

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

SUSAN L OTT
Claimant

APPEAL NO. 13A-UI-02351-NT

**ADMINISTRATIVE LAW JUDGE
DECISION**

TRI MARK CORPORATION
Employer

OC: 01/20/13
Claimant: Respondent (2R)

Section 96.5-2-a – Discharge
Section 96.3-7 – Benefit Overpayment

STATEMENT OF THE CASE:

Tri Mark Corporation filed a timely appeal from a representative's decision dated February 19, 2013, reference 01, which held claimant eligible to receive unemployment insurance benefits. After due notice was provided, a telephone hearing was held on March 26, 2013. Claimant participated. The employer participated by Mr. Lynn Hopp, Vice President Human Resources and Ms. Debra Pritts, Human Resource Manager.

ISSUE:

The issue in this matter is whether the claimant was discharged for misconduct sufficient to warrant the denial of unemployment insurance benefits.

FINDINGS OF FACT:

The administrative law judge, having considered the evidence in the record, finds: Ms. Ott was employed by Tri Mark Corporation from August 31, 2009 until January 24, 2013 when she was discharged from employment. Ms. Ott worked as a full-time assembler and was paid by the hour. Her immediate supervisor was her sister, Ms. Chris Ott.

The claimant was discharged based upon the investigation of an incident that had taken place on December 19, 2012 at the employer's workplace. One or more company employees had indicated that Ms. Ott and her sister had engaged in inappropriate activity that night. The company followed a reasonable course of action by investigating and taking statements from witnesses who were present. The evidence gathered by the employer showed that Ms. Ott and her sister had made patently inappropriate references to an ethnic group and atrocities that had occurred to them during the holocaust. Company employees reported that Ms. Ott and her sister were observed carrying a child's toy oven around the plant premises with small dolls within the oven. While displaying these items, the claimant and her sister were stating, "Happy Hanukkah" and making references to "cooking some Jews." Based upon the consistency of the reports received from various workers about the incident, the employer reasonably concluded that the allegations were valid and discharged the claimant and her sister from employment.

The employer believed that the claimant's conduct patently violated the company's policies against creating a hostile work environment, harassment and discrimination.

It is Ms. Ott's position, although they were carrying a toy oven about, the oven contained "gingerbread cookies" and the statements were limited to wishing other employees "Happy Holidays, Merry Christmas."

REASONING AND CONCLUSIONS OF LAW:

The question before the administrative law judge is whether the evidence in the record establishes misconduct sufficient to warrant the denial of unemployment insurance benefits. It does.

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. 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).

In this matter the evidence in the record establishes that the company investigated allegations that were made by employees regarding the conduct of Susan Ott and her sister on the night of December 19, 2012. The employer investigated the allegations as soon as the allegations were

brought forward. Statements were taken from various employees and based upon the consistency of the statements confirming the allegations about the claimant and her sister's conduct, a decision was made to terminate Ms. Ott and her sister from employment.

The employer reasonably concluded based upon the statements of employees that Ms. Ott and her sister had engaged in patently inappropriate conduct that was not only ethnically insensitive but also may have created a hostile working environment for other employees. Based upon the company's policies against harassment, discrimination, threatening behavior and common sense the claimant knew or should have known that conduct of this nature was clearly inappropriate in a work setting and could cause her immediate termination from employment. Although the administrative law judge is cognizant of the claimant's denials, the administrative law judge finds the claimant's explanations strain credibility.

The employer has sustained its burden of proof in establishing disqualifying job misconduct. Unemployment insurance benefits are withheld.

Iowa Code section 96.3-7, as amended in 2008, provides:

7. Recovery of overpayment of benefits.

a. If an individual receives benefits for which the individual is subsequently determined to be ineligible, even though the individual acts in good faith and is not otherwise at fault, the benefits shall be recovered. The department in its discretion may recover the overpayment of benefits either by having a sum equal to the overpayment deducted from any future benefits payable to the individual or by having the individual pay to the department a sum equal to the overpayment.

b. (1) If the department determines that an overpayment has been made, the charge for the overpayment against the employer's account shall be removed and the account shall be credited with an amount equal to the overpayment from the unemployment compensation trust fund and this credit shall include both contributory and reimbursable employers, notwithstanding section 96.8, subsection 5. However, provided the benefits were not received as the result of fraud or willful misrepresentation by the individual, benefits shall not be recovered from an individual if the employer did not participate in the initial determination to award benefits pursuant to section 96.6, subsection 2, and an overpayment occurred because of a subsequent reversal on appeal regarding the issue of the individual's separation from employment. The employer shall not be charged with the benefits.

(2) An accounting firm, agent, unemployment insurance accounting firm, or other entity that represents an employer in unemployment claim matters and demonstrates a continuous pattern of failing to participate in the initial determinations to award benefits, as determined and defined by rule by the department, shall be denied permission by the department to represent any employers in unemployment insurance matters. This subparagraph does not apply to attorneys or counselors admitted to practice in the courts of this state pursuant to section 602.10101.

DECISION:

The representative's decision dated February 19, 2013, reference 01, is reversed. The claimant is disqualified. Unemployment insurance benefits are withheld until the claimant has worked in and been paid wages for insured work equal to ten times her weekly benefit amount and is

otherwise eligible. The issue of whether the claimant must repay the unemployment benefits is remanded to the UIS Division for determination.

Terence P. Nice
Administrative Law Judge

Decision Dated and Mailed

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