

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**TAMMY SUMMERVILLE**  
Claimant

**APPEAL NO: 10A-UI-11681-ET**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**LABOR READY MIDWEST INC**  
Employer

**OC: 06-13-10**  
**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 August 3, 2010, reference 01, 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 March 9, 2011. The claimant provided a phone number prior to the hearing but that number was disconnected at the time of the hearing and the claimant did not provide a new one, participate in the hearing or request a postponement of the hearing as required by the hearing notice. Brian Morgan, Investigator and Michael Nicolosi, Branch 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 full-time customer service representative for Labor Ready Midwest from August 17, 2009 to June 14, 2010. Employees and day workers “bombarded” the employer with complaints that the claimant was showing favoritism when handing out job assignments to one worker, Dennis Green, in particular, who the claimant was rumored to be dating or living with. On May 5, 2010, Branch Manager Michael Nicolosi, spoke to the claimant about the situation and she denied showing favoritism to Mr. Green even though she would often come to work with him in her vehicle and ask if she could give him a ride to work. She did ask Mr. Nicolosi if she could date or live with Mr. Green if he was not working there and Mr. Nicolosi explained it would still be a violation because employees come and go so frequently in that business and it would be a conflict of interest if she had a relationship with him. The claimant received a written warning for her actions. After that conversation Mr. Nicolosi watched the claimant more closely and noticed she had a pattern of giving Mr. Green assignments ahead of other day workers and also that she was giving assignments to her father-in-law, brother-in-law and sister-in-law that should have rightly gone to other workers. Mr. Nicolosi confronted her about her actions and asked why she was pulling other workers off jobs and giving them to Mr. Green and her friends and family and the claimant said

she was “just taking them off the (work) tickets.” On approximately May 25, 2010, another customer service representative (CSR) talked to Mr. Nicolosi about the situation and agreed to provide a written statement. On May 30, 2010, the CSR gave the employer a written statement about the conflicts of interest involving the claimant that she personally witnessed and indicated the claimant told her she lived with Mr. Green. Investigator Brian Morgan opened an investigation into the situation June 1, 2010, and completed his investigation June 7, 2010. His report was reviewed by the corporate office and the decision was made to terminate the claimant's employment June 14, 2010, for violating the employer's policies regarding conflicts of interest and dating and romantic relationships.

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 was warned she could not continue her relationship with Mr. Green but despite that warning she apparently continued to date and

then live with him while providing him with favorable work assignments that should have been given to other temporary workers. She also gave family members work assignments that other temporary workers should have received. In both instances the claimant showed favoritism by giving assignments to her boyfriend and family members rather than to temporary workers who were in line for the jobs. She was aware her actions violated the employer's policy on conflicts of interest as well as dating and romantic relationships. 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 August 3, 2010, reference 01, 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.

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Julie Elder  
Administrative Law Judge

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Decision Dated and Mailed

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