IOWA WORKFORCE DEVELOPMENT
Unemployment Insurance Appeals Section
1000 East Grand—Des Moines, Iowa 50319
DECISION OF THE ADMINISTRATIVE LAW JUDGE
68-0157 (7-97) – 3091078 - EI

OPAL SUE KELLEY
PO BOX 69
BOXHOLM IA 50040

HCM INC
C/O TALX UCM SERVICES INC
PO BOX 283
SAINT LOUIS MO 63166-0283

Appeal Number: 04A-UI-10923-S2T
OC: 09/12/04 R: 02
Claimant: Appellant (1)

This Decision Shall Become Final, unless within fifteen (15) days from the date below, you or any interested party appeal to the Employment Appeal Board by submitting either a signed letter or a signed written Notice of Appeal, directly to the ***Employment Appeal Board, 4th Floor—Lucas Building, Des Moines, Iowa 50319***.

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

STATE CLEARLY

1. The name, address and social security number of the claimant.
2. A reference to the decision from which the appeal is taken.
3. That an appeal from such decision is being made and such appeal is signed.
4. The grounds upon which such appeal is based.

YOU MAY REPRESENT yourself in this appeal or you may obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds. It is important that you file your claim as directed, while this appeal is pending, to protect your continuing right to benefits.

_____
(Administrative Law Judge)

_____
(Decision Dated & Mailed)

Section 96.5-2-a – Discharge for Misconduct

STATEMENT OF THE CASE:

Opal Sue Kelley (claimant) appealed a representative's September 20, 2004 decision (reference 01) that concluded she was not eligible to receive unemployment insurance benefits because she was discharged from work with HCM (employer) for theft of company property. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on October 27, 2004. The claimant participated personally and through Janet Fuson, Certified Nurses Aid, and Gloria Gochee, Certified Nurses Aid. The employer participated by June Mumper, Registered Nurse and Assistant Director of Nursing; June Ober, Housekeeper; and Diana Hawkins, Dietary Cook.

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 August 3, 1993, as a full-time certified nursing assistant. The employees understood that it was against the employer's policy to take gifts from residents or to eat the resident's food. On May 5, 2004, the claimant was issued a written warning for removing a ceramic garden frog and placing it in an area where she could later take it away from the employer's property. The claimant said she was sorry and that her actions were stupid.

On September 10, 2004, the claimant removed a bag of chips from a resident's drawer and proceeded to eat them. That same day in the dining room the claimant took meatloaf from a resident's plate, placed the meatloaf in a napkin and left the dining area with the meatloaf. The claimant took a bite of the meatloaf. The employer terminated the claimant on September 10, 2004, for taking food from residents.

REASONING AND CONCLUSIONS OF LAW:

The issue is whether the claimant was discharged for misconduct. For the following reasons the administrative law judge concludes she was.

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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. Huntoon v. Iowa Department of Job Service, 275 N.W.2d 445, 448 (Iowa 1979).

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 has established that the claimant did take food from residents with the intent to steal. Employee dishonesty is contrary to the standard of behavior the employer would have a right to expect. The employer has established that the claimant was discharged for misconduct.

DECISION:

The representative's September 30, 2004 decision (reference 01) is affirmed. The claimant is not eligible to receive unemployment insurance benefits because she was discharged from work for misconduct. Benefits are withheld until she has worked in and has been paid wages for insured work equal to ten times her weekly benefit amount provided she is otherwise eligible.

bas/tjc