |

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 November 13, 2015 (reference 02) unemployment insurance decision that allowed benefits. The parties were properly notified about the hearing. A telephone hearing was held on December 14, 2015. Claimant participated. Employer participated through area manager Jason Schmidt. Employer's Exhibit One was admitted into the record with no objection.

**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 retail sales associate from April 28, 2014 and was separated from employment on October 2, 2015; when she was discharged.

The employer has a progressive disciplinary policy; the first step is verbal warning, second step is written warning, third step is a written warning with performance improvement, and final step is discharge. Claimant was aware of the policy per the warnings.

One of claimant's job duties was to properly close the store. Claimant was responsible for making sure the doors and window(s) were locked. Claimant had been properly trained at different location on how to close to store. Prior to September 30, 2015, claimant had properly closed the store. On September 30, 2015, claimant left window(s) and bay doors unlocked;

which prevented the store from being closed properly (Employer's Exhibit One). On October 1, 2015, claimant also left a bay door unlocked (Employer's Exhibit One). Based off claimant's prior warnings, claimant was discharged for the incidents on September 30, 2015 and October 1, 2015.

Claimant had been warned for failing to properly close the store on multiple occasions. On September 15, 2015, claimant left a window and a garage door unlocked (Employer's Exhibit One). Claimant was responsible for making sure the doors and windows were locked. This was a written warning with performance improvement needed (step three) (Employer's Exhibit One). Claimant signed for the warning (Employer's Exhibit One). This put claimant on notice her job was in jeopardy. On September 3, 2015, claimant left the north main door was unlocked and shop lights were on (Employer's Exhibit One). Claimant was responsible for closing; this was a written warning (Employer's Exhibit One). Claimant signed for the written warning (step two) (Employer's Exhibit One). Prior to closing on September 3, 2015, claimant was given a verbal about closing procedures on September 3, 2015 (step one) (Employer's Exhibit One).

The administrative record reflects that claimant has received unemployment benefits in the amount of $1825 since filing a claim with an effective date of October 11, 2015; for the six weeks ending November 21, 2015. The administrative record also establishes that the employer did participate in the fact-finding interview.

**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.

It is the duty of an administrative law judge and the trier of fact in this case, to determine the credibility of witnesses, weigh the evidence and decide the facts in issue. *Arndt v. City of LeClaire*, 728 N.W.2d 389, 394-395 (Iowa 2007). The administrative law judge, as the finder of fact, may believe all, part or none of any witness's testimony. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996). In assessing the credibility of witnesses, the administrative law judge should consider the evidence using his or her own observations, common sense and experience. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996). In determining the facts, and deciding what testimony to believe, the fact finder may consider the following factors: whether the testimony is reasonable and consistent with other evidence you believe; whether a witness has made inconsistent statements; the witness's conduct, age, intelligence, memory, and knowledge of the facts; and the witness's interest in the trial, their motive, candor, bias, and prejudice. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996).

This administrative law judge assessed the credibility of the witnesses who testified during the hearing, considering the applicable factors listed above, and used my own common sense and experience. This administrative law judge reviewed the exhibit submitted. This administrative law judge finds the employer's version of events to be more credible than claimant's recollection of those events.

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:

> 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).

The Iowa Court of Appeals found substantial evidence of misconduct in testimony that the claimant worked slower than he was capable of working and would temporarily and briefly improve following oral reprimands. *Sellers v. Emp't Appeal Bd.*, 531 N.W.2d 645 (Iowa Ct. App. 1995). Generally, continued refusal to follow reasonable instructions constitutes misconduct. *Gilliam v. Atlantic Bottling Co.*, 453 N.W.2d 230 (Iowa Ct. App. 1990). 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).

While the employer did not present the store manager to provide sworn testimony or submit to cross-examination, the combination of claimant's written warnings (Employer Exhibit One) and Mr. Schmidt's testimony, when compared to claimant's recollection of the event, establish the employer's evidence as credible. On September 30, 2015 and October 1, 2015, claimant failed to properly close the store; even though she had successfully closed the store on prior occasions. Claimant's argument that she did lock the doors and window(s) on September 30, 2015 and October 1, 2015 is unpersuasive. Although claimant testified that on September 30, 2015 and October 1, 2015 that she properly locked the doors and windows, she also testified that she properly locked the doors on September 3, 2015. Yet, when claimant received her written warning for the September 3, 2015 incident, which detailed that she failed

to lock doors and shut off lights, she did not write any comments or explanation in the space provided on the warning (Employer's Exhibit One). Claimant knew she was being disciplined for not locking doors even though she said she did lock them; however, she did not try to talk with Mr. Schmidt, the store manager's supervisor, to resolve the situation. Furthermore, claimant had just been given a verbal warning that day, September 3, 2015, about not closing the store properly and then did not close the store properly that night (Employer's Exhibit One). Claimant also received her third step in the progressive disciplinary process when she failed to lock a door on September 15, 2015; which meant the next violation would result in discharge (Employer's Exhibit One).

The employer is entitled to establish reasonable work rules and expect employees to abide by them. The employer has presented substantial and credible evidence that claimant failed to properly close the store on September 30, 2015 and October 1, 2015; after having been warned on prior occasions. This is disqualifying misconduct.

