

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**ROSEMARY WATSON**

Claimant

**APPEAL NO. 09A-UI-17223-ST**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**CASEY'S MARKETING COMPANY**

Employer

**Original Claim: 10/18/09  
Claimant: Respondent (2-R)**

Section 96.5-2-a – Discharge for Misconduct  
Section 96.3-7 – Recovery of Overpayment  
871 IAC 24.32(1) – Definition of Misconduct  
871 IAC 26.14(7) – Late Call

**STATEMENT OF THE CASE:**

The employer appealed a department representative's decision dated November 4, 2009, reference 01, that held the claimant was not discharged for misconduct on September 15, 2009, and that allowed benefits. A telephone hearing was held on December 21, 2009. The claimant participated. Diane Aufenkamp, Store Manager, participated for the employer. Employer Exhibits One through Three were received as evidence.

**ISSUES:**

Whether the claimant was discharged for misconduct.

Whether the claimant is overpaid benefits.

**FINDINGS OF FACT:**

The administrative law judge, having heard the testimony of the witnesses and having considered the evidence in the record, finds that: The claimant began work for the employer on January 5, 2009, and last worked for the employer as a full-time cook on September 11. The employer has an attendance policy that requires employees to report absences prior to the start of each shift. An unreported absence is considered a no-call/no-show, and after two such incidents the employee will be considered to have voluntarily resigned without proper notice. An employee may be terminated for unscheduled occurrences.

The claimant was issued a written warning on April 6 for a no-call/no-show to work on April 3. The claimant was warned that a further occurrence may result in suspension or discharge. The claimant was injured in an accident on September 15 and she reported absences from work to include September 19. Manager Aufenkamp was assured by the claimant on September 19 that she would be at work on September 20. The claimant was a no-call/no-show to work on the 20th and she was discharged on September 22, 2009.

The claimant called in after the close of the record, as she was not available when called for the hearing. The claimant has received benefits on her current claim.

**REASONING AND CONCLUSIONS OF LAW:**

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 administrative law judge concludes that the employer established misconduct in the discharge of the claimant on September 22, 2009 for failing to report to work.

The employer warned the claimant for being a no-call/no-show to work in April and let her know a further occurrence could lead to discharge. Although the claimant properly reported her absences from work to September 19, she was a no-call/no-show to work on September 20.

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.

Since the claimant has received benefits on this claim, the overpayment issue is remanded to claims for determination.

871 IAC 26.14(7) provides:

(7) If a party has not responded to a notice of telephone hearing by providing the appeals section with the names and telephone numbers of its witnesses by the scheduled time of the hearing, the presiding officer may proceed with the hearing.

a. If an absent party responds to the hearing notice while the hearing is in progress, the presiding officer shall pause to admit the party, summarize the hearing to that point, administer the oath, and resume the hearing.

b. If a party responds to the notice of hearing after the record has been closed and any party which has participated is no longer on the telephone line, the presiding officer shall not take the evidence of the late party. Instead, the presiding officer shall inquire as to why the party was late in responding to the notice of hearing. For good cause shown, the presiding officer shall reopen the record and cause further notice of hearing to be issued to all parties of record. The record shall not be reopened if the presiding officer does not find good cause for the party's late response to the notice of hearing.

c. Failure to read or follow the instructions on the notice of hearing shall not constitute good cause for reopening the record.

At issue is a request to reopen the record made after the hearing had concluded. The request to reopen the record is denied because the party making the request failed to participate by reading and following the instructions on the hearing notice.

The claimant failed to offer a good cause to reopen the record, as she did not make herself available when called for the hearing.

**DECISION:**

The decision of the representative dated November 4, 2009, reference 01, is reversed. The claimant was discharged for misconduct in connection with employment on September 22, 2009. Benefits are denied until the claimant re-qualifies by working in and being paid wages for insured work equal to ten times her weekly benefit amount, provided she is otherwise eligible. The overpayment issue is remanded.

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Randy L. Stephenson  
Administrative Law Judge

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Decision Dated and Mailed

rls/kjw