

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

KIMBERLY K PAMETICKY
Claimant

APPEAL NO. 15R-UI-05141-TN-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

MURPHY OIL USA INC
Employer

OC: 02/08/15
Claimant: Respondent (2)

Section 96.5-2-a – Discharge
Section 96.3-7 – Benefit Overpayment

STATEMENT OF THE CASE:

Murphy Oil USA, Inc., filed a timely appeal from a representative's decision dated February 26, 2015, reference 01, which held claimant eligible to receive unemployment insurance benefits. A telephone hearing was held on April 1, 2015. The employer did not appear for or participate in the hearing. On April 2, 2015, the administrative law judge decision was entered dismissing the employer's appeal by default. The employer appealed the administrative law judge's decision to the Employment Appeal Board on April 29, 2015. The Employment Appeal Board remanded the employer's appeal back for a new hearing finding the employer did not receive the initial notice of hearing. After due notice was provided, a telephone hearing was held on June 3, 2015. Although the claimant was duly notified, there was no participation by Ms. Pameticky. The employer participated by Ms. Thresa Majors, Store Manager, and Ms. Annette Hatch, District Manager.

ISSUE:

The issue is whether the claimant was discharged for misconduct sufficient to warrant the denial of unemployment insurance benefits and whether the claimant has been overpaid unemployment insurance benefits.

FINDINGS OF FACT:

Having considered the evidence in the record, the administrative law judge finds: Kimberly Pameticky was employed by Murphy Oil USA, Inc. from August 12, 2013 until February 11, 2015 when she was discharged from employment. Ms. Pameticky was employed as a part-time cashier and was paid by the hour. Her immediate supervisor was the store manager, Thresa Majors.

Ms. Pameticky was discharged after it was determined that she failed to follow established and required company procedure by scanning the ID of any persons purchasing cigarettes or alcohol who appeared to be under 28 years of age. Ms. Pameticky was aware of the procedure and had demonstrated the ability to properly follow the procedure in the past. The company

also holds monthly checks to insure that employees are following the ID scan procedure. The claimant was discharged after she sold cigarettes to a 16-year-old minor during a sting operation. Although the minor presented his ID, Ms. Pameticky did not follow the procedure by scanning it to insure that the purchaser's age was sufficient to purchase cigarettes. Ms. Pameticky received a criminal citation for her conduct and the employer may have been subject to an administrative fine as well because of the claimant's actions.

REASONING AND CONCLUSIONS OF LAW:

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.

Iowa Admin. Code r. 871-24.32(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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. *Huntoon v. Iowa Dep't of Job Serv.*, 275 N.W.2d 445, 448 (Iowa 1979).

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, the evidence in the record establishes that Ms. Pameticky was aware of the company rule which required all employees to scan the identification of any purchasers of alcohol or cigarettes who appeared to be 28 years of age or younger. The importance of the rule was emphasized by the employer and the employer routinely verified that employees were complying with the rule.

Although the claimant was familiar with the rule and had followed it in the past, she did not scan the ID of a 16-year-old purchaser and sold the purchaser cigarettes without scanning the purchaser's ID in violation of company policy. Claimant's conduct was considered to be a very serious disregard of the employer's interests and standards of behavior and subjected the employer to a potential administrative fine. Ms. Pameticky also received a criminal citation for her actions.

There being no evidence to the contrary, the administrative law judge concludes that the employer has sustained its burden of proof in showing the claimant's discharge took place under disqualifying conditions. Because the claimant was discharged for misconduct in connection with her work, she is disqualified from the receipt of unemployment insurance benefits until she has worked in and been paid wages for insured work equal to ten times her weekly benefit amount and is otherwise eligible.

Because the claimant has been deemed ineligible for benefits, any benefits the claimant has received could constitute an overpayment. The administrative record reflects that the claimant has received unemployment insurance benefits in the amount of \$61.00 since filing a claim with an effective date of February 8, 2015 for the week ending date of February 14, 2015. The administrative record also establishes that the employer did not participate in the fact-finding interview or make a firsthand witness available for rebuttal.

Iowa Code § 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.

Iowa Admin. Code r. 871-24.32(8) provides:

(8) Past acts of misconduct. While past acts and warnings can be used to determine the magnitude of a current act of misconduct, a discharge for misconduct cannot be based on such past act or acts. The termination of employment must be based on a current act.

Because the claimant's separation was disqualifying, benefits were paid to which she was not entitled. The unemployment insurance law provides that benefits must be recovered from a claimant who received benefits and is later determined to be ineligible for benefits, even though the claimant acted in good faith and was not otherwise at fault. However, the overpayment will not be recovered when it is based on a reversal on appeal of an initial determination to award benefits on an issue regarding the claimant's employment separation if: (1) the benefits were not received due to any fraud or willful misrepresentation by the claimant and (2) the employer did not participate in the initial proceeding to award benefits. The employer will not be charged for benefits if it is determined they did participate in the fact-finding interview. Iowa Code section 96.3(7). In this case the claimant has received benefits but was not eligible for those benefits. Since the employer did not participate in the fact-finding interview, the claimant is not obligated to repay to the agency the benefits she received and the employer's account shall be charged.

DECISION:

The representative's decision dated February 26, 2015, reference 01, is reversed. Claimant was discharged for misconduct. 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 claimant has been overpaid unemployment insurance benefits in the amount of \$61.00. Claimant is not liable to repay that amount. The employer's account shall be charged based upon the employer's failure to participate in the fact finding in this matter.

Terence P. Nice
Administrative Law Judge

Decision Dated and Mailed

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