

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

BRENDA J ZAPKA
Claimant

APPEAL NO. 17A-UI-08993-S1-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

HARBOR FREIGHT TOOLS USA INC
Employer

OC: 07/30/17
Claimant: Respondent (1)

Section 96.5-2-a – Discharge for Misconduct
Section 96.3-7 – Overpayment

STATEMENT OF THE CASE:

Harbor Freight Tools USA (employer) appealed a representative's August 21, 2017, decision (reference 01) that concluded Brenda Zapka (claimant) was eligible to receive unemployment insurance benefits. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was scheduled for September 20, 2017. The claimant participated personally. The employer participated by Daniel Butler, Area Loss Prevention Manager. The Exhibit D-1 was received into evidence.

ISSUE:

The issue is whether the claimant was separated from employment for any disqualifying reason.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds that: The claimant was hired on February 7, 2017, and at the end of her employment she was working as a full-time senior associate of logistics at the Davenport, Iowa, location. She had been working at the Muscatine, Iowa, store but was given a promotion and transferred to the Davenport, Iowa, store. The claimant signed for receipt of a portion of the employer's handbook on February 7, 2017.

On June 5, 2017, after the claimant got off work, she returned an item for a friend. The cashier was the claimant's supervisor in the Muscatine, Iowa, store and the claimant explained the situation to the supervisor. The supervisor put the returned amount, \$128.39, on a gift card and gave it to the claimant. Soon after this the claimant was transferred to Davenport, Iowa. She received a gift card in the mail for \$120.00 and thought it was given to her by her former co-workers in Muscatine, Iowa. The two gift cards ended up in the same location in the claimant's house, a place the claimant keeps gift cards. On June 23, 2017, the claimant used a gift card in the store. She thought she was using the \$120.00 card but she took the \$128.39 card from her home instead. Unbeknownst to the claimant, the employer investigated her use of the card.

On July 4, 2017, the claimant pushed aside a couple of empty boxes she planned to take home for her upcoming move. On previous days she took empty boxes out of the store after they were inspected at the front door. During the day two co-workers looked in the boxes and found a piece of merchandise. The claimant was surprised and denied putting the item in the empty boxes. The incident was reported to the area loss prevention manager and the claimant continued to report to work. The manager was on vacation from July 3 until July 12, 2017. While he was away, his supervisor handled his responsibilities.

On July 26, 2017, the area loss prevention manager questioned the claimant about the merchandise and the boxes. The claimant denied putting the merchandise in the boxes. He also questioned her about using the gift card. She explained the gift was from the folks in Muscatine, Iowa. The manager told her the gift card was actually from a return. The claimant realized it was the other card and explained about her friend's return. The manager placed the claimant on administrative leave. On August 2, 2017, the employer terminated the claimant.

The claimant filed for unemployment insurance benefits with an effective date of July 30, 2017. The employer participated personally at the fact finding interview on August 17, 2017, by Dan Butler.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow the administrative law judge concludes the claimant was not discharged for misconduct.

Iowa Code section 96.5(2)a provides:

An individual shall be disqualified for benefits, regardless of the source of the individual's wage credits:

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 disqualification shall continue 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 employer must establish not only misconduct but that there was a final incident of misconduct which precipitated the discharge. The last incident provided by the employer occurred on July 4, 2017. The claimant was not placed on leave until July 26, 2017, and not discharged until August 2, 2017. The time lapse between the final incident and the separation is too great. The employer has failed to provide any evidence of willful and deliberate misconduct which was the final incident leading to the discharge and disqualification may not be imposed.

DECISION:

The representative's August 21, 2017, decision (reference 01) is affirmed. The employer has not met its burden of proof to establish job related misconduct. Benefits are allowed, provided claimant is otherwise eligible.

Beth A. Scheetz
Administrative Law Judge

Decision Dated and Mailed

bas/rvs