Iowa Code § 96.3-7, as amended in 2008, provides:

> 7. Recovery of overpayment of benefits.
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> a. If an individual receives benefits for which the individual is subsequently determined to be ineligible, even though the individual acts in good faith and is not otherwise at fault, the benefits shall be recovered. The department in its discretion may recover the overpayment of benefits either by having a sum equal to the overpayment deducted from any future benefits payable to the individual or by having the individual pay to the department a sum equal to the overpayment.
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> b. (1) If the department determines that an overpayment has been made, the charge for the overpayment against the employer's account shall be removed and the account shall be credited with an amount equal to the overpayment from the unemployment compensation trust fund and this credit shall include both contributory and reimbursable employers, notwithstanding section 96.8, subsection 5. However, provided the benefits were not received as the result of fraud or willful misrepresentation by the individual, benefits shall not be recovered from an individual if the employer did not participate in the initial determination to award benefits pursuant to section 96.6, subsection 2, and an overpayment occurred because of a subsequent reversal on appeal regarding the issue of the individual's separation from employment. The employer shall not be charged with the benefits.
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> (2) An accounting firm, agent, unemployment insurance accounting firm, or other entity that represents an employer in unemployment claim matters and demonstrates a continuous pattern of failing to participate in the initial determinations to award benefits, as determined and defined by rule by the department, shall be denied permission by the department to represent any employers in unemployment insurance matters. This subparagraph does not apply to attorneys or counselors admitted to practice in the courts of this state pursuant to section 602.10101.

Iowa Admin. Code r. 871-24.10 provides:

> Employer and employer representative participation in fact-finding interviews.
>
> (1) "Participate," as the term is used for employers in the context of the initial determination to award benefits pursuant to Iowa Code section 96.6, subsection 2, means submitting detailed factual information of the quantity and quality that if unrebutted would be sufficient to result in a decision favorable to the employer. The most effective means to participate is to provide live testimony at the interview from

a witness with firsthand knowledge of the events leading to the separation. If no live testimony is provided, the employer must provide the name and telephone number of an employee with firsthand information who may be contacted, if necessary, for rebuttal. A party may also participate by providing detailed written statements or documents that provide detailed factual information of the events leading to separation. At a minimum, the information provided by the employer or the employer's representative must identify the dates and particular circumstances of the incident or incidents, including, in the case of discharge, the act or omissions of the claimant or, in the event of a voluntary separation, the stated reason for the quit. The specific rule or policy must be submitted if the claimant was discharged for violating such rule or policy. In the case of discharge for attendance violations, the information must include the circumstances of all incidents the employer or the employer's representative contends meet the definition of unexcused absences as set forth in 871—subrule 24.32(7). On the other hand, written or oral statements or general conclusions without supporting detailed factual information and information submitted after the fact-finding decision has been issued are not considered participation within the meaning of the statute.

(2) "A continuous pattern of nonparticipation in the initial determination to award benefits," pursuant to Iowa Code section 96.6, subsection 2, as the term is used for an entity representing employers, means on 25 or more occasions in a calendar quarter beginning with the first calendar quarter of 2009, the entity files appeals after failing to participate. Appeals filed but withdrawn before the day of the contested case hearing will not be considered in determining if a continuous pattern of nonparticipation exists. The division administrator shall notify the employer's representative in writing after each such appeal.

(3) If the division administrator finds that an entity representing employers as defined in Iowa Code section 96.6, subsection 2, has engaged in a continuous pattern of nonparticipation, the division administrator shall suspend said representative for a period of up to six months on the first occasion, up to one year on the second occasion and up to ten years on the third or subsequent occasion. Suspension by the division administrator constitutes final agency action and may be appealed pursuant to Iowa Code section 17A.19.

(4) "Fraud or willful misrepresentation by the individual," as the term is used for claimants in the context of the initial determination to award benefits pursuant to Iowa Code section 96.6, subsection 2, means providing knowingly false statements or knowingly false denials of material facts for the purpose of obtaining unemployment insurance benefits. Statements or denials may be either oral or written by the claimant. Inadvertent misstatements or mistakes made in good faith are not considered fraud or willful misrepresentation.

This rule is intended to implement Iowa Code section 96.3(7)"b" as amended by 2008 Iowa Acts, Senate File 2160.

Because the claimant's separation was disqualifying, benefits were paid to which she was not entitled. The unemployment insurance law provides that benefits must be recovered from a claimant who receives benefits and is later determined to be ineligible for benefits, even though the claimant acted in good faith and was not otherwise at fault. However, the overpayment will not be recovered when it is based on a reversal on appeal of an initial determination to award benefits on an issue regarding the claimant's employment separation if: (1) the benefits were not received due to any fraud or willful misrepresentation by the claimant and (2) the employer did not participate in the initial proceeding to award benefits. The employer will not be charged

for benefits if it is determined that they did participate in the fact-finding interview. Iowa Code § 96.3(7), Iowa Admin. Code r. 871-24.10. In this case, the claimant has received benefits but was not eligible for those benefits. Since the employer did participate in the fact-finding interview the claimant is obligated to repay to the Agency the benefits she received and the employer's account shall not be charged.

**DECISION:**

The November 13, 2015 (reference 02) unemployment insurance decision is reversed. The claimant was discharged from employment due to job-related misconduct. Benefits are withheld until such time as she has worked in and been paid wages for insured work equal to ten times her weekly benefit amount, provided she is otherwise eligible.

The claimant has been overpaid unemployment insurance benefits in the amount of $1825 and is obligated to repay the Agency those benefits. The employer did participate in the fact-finding interview and its account shall not be charged.

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Jeremy Peterson
Administrative Law Judge

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Decision Dated and Mailed

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