

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

LINDSEY M OSWALD

Claimant

APPEAL NO. 10A-UI-03851-NT

**ADMINISTRATIVE LAW JUDGE
DECISION**

CASEY'S MARKETING COMPANY

Employer

**Original Claim: 01/10/10
Claimant: Respondent (2-R)**

Section 96.5-2-a – Discharge

Section 96.3-7 – Benefit Overpayment

STATEMENT OF THE CASE:

The employer filed a timely appeal from a representative's decision dated March 5, 2010, reference 01, which held the claimant eligible to receive unemployment insurance benefits. After due notice was issued, a telephone hearing was held on April 27, 2010. The claimant participated personally. The employer participated by Mr. Harmon Wright, store manager.

ISSUE:

At issue is whether the claimant was discharged for misconduct sufficient to warrant the denial of unemployment insurance benefits.

FINDINGS OF FACT:

Having considered the evidence in the record, the administrative law judge finds: Lindsey Oswald was employed by Casey's Marketing Company as a part-time cook from June 23, 2009, until December 29, 2009, when she was discharged from employment. Ms. Oswald averaged 20 to 30 hours of work per week and was paid by the hour. Her immediate supervisor was Harmon Wright.

The claimant was discharged after she failed to report for scheduled work and provided no notification to the employer on December 12, December 17, and December 29, 2009. Ms. Oswald had previously been warned for repetitive tardiness after the claimant failed to report or provide notification on December 12. The claimant was issued a warning by the store manager, Mr. Wright. Although Ms. Oswald was scheduled to work on December 17 and December 29, 2009, she did not report for work and did not provide notification as required by company policy and by the warning that had been served upon her. The store manager, Mr. Wright, personally checked to ensure that the claimant had not called in as required. Mr. Wright received no notification that Ms. Oswald had called in to report her impending absence or for any other reason during this time. Mr. Wright had attempted to contact the claimant on numerous occasions to determine why she was not reporting or calling in but received no answer.

It is the claimant's position that she was told by an unnamed hourly employee that she must speak to Mr. Wright before returning to work. It is the claimant's further position that she did not report back for scheduled work because she had been unable to make telephone contact with Mr. Wright on the two to three occasions that she attempted to contact him.

Mr. Wright did not issue any directives to hourly employees to tell Ms. Oswald not to report and received no message that the claimant had attempted to contact him for any reason.

REASONING AND CONCLUSIONS OF LAW:

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

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.

In this case, the testimony is disputed. The administrative law judge, having heard the testimony of the witnesses and having considered the matter at length, finds the weight of evidence to be in support of the employer.

Mr. Wright testified with specificity regarding the days the claimant failed to report for work and did not provide notification to the company as required. He also testified with specificity as to the dates that the claimant had been warned regarding her failure to report or provide

notification. Mr. Wright was also specific in his testimony that he had instructed no hourly employees to inform Ms. Oswald not to report and that he personally checked to determine whether any incoming phone calls had been received from Ms. Oswald during the period of time in question. In contrast, Ms. Oswald generally testified that she was told not to report by an unnamed individual on an unnamed date and that her employment ended when she was unable to contact Mr. Wright on two to three occasions when she attempted to call him at the convenience store. The administrative law judge finds Ms. Oswald's testimony to strain credibility. The employer is not in the practice of having hourly employees intervene in personnel matters and the evidence establishes that the store manager went to great lengths to contact Ms. Oswald but received no phone calls from her.

The Iowa Supreme Court in the case of Higgins v. Iowa Department of Job Service, 350 N.W.2d 187 (Iowa 1984) held that excessive unexcused absenteeism is a form of misconduct. The Court held that the concept includes tardiness, leaving early, etc. An absence is not deemed as excused unless the employee properly notifies the employer. The repetitive nature of the claimant's failure to report or provide notification of impending absences showed a disregard of the employer's interests and standards of behavior and thus was disqualifying conduct under the provisions of the Iowa Employment Security Act. 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.

The issue of whether the claimant must repay the unemployment benefits she has received is remanded to the Unemployment Insurance Services Division for a determination.

DECISION:

The representative's decision dated March 5, 2010, 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, provided she meets all other eligibility requirements of Iowa law. The issue of whether the claimant must repay the unemployment benefits she has received is remanded to the Unemployment Insurance Services Division for a determination.

Terence P. Nice
Administrative Law Judge

Decision Dated and Mailed

tpn/kjw