

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

JEANINE M MCDONALD
Claimant

APPEAL NO. 09A-UI-16370-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

VON MAUR INC
Employer

OC: 10/04/09
Claimant: Respondent (2-R)

Iowa Code Section 96.5(2)(a) – Discharge for Misconduct

STATEMENT OF THE CASE:

The employer filed a timely appeal from the October 21, 2009, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on December 7, 2009. Claimant Jeanine McDonald participated. Glenda Smith, Store Manager, represented the employer. Exhibits One through 12 and 14 through 21 were received into evidence.

ISSUE:

Whether the claimant was discharged for misconduct in connection with the employment that disqualifies the claimant for unemployment insurance benefits.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Jeanine McDonald was employed by Von Maur as a full-time lingerie department manager from September 2008 until September 21, 2009, when Glenda Smith, Iowa City Store Manager, and Carrie Menke, Regional Director of Stores, discharged her for dishonesty and for violating the employer policy against exchanging or returning vendor gifts for store credit.

On September 10, 2009, Ms. McDonald had her sister-in-law return for \$280.34 on a merchandise credit card items Ms. McDonald had received from vendors as gifts. The employer's established policy allowed Ms. McDonald to receive gifts from vendors who did business with the employer. The employer's written Code of Conduct prohibited employees from "[e]xchanging or returning vendor gifts, gratis items or merchandise prizes for cash or credit." Ms. McDonald was aware of the work rule and signed her acknowledgement of the Code of Conduct at the start of her employment. Though Ms. McDonald worked at the Iowa City store, lived in Solon, and her sister-in-law lived in West Branch, Ms. McDonald had her sister-in-law travel to the Davenport store to return the items for store credit. The \$280.34 in store credit represented an equivalent loss to the employer. The next day, September 11, Ms. McDonald and her husband used the store credit card to obtain \$244.49 in merchandise at the employer's store in Moline, Illinois. Despite the sizable "purchase," Ms. McDonald did not use her 20 percent employee discount. On September 12, Ms. McDonald used the store credit card at the Iowa City store to obtain an additional \$35.10 in merchandise. For these purchases,

Ms. McDonald did utilize her employee discount to get 20 percent off. Ms. McDonald's use of the employee discount code in conjunction with the store credit card caused the employer's computer software system to flag the transactions and generated notice to Ms. Smith.

Ms. Smith then had to wait for surveillance records and computerized transaction records from the Moline store before she could move forward with her investigation. Within a few days of September 21, Ms. Smith had received the documentation she needed to move forward with her investigation.

On September 21, Ms. Smith met with Ms. McDonald to discuss how she came into possession of the store merchandise credit card. Ms. McDonald admitted that her sister-in-law had returned items for credit and had given the card to Ms. McDonald. Ms. McDonald was unable to explain how her sister-in-law came into possession of the three items Ms. McDonald had received as gifts from vendors. The employer had researched the three items and had collected the documentation showing all pertinent details concerning the vendor gifts. The items returned by the sister-in-law without a receipt on September 10 were the same items Ms. McDonald had received as gifts. Ms. McDonald acknowledged she was aware of the policy that prohibited her from returning vendor gifts for store credit.

On May 21, 2009, Ms. McDonald's supervisor had counseled Ms. McDonald about the policy concerning return of vendor gifts for store credit after Ms. McDonald allowed a staff member under supervision to engage in the conduct.

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.

The employer has the burden of proof in this matter. See Iowa Code section 96.6(2). Misconduct must be substantial in order to justify a denial of unemployment benefits. Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of unemployment benefits. See Lee v. Employment Appeal Board, 616 N.W.2d 661 (Iowa 2000). The focus is on deliberate, intentional, or culpable acts by the employee. See Gimbel v. Employment Appeal Board, 489 N.W.2d 36, 39 (Iowa Ct. App. 1992).

While past acts and warnings can be used to determine the magnitude of the current act of misconduct, a discharge for misconduct cannot be based on such past act(s). The termination of employment must be based on a current act. See 871 IAC 24.32(8). In determining whether the conduct that prompted the discharge constituted a “current act,” the administrative law judge considers the date on which the conduct came to the attention of the employer and the date on which the employer notified the claimant that the conduct subjected the claimant to possible discharge. See also Greene v. EAB, 426 N.W.2d 659, 662 (Iowa App. 1988).

Allegations of misconduct or dishonesty without additional evidence shall not be sufficient to result in disqualification. If the employer is unwilling to furnish available evidence to corroborate the allegation, misconduct cannot be established. See 871 IAC 24.32(4). When it is in a party’s power to produce more direct and satisfactory evidence than is actually produced, it may fairly be inferred that the more direct evidence will expose deficiencies in that party’s case. See Crosser v. Iowa Dept. of Public Safety, 240 N.W.2d 682 (Iowa 1976).

During the hearing, Ms. McDonald offered a complicated, far-fetched story of how her sister-in-law bought exact duplicate items, how Ms. McDonald agreed to give her gratis items to the sister-in-law, how her sister-in-law decided to return—without a receipt—the exact duplicate items she had allegedly purchased, how her sister-in-law happened to owe her money and gave her the merchandise credit card instead, how Ms. McDonald happened to be shopping more than an hour from home when she worked at a store much closer that carried the same merchandise, and so on. Ms. McDonald’s tale was bogus from start to finish. The employer provided a much more straightforward, plausible explanation—complete with all appropriate documentation—of how the employer learned of and investigated Ms. McDonald’s theft from, and fraud perpetrated on, the employer. The weight of the evidence establishes that Ms. McDonald did indeed perpetrate a fraud on the employer and did indeed commit theft from the employer. The theft amount exceeded \$200.00 and therefore could have subjected Ms. McDonald to prosecution on an indictable criminal offense. Given the lengths Ms. McDonald went to conceal the fraud and theft, the employer had to wait until the pieces of the puzzle could be collected before questioning Ms. McDonald about the conduct. The evidence establishes a current act of misconduct.

Ms. McDonald is disqualified for benefits until 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 employer’s account shall not be charged for benefits paid to Ms. McDonald.

Iowa Code section 96.3(7) 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. The overpayment recovery law was updated in 2008. See Iowa Code section 96.3(7)(b). Under the revised law, a claimant will not be required to repay an overpayment of benefits if all of the following factors are met. First, the

prior award of benefits must have been made in connection with a decision regarding the claimant's separation from a particular employment. Second, the claimant must not have engaged in fraud or willful misrepresentation to obtain the benefits or in connection with the Agency's initial decision to award benefits. Third, the employer must not have participated at the initial fact-finding proceeding that resulted in the initial decision to award benefits. If Workforce Development determines there has been an overpayment of benefits, the employer will not be charged for the benefits, regardless of whether the claimant is required to repay the benefits.

Because the claimant has been deemed ineligible for benefits, any benefits the claimant has received would constitute an overpayment. Accordingly, the administrative law judge will remand the matter to the Claims Division for determination of whether there has been an overpayment, the amount of the overpayment, and whether the claimant will have to repay the benefits.

DECISION:

The Agency representative's October 21, 2009, reference 01, decision is reversed. The claimant was discharged for misconduct. The claimant is disqualified for unemployment benefits until she has worked in and paid wages for insured work equal to ten times her weekly benefit allowance, provided she meets all other eligibility requirements. The employer's account will not be charged.

This matter is remanded to the Claims Division for determination of whether there has been an overpayment, the amount of the overpayment, and whether the claimant will have to repay the benefits.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/pjs