

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

KIMBERLY K MCNELEY

Claimant

APPEAL NO. 16A-UI-11651-TN-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

BASS PRO OUTDOOR WORLD LLC

c/o TALX

BASS PRO SHOPS OUTDOOR WORLD

Employer

OC: 09/18/16

Claimant: Respondent (1)

Section 96.5-2-a - Discharge

STATEMENT OF THE CASE:

Bass Pro Outdoor World LLC, the employer, filed a timely appeal from a representative's decision dated October 17, 2016, reference 03, which held claimant eligible to receive unemployment insurance benefits finding the claimant was discharged from work on April 8, 2016 finding that the claimant's dismissal was not for a current act of misconduct. After due notice was provided, a telephone hearing was held on November 10, 2016. Although duly notified, the claimant did not respond to the notice of hearing and did not participate. The employer participated by Ms. Kathy Dewald, Human Resource Manager, Altoona, Iowa location.

ISSUE:

The issue is whether the claimant was discharged for a current act of misconduct.

FINDINGS OF FACT:

Having considered the evidence in the record, the administrative law judge finds: Kimberly McNeley was employed by Bass Pro Outdoor World LLC from September 1, 2015 until April 8, 2016 when she was discharged from employment. Ms. McNeley was employed as a part-time cashier working 15-25 hours per week and was paid by the hour. Her immediate supervisor was Daniel Stephany.

Kimberly McNeley was discharged on April 8, 2016 because she had failed to follow established company policy in an incident that had taken place on March 7, 2016.

On March 7, 2016, the employer was alerted to a purchase made by Ms. McNeley during which a portion of the payment by Ms. McNeley was in the form of cash remaining on a gift card that had been registered to a different person. Company employees are informed at the time of hire and regularly reminded that the use of any remaining balances on gift cards that had been sold to a Bass Pro customer, cannot be used by store employees as payment for any purchases from the company made by the employee. Employees are to inform management immediately if any gift cards with remaining balances are inadvertently left by customers, or for any reason the company employee will be using a gift card registered to another for the employee's own purchases.

Because the company deems violation of the rule to be a serious matter, the company has set up a system that allows the company to immediately be made aware when an employee is using the gift card of another or the employee is making purchases from Bass Pro Outdoor World. The report of the transaction is immediately generated and flagged by the company's systems. Before an employee can be discharged from employment, however, the matter must be reviewed by Loss Prevention Specialists at the company's corporate headquarters. Although the employer was aware of the transaction made by Ms. McNeley on March 7, 2016, the company's headquarters took no action to discharge the claimant until over one month later when the local facility in Altoona, Iowa was advised by corporate headquarters to discharge Ms. McNeley.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow the administrative law judge concludes the claimant was discharged from employment for no disqualifying reason.

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(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 employer has the burden of proof in establishing disqualifying job misconduct. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). The issue is not whether the employer made a correct decision in separating the claimant but whether the claimant is entitled to unemployment insurance benefits. Infante v. Iowa Department of Job Service, 364 N.W.2d 262 (Iowa App. 1984). What constitutes misconduct justifying termination of an employee and what misconduct warrants the denial of unemployment insurance benefits are two separate decisions. Pierce v. Iowa Department of Job Service, 425 N.W.2d 679 (Iowa App. 1988). Misconduct serious enough to warrant discharge is not always serious enough to warrant a denial of unemployment insurance benefits. In the case at hand, the claimant was discharged for violating a rule that prohibited company employees from using as payment, or part payment, funds remaining on a gift card that had been sold to a company customer who is not the employee using the card for the purchase. The purpose of the rule was to prevent employees from using the balances on gift cards of customers that may have been mislaid or otherwise have come into the possession of the employee without the approval of the customer.

The company became aware that Ms. McNeley had violated the rule on March 7, 2016, but took action to discharge Ms. McNeley from her employment until over one month later on April 8, 2016. During the over one month interim, the claimant was allowed to continue working by the employer although the company had notice of the violation. Although management at the local level may have been aware of the violation when it occurred, they were not allowed to take any action until the matter had been reviewed at the corporate offices by a Loss Prevention Specialist.

Because the evidence in the record does not establish any misconduct or policy violations by the claimant after March 7, 2016, the administrative law judge concludes based upon the evidence in the record that the claimant was not discharged on April 8, 2016 for a current act of misconduct sufficient to warrant the denial of unemployment insurance benefits.

Because the employer has not established a current act of misconduct, the benefits are allowed, providing that the claimant meets all other eligibility requirements of Iowa law.

DECISION:

The representative's decision dated October 17, 2016, reference 03, is affirmed. The claimant's dismissal from work on April 8, 2016 was not for a current act of misconduct. Benefits are allowed, providing the claimant is otherwise eligible.

Terence P. Nice
Administrative Law Judge

Decision Dated and Mailed

pjs/pjs