

IOWA WORKFORCE DEVELOPMENT
Unemployment Insurance Appeals Section
1000 East Grand—Des Moines, Iowa 50319
DECISION OF THE ADMINISTRATIVE LAW JUDGE
68-0157 (7-97) – 3091078 - EI

SANDY J SEBEK
994 MT LORETTA ST
DUBUQUE IA 52003

QUICK START LEARNING CENTER
ASHBURY SQUARE LOWER LEVEL
2255 JFK RD
DUBUQUE IA 52002

AMENDED

Appeal Number: 06O-UI-05575-JTT
OC: 09/04/05 R: 04
Claimant: Respondent (2)

This Decision Shall Become Final, unless within fifteen (15) days from the date below, you or any interested party appeal to the Employment Appeal Board by submitting either a signed letter or a signed written Notice of Appeal, directly to the **Employment Appeal Board, 4th Floor—Lucas Building, Des Moines, Iowa 50319**.

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

STATE CLEARLY

1. The name, address and social security number of the claimant.
2. A reference to the decision from which the appeal is taken.
3. That an appeal from such decision is being made and such appeal is signed.
4. The grounds upon which such appeal is based.

YOU MAY REPRESENT yourself in this appeal or you may obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds. It is important that you file your claim as directed, while this appeal is pending, to protect your continuing right to benefits.

(Administrative Law Judge)

(Decision Dated & Mailed)

Section 96.5(2)(a) – Discharge for Misconduct
Section 96.3(7) – Recovery of Overpayment

STATEMENT OF THE CASE:

This matter comes back before the administrative law judge pursuant to an Employment Appeal Board decision in case number 06B-UI-11478. The Employment Appeal Board remand decision indicates as follows: “This matter is remanded ... for the limited purpose of allowing the claimant to respond to the tape, i.e., by subpoena and cross-examination of the witness on the tape. The administrative law judge shall conduct a limited hearing following due notice. After the hearing, the administrative law judge shall issue a new decision in consideration of the new evidence. That decision shall also provide the parties appeal rights.”

Pursuant to the remand decision and after due notice, a limited hearing was held on June 23, 2006. Claimant Sandy Sebek participated personally and was represented by her husband, Yaro Sebek. Owner Linda Soat represented the employer. Witness Sarah Johnson appeared

pursuant to a subpoena and gave testimony in response to questions posed by the administrative law judge, Yaro Sebek and Linda Soat. No other evidence was received.

A hearing was previously conducted and a decision entered in this matter in Appeal Number 05A-UI-11478-JT. Quick Start Preschool had filed a timely appeal from the November 3, 2005, reference 03, decision that allowed benefits. After due notice was issued, a hearing was held on February 10, 2005. Claimant Sandy Sebek participated personally and was represented by Attorney Peter Arling, who presented additional testimony through Department of Human Services employee Tom Taylor and Ms. Sebek's son-in-law, Anthony Cutsforth. Owner Linda Soat represented the employer and presented additional testimony through Owner David Soat and Assistant Preschool Teacher Donna Lang. Exhibits One, Five, C, D and E were received into evidence.

The following new decision is entered pursuant to the Employment Appeal Board's remand directive.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, including the sworn testimony of witness Sarah Johnson, the administrative law judge finds:

Sandy Sebek was employed by Quick Start Learning Center as a part-time assistant teacher from August 27, 2005 until September 24, 2005, when owner Linda Soat discharged her.

The employment relationship ran into trouble early on. Ms. Sebek had left a position with another preschool to assume what she believed would be full-time employment at Quick Start. Quick Start had hired Ms. Sebek for what it believed would be full-time employment. Quick Start was just opening its preschool and had enrolled more than two dozen children. Quick Start thought it would be able to expand at its then current location to construct the preschool facilities, but was unable to do so. Quick Start could not receive a license to operate a preschool from the Department of Human Services until it had appropriate facilities approved by the fire marshal. Tom Taylor was the D.H.S. representative responsible for licensing preschools in the Dubuque area. Quick Start lost all but six of its enrolled preschoolers. Quick Start only needed a license if it had more than six students at its facility at any given time. Quick Start moved to a different location. Quick Start was unable to provide Ms. Sebek with full-time hours and did not protest Ms. Sebek's application for unemployment insurance benefits based on partial unemployment. Quick Start subsequently lost three additional preschoolers and attributed this to Ms. Sebek.

