

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

ASHLEY KIBBEE
Claimant

APPEAL NO. 13A-UI-13168-NT

**ADMINISTRATIVE LAW JUDGE
AMENDED DECISION**

KUM & GO LC
Employer

**OC: 11/03/13
Claimant: Respondent (2-R)**

Section 96.5-2-a – Discharge

STATEMENT OF THE CASE:

Kum & Go LC filed a timely appeal from a representative's decision dated November 22, 2013, reference 01, which held claimant eligible to receive unemployment insurance benefits. After due notice was provided, a telephone hearing was held on December 18, 2013. Claimant, although duly notified, did not participate. The employer participated by Ms. Mindy Schrader, Store Manager. The claimant did not submit a telephone number for the hearing and did not request a postponement of the hearing as required by the provisions of the hearing notice.

ISSUE:

The issue is whether the evidence in the record establishes 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: Ashley Kibbee was employed by Kum & Go LC from July 2012 until November 4, 2013 when she was discharged from employment.

Ms. Kibbee was discharged after a review of company security video tapes showed the claimant supplying a refund of cash to two individuals in the Kum & Go facility without payment being made by the individuals for the item being returned. The video tape showed the couple removing an item from the company shelves in the presence of Ms. Kibbee, the couple taking the item to Ms. Kibbee at the cash register and the claimant providing a refund for the item that had not been purchased.

Ms. Schrader had reviewed the security tapes after noting several anomalies in stock at the facility and the absence of required return slips that should have been prepared by the claimant to verify refunds given to patrons.

Based upon the personal observations of the store manager on the video tape, the store manager reasonably concluded that Ms. Kibbee was violating company policy by giving cash for

returned items that had not been purchased and she also violated company policy by failing to maintain a record of the refunds that she was issuing. Because of what the employer reasonably considered to be her willful disregard of the employer's interests, Ms. Kibbee was discharged from employment.

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 insurance benefits. Misconduct that may be serious enough to warrant the discharge of an employee may not necessarily be serious enough to warrant the denial of unemployment insurance benefits. See Lee v. Employment Appeal Board, 616 N.W.2d 661 (Iowa 2000). 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. of Appeals 1992).

In the case at hand, Ms. Kibbee's store manager testified with specificity of her observations on a company security tape showing Ms. Kibbee providing refunds to individuals in the store who had not purchased items. The evidence also establishes that the claimant failed to keep and prepare return slips for refunds as required by company policy. Based upon the store manager's observations, the employer reasonably concluded that Ms. Kibbee was intentionally violating company policy by providing cash refunds to individuals who had not purchased items from Kum & Go LC.

There being no evidence in the record to the contrary, the administrative law judge concludes that the employer has sustained its burden of proof in establishing that the claimant's conduct was in willful disregard of the employer's interests and standards of behavior that the employer had a right to expect of its employees under the provisions of the Employment Security Law. Unemployment insurance benefits are withheld.

The unemployment insurance law requires benefits be recovered from a claimant who receives benefits and is later denied benefits even if the claimant acted in good faith and was not at fault. However, a claimant will not have to repay an overpayment when an initial decision to award benefits on an employment separation issue is reversed on appeal if two conditions are met: (1) the claimant did not receive the benefits due to fraud or willful misrepresentation, and (2) the employer failed to participate in the initial proceeding that awarded benefits. In addition, if a claimant is not required to repay an overpayment because the employer failed to participate in the initial proceeding, the employer's account will be charged for the overpaid benefits. Iowa Code § 96.3-7-a, -b.

The matter of deciding the amount of the overpayment and whether the amount overpaid should be recovered from the claimant and charged to the employer under Iowa Code § 96.3-7-b is remanded to the Agency.

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 overpayment in benefits or the amount will be charged to the employer's account based upon the employer's participation in fact finding.

DECISION:

The representative's decision dated November 22, 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 there has been an overpayment, the amount of the overpayment and whether the claimant will be required to repay the overpayment based upon the employer's participation at fact finding is remanded to the Claims Division for determination.

Terence P. Nice
Administrative Law Judge

Decision Dated and Mailed

pjs/pjs