

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

KAYSE A CARTER
Claimant

APPEAL NO. 11A-UI-11899-SW

**ADMINISTRATIVE LAW JUDGE
DECISION**

THE BRIDAL CONNECTION LLC
Employer

OC: 08/07/11
Claimant: Respondent (2-R)

Section 96.5-2-a – Discharge
Section 96.3-7 – Overpayment of Benefits

STATEMENT OF THE CASE:

The employer appealed an unemployment insurance decision dated August 30, 2011, reference 01, that concluded the claimant's discharge was not for work-connected misconduct. Hearings were held on October 10 and 14, 2011. The parties were properly notified about the hearing. The claimant participated in the hearing with her representative, Julia Ofenbakh. Lara Bunkers participated in the hearing on behalf of the employer with witnesses, Melissa Kaufman and Sara Staiert. Exhibits One to Seven were admitted into evidence at the hearing.

ISSUES:

Was the claimant discharged for work-connected misconduct?
Was the claimant overpaid unemployment insurance benefits?

FINDINGS OF FACT:

The claimant worked full time for the employer as the bridal manager from September 20, 2010, to August 8, 2011. She was not required to sign a noncompete agreement during her employment. Lara and Dan Bunkers own the business.

In early 2011, the claimant decided she wanted to open her own bridal shop in Ames, Iowa. In February 2011, she spoke with a friend and former employee of The Bridal Connection, Sara Staiert, outside the workplace about hiring her to work in the claimant's store. Staiert who was unemployed at the time expressed interest in working in the claimant's store.

In May 2011, Staiert was hired by the Bridal Connection as an assistant manager. The claimant and Staiert continued to talk about the claimant's proposed business venture, including during work hours on the employer's premises. They discussed ideas for the claimant's bridal shop while working for the employer, including shop design ideas and what lines of clothing would be offered in the business. These activities did not keep the claimant from performing her job duties with the employer.

At the end of July 2011, while the Bunkers were on vacation, the claimant shared her plans about opening her own bridal shop in Ames with another assistant manager, Melissa Kaufman, during work hours. She talked about her business plan and financing. She showed Kaufman some pictures of dresses she wanted to carry in her store. She told Kaufman that Staiert was going to come to work for her and asked Kaufman if she was interested. Kaufman replied that she was not interested in working outside of the Des Moines area and was happy with her job. The claimant continued to share information with Kaufman about the Ames store but asked Kaufman to keep it quiet.

When the Bunkers returned from vacation on August 4, 2011, Kaufman told them what the claimant had discussed with her about her store. Staiert was questioned by the Bunkers, and Staiert shared the conversations she had with the claimant.

On August 8, 2011, the employer discharged the claimant for engaging in planning activities for a competing business while on company time and soliciting employees for her business.

The claimant has received unemployment insurance benefits since filing her claim effective August 7, 2011.

REASONING AND CONCLUSIONS OF LAW:

The issue in this case is whether the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law.

The unemployment insurance law disqualifies claimants discharged for work-connected misconduct. Iowa Code § 96.5-2-a. The rules define misconduct as (1) deliberate acts or omissions by a worker that materially breach the duties and obligations arising out of the contract of employment, (2) deliberate violations or disregard of standards of behavior that the employer has the right to expect of employees, or (3) carelessness or negligence of such degree of recurrence as to manifest equal culpability, wrongful intent or evil design. 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 misconduct within the meaning of the statute. 871 IAC 24.32(1).

Iowa Supreme Court decided a case with nearly identical facts in 1985. In that case, *Porth v. Iowa Dept. of Job Service*, 372 NW 2d 269 (Iowa 1985), the Court ruled that an employee who solicits fellow employees to leave their employer in favor of a competitor breaches the duty of loyalty owed by an employee to his or her employer. The Court reasoned that this duty of loyalty could be considered among the "duties and obligations" encompassed by rule 871 IAC 24.32(1). *Id.* at 274.

The findings of fact show how I resolved the disputed factual issues in this case by carefully assessing the credibility of the witnesses and reliability of the evidence and by applying the proper standard and burden of proof. While the claimant denied soliciting Kaufman to work for her, the preponderance of the credible evidence establishes that Kaufman was truthful about this. It is likely that the claimant in her exuberance in telling Kaufman about her new business was checking to see if Kaufman was interested.

While I am not convinced that the claimant was spending significant time at work on her business planning activities or was using significant company resources for her own business, her actions in soliciting employees for her own business during work hours are enough to

establish work-connected misconduct under the law. This is true even though the claimant did not sign a noncompete agreement.

The unemployment insurance law requires benefits to 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. But the overpayment will not be recovered when an initial determination to award benefits is reversed on appeal 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 § 96.3-7. In this case, the claimant has received benefits but was ineligible for those benefits. The matter of deciding the amount of the overpayment and whether the overpayment should be recovered under Iowa Code § 96.3-7-b is remanded to the Agency.

DECISION:

The unemployment insurance decision dated August 30, 2011, reference 01, is reversed. The claimant is disqualified from receiving unemployment insurance benefits until she has been paid wages for insured work equal to ten times her weekly benefit amount, provided she is otherwise eligible. The matter of deciding the amount of the overpayment and whether the overpayment should be recovered under Iowa Code § 96.3-7-b is remanded to the Agency.

Steven A. Wise
Administrative Law Judge

Decision Dated and Mailed

saw/pjs