

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

CAROLINE LEPIC
Claimant

APPEAL NO: 13A-UI-02840-ET

**ADMINISTRATIVE LAW JUDGE
DECISION**

JAX INC
Employer

OC: 01/20/13
Claimant: Respondent (2R)

Section 96.5-2-a – Discharge/Misconduct
Section 96.3-7 – Recovery of Benefit Overpayment

STATEMENT OF THE CASE:

The employer filed a timely appeal from the March 1, 2013, reference 03, decision that allowed benefits to the claimant. After due notice was issued, a hearing was held by telephone conference call before Administrative Law Judge Julie Elder on April 8, 2013. The claimant did not respond to the hearing notice and did not participate in the hearing or request a postponement of the hearing as required by the hearing notice. Marshal Toms, Store Manager; Morgan Dowdall, Camping Department Manager; and Holly Aronson, Assistant Store Manager; participated in the hearing on behalf of the employer.

ISSUE:

The issue is whether the employer discharged the claimant for work-connected misconduct.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed as a part-time apparel and footwear sales associate for Jax Outdoor Gear from September 5, 2012 to January 23, 2013. On January 9, 2013, the claimant and her boyfriend approached the camping register of the fishing, hunting and camping building and tried to return two Haiku wallets valued at \$45.00 each. The wallets had Jax price tags on them and were in Jax boxes. Camping Department Manager Morgan Dowdall was working the register when the claimant and her boyfriend asked to return the wallets. Mr. Dowdall asked them if they had a receipt and they stated they did not and explained they bought them to give to friends as Christmas gifts but changed their minds. Mr. Dowdall attempted to find the purchase on the employer's computer system. He asked them when they bought the items and was told in September or November 2012. Mr. Dowdall looked from June 2012 forward and learned only three of those particular wallets were sold and all three were paid for with credit cards. The credit card transactions contained the names of the purchasers and neither the claimant nor her boyfriend was listed as buyers. Mr. Dowdall instructed the claimant to take the wallets over to Assistant Store Manager Holly Aronson, who was located in the apparel and footwear building. The claimant and her boyfriend first went to their vehicle in the parking lot before going to the apparel and footwear building and did speak to Ms. Aronson but did not

speak to her about the wallets. As they were closing that evening Mr. Dowdall mentioned the situation to Ms. Aronson and she stated the claimant did not bring the situation up to her. Ms. Aronson pulled the inventory list the following morning before the store opened and learned they had three of the wallets in inventory but none of the three were on the floor. She then spoke to Store Manager Marshal Toms about the incident and they decided to meet with the claimant the next time all three were scheduled to work which was January 15, 2013. Mr. Toms asked the claimant why she was trying to return the wallets in the camping department building instead of the clothing department building where they would have been sold and the claimant indicated she and her boyfriend were going to look at camping equipment but the video did not show them going anywhere but to the camping register with the wallets. Ms. Aronson told the claimant the items were missing from the inventory and the claimant stated they may have been purchased by her boyfriend at the Von Maur store in Des Moines although she could not explain why they had the employer's tags on them if bought from Von Maur. Ms. Aronson called the Von Maur store in Des Moines and learned they did not carry the Haiku brand of wallets. Mr. Toms and Ms. Aronson decided to wait to discuss the situation with the claimant one more time the next time all three of them worked and that occurred January 23, 2013. They told the claimant that the evidence "did not add up" and asked the claimant for her boyfriend's number which she provided but appeared very nervous about the situation. Later that evening there was a store meeting and prior to the meeting the employer terminated the claimant's employment because it suspected her of theft and no longer trusted her. It filed a police report against the claimant and she asked the police officer who interviewed her if she and her boyfriend could simply pay for the wallets and let it go but the case is ongoing.

The claimant has claimed and received unemployment insurance benefits since her separation from this employer.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment for disqualifying job misconduct.

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.

The employer has the burden of proving disqualifying misconduct. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). The claimant's actions definitely gave the employer cause to be suspicious that she took two \$45.00 Haiku wallets from its store and tried to return them for cash. The claimant tried to return the wallets to the camping department rather than the apparel building where the wallets would have been purchased. The wallets had the employer's tags on them and were in boxes from the employer, which were accessible to all employees, especially over the Christmas shopping season, but were not on the sales floor at the time the claimant stated they were purchased or when she tried to return them. The three sold before the holidays were all purchased with credit cards, none of which contained the claimant or her boyfriend's name on them. The claimant nervously suggested maybe her boyfriend bought the wallets from Von Maur in Des Moines but Ms. Aronson verified that store did not carry that brand of wallet. Finally, when confronted by the Ames Police Department officer, the claimant, again acting very nervously, asked if she could just pay for the wallets and let the situation go but the employer is pursuing the theft charges against the claimant and her boyfriend. The information does more than raise suspicions against the claimant; it proves by a preponderance of the evidence that the claimant tried to return merchandise she stole from the employer to the employer January 9, 2013. Under these circumstances, the administrative law judge concludes the claimant's conduct demonstrated a willful disregard of the standards of behavior the employer has the right to expect of employees and shows an intentional and substantial disregard of the employer's interests and the employee's duties and obligations to the employer. The employer has met its burden of proving disqualifying job misconduct. Cosper v. IDJS, 321 N.W.2d 6 (Iowa 1982). Therefore, benefits are denied.

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 whether or not the overpayment is recovered. Iowa Code section 96.3-7. In this case, the claimant has received benefits but was not eligible for those benefits. The matter of determining the amount of the overpayment and whether the overpayment should be recovered under Iowa Code section 96.3-7-b is remanded to the Agency.

DECISION:

The March 1, 2013, reference 03, 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 received benefits but was not eligible for those benefits. The matter of determining the amount of the overpayment and whether the overpayment should be recovered under Iowa Code section 96.3-7-b is remanded to the Agency.

Julie Elder
Administrative Law Judge

Decision Dated and Mailed

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