

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

RONALD J COOP
Claimant

APPEAL NO: 12A-UI-02714-ST

**ADMINISTRATIVE LAW JUDGE
DECISION**

KADINA CORPORATION
Employer

**OC: 01/22/12
Claimant: Respondent (2-R)**

Section 96.5-2-a – Discharge
871 IAC 24.32(1) – Definition of Misconduct
Section 96.3-7 – Recovery of Overpayment
871 IAC 26.14(7) – Request to Re-open

STATEMENT OF THE CASE:

The employer appealed a department decision dated March 9, 2012, reference 01, that held the claimant was not discharged for misconduct on January 26, 2012, and benefits are allowed. A telephone hearing was held on April 10, 2012. The claimant did not participate. Kyle Stansberry, Operations Director, participated for the employer. The Employer Video was received as evidence.

ISSUE:

Whether the claimant was discharged for misconduct in connection with employment.

FINDINGS OF FACT:

The administrative law judge having heard the testimony of the witnesses, and having considered the evidence in the record, finds: The claimant began employment on January 24, 2010, and last worked for the employer as a part-time crew person on January 26, 2012. The employer policy provides that theft of store product may result in employment termination.

The employer noted on January 26 that there was a box containing store product left outside the store. It viewed a video surveillance tape that showed claimant taking the box from the store and placing it outside. The box contained Oreo brownies. The box did not identify the contents as Oreo brownies.

The employer confronted claimant with the evidence that included the video. Claimant admitted he took the box outside the store. He was discharged for theft.

Claimant was called at the phone number he provided for the hearing but did not answer. A message was left about the hearing and how he needed to call in for it. Claimant called at 3:15 p.m. without a good excuse for missing the call, and failing to timely call in.

REASONING AND CONCLUSIONS OF LAW:

871 IAC 24.26(19) provides:

Voluntary quit with good cause attributable to the employer and separations not considered to be voluntary quits. The following are reasons for a claimant leaving employment with good cause attributable to the employer:

(19) The claimant was employed on a temporary basis for assignment to spot jobs or casual labor work and fulfilled the contract of hire when each of the jobs was completed. An election not to report for a new assignment to work shall not be construed as a voluntary leaving of employment. The issue of a refusal of an offer of suitable work shall be adjudicated when an offer of work is made by the former employer. The provisions of Iowa Code section 96.5(3) and rule 24.24(96) are controlling in the determination of suitability of work. However, this subrule shall not apply to substitute school employees who are subject to the provisions of Iowa Code section 96.4(5) which denies benefits that are based on service in an educational institution when the individual declines or refuses to accept a new contract or reasonable assurance of continued employment status. Under this circumstance, the substitute school employee shall be considered to have voluntarily quit employment.

Claimant's request to re-open the record is denied because he did not have a good cause for failing to participate.

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 administrative law judge concludes the employer has established claimant was discharged for misconduct in connection with employment on January 26, 2012.

Employee honesty is a standard of behavior the employer has a right to expect. The employer caught claimant removing food product from the store that is an act of theft, and it constitutes job disqualifying misconduct.

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.

Since this decision denies claimant benefits after he has received them, the overpayment issue is remanded to Claims for a decision.

DECISION:

The department decision dated March 9, 2012, reference 01, is reversed. The claimant was discharged for misconduct on January 26, 2012.

Randy L. Stephenson
Administrative Law Judge

Decision Dated and Mailed

rls/css