

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**SAJAN VARGHESE**  
Claimant

**APPEAL NO. 09A-UI-17221-ST**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**WALGREEN CO**  
Employer

**Original Claim: 10/11/09  
Claimant: Respondent (2-R)**

Section 96.5-2-a,b,c – Discharge/Gross Misconduct  
871 IAC 24.32(1) – Definition of Misconduct  
Section 96.3-7 – Recovery of Overpayment

**STATEMENT OF THE CASE:**

The employer appealed a department decision dated October 30, 2009, reference 01, that held the claimant was not discharged for misconduct on August 30, 2009, and that allowed benefits. A telephone hearing was held on December 21, 2009. The claimant participated. Shirley Phinney, Loss Prevention Supervisor, and Diana Perry-Lehr, Representative, participated for the employer. Official Notice was taken of the employer appeal documents.

**ISSUES:**

Whether the claimant was discharged for gross misconduct in connection with employment.

Whether the claimant is overpaid benefits.

**FINDINGS OF FACT:**

The administrative law judge, having heard the testimony of the witnesses and having considered the evidence in the record, finds: The claimant began full-time employment on December 26, 2006, and last worked for the employer as a full-time assistant store manager on August 29, 2009. The employer's policy is theft is grounds for immediate discharge.

Supervisor Phinney received a tip that the claimant was planning to steal property from the store on August 30, 2009. She conducted surveillance with local law enforcement, and the claimant was observed loading store merchandise in his vehicle. The Des Moines police department stopped the claimant's vehicle and he was arrested for first degree theft. The employer discharged the claimant for theft of property with a value of about \$14,000.

The claimant entered a guilty plea to a Class C felony theft on November 30, and he admitting stealing employer merchandise of a value greater than \$10,000. His sentencing is set for January 19, 2010. The claimant has received benefits on his claim.

## REASONING AND CONCLUSIONS OF LAW:

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.

871 IAC 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 administrative law judge concludes the employer has established that the claimant was discharged for gross misconduct in connection with employment on August 30, 2009, due to a theft of company property in excess of \$10,000.

The claimant's plea of guilty to a Class C felony on November 30 for stealing employer merchandise on August 30 does constitute gross misconduct based on an admission that is court recorded. The conviction occurs at the time of sentencing, which is set for January 19. The conviction for gross misconduct causes a cancellation of the claimant's wage credits earned with all prior employers.

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

7. Recovery of overpayment of benefits.

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.

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.

(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.

Since the claimant is denied benefits by reason of this decision, there is an issue of overpayment that is remanded for determination.

**DECISION:**

The unemployment insurance decision dated June 3, 2009, reference 01, is reversed. The claimant was discharged for gross misconduct on August 30, 2009. Benefits are denied, and the claimant's wage credits earned with prior employers are canceled. The overpayment issue is remanded for determination.

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Randy L. Stephenson  
Administrative Law Judge

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Decision Dated and Mailed

rls/kjw