

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

MARY BEHM
Claimant

APPEAL NO: 12A-UI-00838-B

**ADMINISTRATIVE LAW JUDGE
DECISION**

MASON CITY FORD LINCOLN MERCURY
Employer

OC: 12/18/11
Claimant: Respondent (2/R)

Iowa Code § 96.5(2)(a) - Discharge for Misconduct
Iowa Code § 96.3-7 - Overpayment

STATEMENT OF THE CASE:

Mason City Ford Lincoln Mercury (employer) appealed an unemployment insurance decision dated January 19, 2012, reference 01, which held that Mary Behm (claimant) was eligible for unemployment insurance benefits. After hearing notices were mailed to the parties' last-known addresses of record, a hearing was held in Mason City, Iowa, on March 15, 2012. The claimant participated in the hearing. The employer participated through James Skarlis, regional vice-president; Tammy Saidat, office staff; and Richard Piscopo, attorney at law. Employer's Exhibit One was 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 claimant was discharged for misconduct sufficient to warrant a denial of unemployment benefits.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and having considered all of the evidence in the record, finds that: The claimant was employed as a full-time general labor from October 3, 2007 through December 22, 2011, when she was discharged. Her job involved running errands, working as a shuttle driver, and working in the new car prep area. Several of the claimant's family members also worked for the employer. Her father Tim Behm was the Sales Manager, her uncle Scott Behm was a salesman and the Assistant Sales Manager, and her grandfather John Behm Sr. was a salesman. The claimant's half-sister, Sarah Behm, also worked there. The claimant was terminated at the same time as nine other employees including her father, her uncle and her grandfather. Subsequent to the termination, Tim Behm, Scott Behm and John Behm have all been charged with felonies and ongoing criminal activities arising out of their employment with the employer.

The investigation that led to the criminal charges began with a tip from the Cerro Gordo County Treasurer's office in the latter part of October 2011. The treasurer's office acts as an agent for

the State of Iowa, the Department of Transportation, and the Department of Revenue and Finance in the processing of motor vehicle transactions. It collects the fees, forwards the funds to the appropriate state agency and retains a small portion to help defray the expenses of the treasurer's office. In particular, the treasurer's office collects license, title, and a use tax. If there is a suspicion of fraud, the treasurer's office is required to report it for further investigation. The Cerro Gordo County Treasurer's office noted suspicious activity in repeated motor vehicle transactions in which cars were being sold to employees, their family members or friends, for much less than the vehicles were worth. Some employees were purchasing seven or eight cars a year.

Once the employer received the information, it hired a retired Waterloo police officer to begin a thorough investigation. During the investigation, the employer learned that the claimant had been shredding documents in the end of October 2011, which was not part of her regular job duties and was not something she had ever done previously. The employer has to keep documents and receipts for ten years for tax purposes. It has an off-site storage location and there was no legitimate reason why any documents needed to be shredded and no reason whatsoever as to why the claimant would have been involved in that.

The claimant testified that she only acted at the direction of office staff Tammy Saidat. Ms. Saidat was subsequently called during the hearing and she admitted she did direct the claimant to shred documents but she was only following the orders of the claimant's father, Tim Behm. The claimant testified that she did not personally shred the documents but did select which documents were to be shredded and put them in a container to be shredded.

The investigation also revealed the claimant's involvement in another questionable practice. Part of her regular job duties was to obtain and charge gas at a nearby gas station. She was required to document the charge ticket as to which vehicle she was filling with gas and the charge slips all required an authorized purchaser's signature. The claimant's father, Tim Behm, authorized all of her gas charges, but the claimant failed to complete the identifying information on most of the charge slips, which indicated to the employer that some of the gas was for personal use and not business related. The claimant charged gas all the way up to her date of discharge. When she was charging gas at the gas station, the total gas charges were approximately \$8,000.00 or \$9,000.00 per month. After she left, the charges only totaled an average of \$3,000.00 per month.

Once the retired Waterloo police officer completed his investigation, the matter was turned over to the Mason City Police, who began their own investigation. It was determined the employer sustained a significant financial loss due to fraud. Additionally, the Department of Transportation is conducting its own investigation and even the FBI is involved. The authorities told the employer that the claimant and many of her family members were involved in ongoing criminal activity. The Mason City police were on site when the nine employees were discharged and the police advised the employer not to question these individuals due to the continuing investigation.

The claimant filed a claim for unemployment insurance benefits effective December 18, 2011 and has received benefits after the separation from employment.

REASONING AND CONCLUSIONS OF LAW:

The issue 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 on December 22, 2011 for fraudulent behavior. While she contends she was directed by Tammy Saidat to shred the documents, the directives were actually given by her father, who has been charged with criminal activities related to his employment. The preponderance of the evidence confirms the claimant acted with the intent and knowledge that her conduct was fraudulent, since she had never before shredded documents and it was not part of her regular job duties. Furthermore, her repeated failure to provide the identifying information on the credit card slips was a clear violation of company policy and just one more step in hiding information from the employer. The employer has met its burden. The claimant's conduct shows 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 January 19, 2012, 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/kjw