

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

CODY WEYEN
Claimant

APPEAL NO: 11A-UI-10628-ET

**ADMINISTRATIVE LAW JUDGE
DECISION**

KPTOO INC
Employer

OC: 07-10-11
Claimant: Respondent (2R)

Section 96.5-2-a – Discharge/Misconduct
Section 96.3-7 – Recovery of Benefit Overpayment

STATEMENT OF THE CASE:

The claimant filed a timely appeal from the August 4, 2011, 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 September 6, 2011. The claimant participated in the hearing. Nicole Rensink, Store 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 part-time area grill manager for McDonalds from December 29, 2008 to July 13, 2011. On July 1, 2011, the claimant was scheduled to work from 5:00 p.m. to close and was a no-call/no-show. On July 2, 2011, he was scheduled to work a double shift; the first from 11:00 a.m. to 2:00 p.m. and the second from 5:00 p.m. to close and was a no-call/no-show for both shifts. He worked July 3, 2011. On July 4, 2011, the claimant was upset when he saw the schedule and circled his shift and wrote, "This is bullshit." On July 5, 2011, he was one hour tardy and the manager in charge had prepared two written warnings for the claimant regarding the no-call/no-shows and the claimant became angry and began sending text messages to the manager who had signed the written warnings. They exchanged approximately five inappropriate, profanity laced text messages. The claimant stated the manager was a "bitch" and the situation was "bullshit." The manager also engaged in profanity but did not share her texts to the claimant with Store Manager Nicole Rensink who was on vacation at the time. When she called Ms. Rensink to tell her about the situation Ms. Rensink instructed her to suspend the claimant until she returned from vacation July 11, 2011. Ms. Rensink met with the claimant July 11, 2011, and told him his suspension would continue until she talked to her supervisor. On July 13, 2011, Ms. Rensink notified the claimant that his employment was terminated. The claimant attempted to find coverage for the last three shifts he missed but was aware the employee he thought was going to work for him July 1, 2011,

could not cover his shift and that the employer was short staffed for the evening shift July 2, 2011, and needed the claimant's replacement to work during the day. The claimant was a no-call/no-show August 8 and 31, 2010, and received written warnings on both occasions. He was a no-call/no-show June 11, 2011, and received a written warning and was nine minutes tardy June 19, 2011, and received another written warning. The employer's policy states that three no-call/no-shows will result in termination of employment.

The claimant has claimed and received unemployment insurance benefits since his 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 had three no-call/no-shows July 1 and 2, 2011, which results in termination of employment under the employer's policy. Although he may have tried to cover those shifts, he compounded the problem by writing, "This is bullshit," on the schedule and engaged in a text argument with his manager where both made inappropriate remarks and used profanity. 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 must be 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 4, 2011, reference 01, decision is reversed. The claimant was discharged from employment due to job-related misconduct. Benefits are withheld until such time as he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he 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.

Julie Elder
Administrative Law Judge

Decision Dated and Mailed

je/css