

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

TANESHA VIVIAN
Claimant

APPEAL NO: 08A-UI-08042-BT

**ADMINISTRATIVE LAW JUDGE
DECISION**

BLC-RAMSEY LLC
Employer

OC: 08/03/08 R: 02
Claimant: Respondent (2/R)

Iowa Code § 96.5(2)(a) - Discharge for Misconduct
Iowa Code § 96.3-7 - Overpayment
871 IAC 26.14(7) - Late Call
Iowa Code § 17A.12-3 - Non-Appearance of Party

STATEMENT OF THE CASE:

BLC-Ramsey, LLC (employer), doing business as Ramsey Village, appealed an unemployment insurance decision dated August 26, 2008, reference 01, which held that Tanesha Vivian (claimant) was eligible for unemployment insurance benefits. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on October 7, 2008. The claimant provided a telephone number but was not available when that number was called for the hearing, and therefore, did not participate. The employer participated through Tammy Forschler, Director of Financial Services and Human Resources; Chris Parkey, Director of Dining Services; and employer representative Barb Hamilton. Employer's Exhibits One and Two were admitted into evidence. Based on the evidence, the arguments of the parties, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUE:

The issue is whether the employer discharged the claimant for work-related misconduct.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds that: The claimant received the hearing notice prior to the October 7, 2008 hearing and provided a telephone number. The administrative law judge called the number provided for the claimant; no one answered and the call went to voice mail. The message identified the phone as the claimant's and a message was left. The claimant did not call until after the record closed. The record closed at 1:19 p.m. and the claimant called the Appeals Section at 1:34 p.m. The claimant argued that she did not receive a telephone call and claimed the judge called the wrong number. The administrative law judge asked the claimant what number she had provided and the claimant responded with the same number the administrative law judge called. The call to the claimant's number was recorded and the claimant was advised of this fact.

The claimant was employed as a part-time dietary aide from May 10, 2006 through August 5, 2008 when she was discharged. She was called to the office on August 4, 2008 to be issued a final written warning. The disciplinary warning was for refusing to follow directives, insubordination and four separate altercations with co-employees that week. The claimant asked which employees complained about her but no names were mentioned. She refused to sign the disciplinary warning and angrily left. Approximately a half hour later, a co-employee named Pierre contacted the supervisor and said he did not know what was going on but he did not want to keep working there if that was how things were going to be. The supervisor asked him what he was talking about and he reported that the claimant called him and left two threatening messages. Pierre played the messages for the employer and was told to come into the office, which he did.

The threatening messages were played four additional times. The director of dining services reported the claimant made the following statements in the voice mail: "don't answer the phone you bitch ass nigga....You don't know who you're fucking with....I'll bash yer motha fuckin head in nigga...you're telling Tammy some bullshit.....I'll fuck you up, bring yer momma, yer sister, yer brother.....I don't give a fuck.....I know things about you nobody else knows you weak ass pussy nigga....better watch your motha fucking back....I don't care if it's at work in the parking lot, on the street, at your house, you come to me I'll come to you, just bring it." The director said the claimant made the same comments over and over. Pierre was so upset by the messages that he contacted the police and filed a report with them. He did not know if he wanted to continue working there and actually did reduce his hours. The claimant was subsequently notified she was suspended due to the harassment and the information was forwarded to management. She was discharged on August 5, 2008.

The claimant filed a claim for unemployment insurance benefits effective August 3, 2008 and has received benefits after the separation from employment.

REASONING AND CONCLUSIONS OF LAW:

The first issue in this case is whether the claimant's request, to reopen the record after the hearing had concluded, should be granted or denied. If a party responds to a hearing notice after the record has been closed, the administrative law judge can only ask why the party responded late to the hearing notice. If the party establishes good cause for responding late, the hearing shall be reopened. The claimant contends she did not receive a telephone call for the hearing, which is not accurate. She was called, her voice mail identified the number as hers and she was not available. The request to reopen the record is denied because the party making the request failed to participate by not being available at the telephone number provided.

The substantive issue of this case is whether the employer discharged the claimant for work-connected misconduct. A claimant is not qualified to receive unemployment insurance benefits if an employer has discharged the claimant for reasons constituting work-connected misconduct. Iowa Code § 96.5-2-a.

Iowa Code § 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 to prove the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). The claimant was discharged for harassing a co-employee by leaving two threatening voice mails. The employer heard the messages and could easily identify the claimant's voice. The number from which the calls were made was the same number the employer had for the claimant so there was no question the claimant made the calls. The claimant's threats to her co-worker show a willful or wanton disregard of the standard of behavior the employer has the right to expect from an employee, as well as an intentional and substantial disregard of the employer's interests and of the employee's duties and obligations to the employer. Work-connected misconduct as defined by the unemployment insurance law has been established in this case and benefits are denied.

Iowa Code § 96.3(7) 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. The overpayment recovery law was updated in 2008. See Iowa Code § 96.3(7)(b). Under the revised law, a claimant will not be required to repay an overpayment of benefits if all of the following factors are met. First, the prior award of benefits must have been made in connection with a decision regarding the claimant's separation from a particular employment. Second, the claimant must not have engaged in fraud or willful misrepresentation to obtain the benefits or in connection with the Agency's initial decision to award benefits. Third, the employer must not have participated at the initial fact-finding proceeding that resulted in the initial decision to award benefits. If Workforce Development determines there has been an overpayment of benefits, the employer will not be charged for the benefits, regardless of whether the claimant is required to repay the benefits.

Because the claimant has been deemed ineligible for benefits, any benefits the claimant has received could constitute an overpayment. Accordingly, the administrative law judge will

remand the matter to the Claims Division for determination of whether there has been an overpayment, the amount of the overpayment, and whether the claimant will have to repay the benefits.

DECISION:

The unemployment insurance decision dated August 26, 2008, reference 01, is reversed. The claimant is not eligible to receive unemployment insurance benefits because she was discharged from work for misconduct. Benefits are withheld until she has worked in and been paid wages for insured work equal to ten times her weekly benefit amount, provided she is otherwise eligible. The matter is remanded to the Claims Section for investigation and determination of the overpayment issue.

Susan D. Ackerman
Administrative Law Judge

Decision Dated and Mailed

sda/pjs