Ms. Sebek has worked as a preschool teacher for several years and came to the employment at Quick Start with firmly rooted ideas of how a preschool should be run. In her prior employment, Ms. Sebek had utilized index cards with emergency contact information for the children in her care. D.H.S. representative Tom Taylor had advised Quick Start to collect and store emergency contact information in a notebook. Quick Start had such a notebook that was kept in Ms. Sebek's desk. On the one occasion when Ms. Sebek needed to consult the notebook, she could not read the handwriting of the parent who provided the emergency contact information. Ms. Sebek is dyslexic. However, her inability to read the information on the form in the notebook concerned the parent's handwriting, not Ms. Sebek's disability. Ms. Sebek did not bring the illegible notebook entry to the employer's attention. However, after this incident, Ms. Sebek discussed with owner Linda Soat her desire to create and carry with

her index cards with emergency contact information. Ms. Soat instructed Ms. Sebek to use the notebook, not the index cards. Ms. Sebek advised Ms. Soat that she did not wish to use the notebook. Ms. Soat indicated that Ms. Sebek would need to use the notebook nonetheless.

The final incident that prompted the discharge occurred on September 24. Ms. Sebek handed index cards to the parents of Quick Start preschoolers and asked them to provide emergency contact information. The note cards contained only the child's first name. Ms. Sebek did not believe it prudent to include the child's last name on the index card. One parent, Sarah Johnson, was particularly disturbed by Ms. Sebek's request for information. Ms. Johnson had several concerns about the request. Ms. Johnson wondered what had become of the information she had previously provided. Ms. Johnson was concerned that the contact information was not available to Ms. Sebek. Ms. Johnson was concerned that Ms. Sebek may not have known her child's last name. Ms. Johnson was concerned that all appropriate contact information may not fit on the index card. When Ms. Johnson asked Ms. Sebek what had happened to the information Ms. Johnson had previously provided, Ms. Sebek told Ms. Johnson that the contact notebook was locked in Linda Soat's office. This was not true and Ms. Sebek knew it was not true at the time she uttered the statement. Ms. Johnson called Quick Start after the encounter with Ms. Sebek and voiced her concerns in a recorded voice message.

When Ms. Soat received the message from Ms. Johnson, she confronted Ms. Sebek about the use of the index cards. Ms. Sebek was apologetic. Ms. Soat advised Ms. Sebek that the employer needed to contact Ms. Johnson. Ms. Sebek indicated a desire to apologize to Ms. Johnson. The call was placed to Ms. Johnson. After the call, Ms. Sebek discharged Ms. Sebek from the employment based on the incident. Ms. Soat had previously contemplated discharging Ms. Sebek due to the lack of preschoolers and due to Ms. Soat's belief that Ms. Sebek was not a good fit in the employment.

Ms. Sebek established a claim for benefits that was effective November 3, 2005 and has received benefits totaling \$970.00 since the separation on September 24, 2005.

REASONING AND CONCLUSIONS OF LAW:

The question is whether the evidence in the record establishes that Ms. Sebek was discharged for misconduct in connection with the employment. 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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. Huntoon v. Iowa Department of Job Service, 275 N.W.2d 445, 448 (Iowa 1979).

Since the claimant was discharged, 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 benefits. Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of unemployment 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. App. 1992).

Continued failure to follow reasonable instructions constitutes misconduct. See Gilliam v. Atlantic Bottling Company, 453 N.W.2d 230 (Iowa App. 1990). An employee's failure to perform a specific task may not constitute misconduct if such failure is in good faith or for good cause. See Woods v. Iowa Department of Job Service, 327 N.W.2d 768, 771 (Iowa 1982). The administrative law judge must analyze situations involving alleged insubordination by evaluating the reasonableness of the employer's request in light of the circumstances, along with the worker's reason for non-compliance. See Endicott v. Iowa Department of Job Service, 367 N.W.2d 300 (Iowa Ct. App. 1985).

The administrative law judge applies a reasonable person standard in analyzing the conduct of the employer or the claimant. See Aalbers v. IDJS, 431 N.W.2d 330, 335-336 (Iowa 1988); O'Brien v. EAB, 494 N.W.2d 660 (Iowa 1993).

Subpoenaed witness Sarah Johnson provided detailed testimony that was internally consistent and consistent with the weight of the evidence. Ms. Johnson's testimony revealed that she held no bias in favor of, or prejudice against, either party. Ms. Johnson's testimony demonstrated that she clearly remembered the discussion with Ms. Sebek that prompted Ms. Sebek's discharge. Ms. Johnson provided candid responses to all questions posed to her. The

administrative law judge found Ms. Johnson's testimony credible and believes the testimony should be given considerable weight.

The evidence establishes that there were two distinct aspects to the conduct on September 24 that prompted the discharge. The first aspect concerned Ms. Sebek's intentional violation of Ms. Soat's directive to forego use of the index cards. The second aspect concerned Ms. Sebek's representation to Ms. Johnson that the emergency contact information was locked in Linda Soat's office. The employer's directive to use the notebook was based on instructions received from the Department of Human Services and was reasonable. Ms. Sebek refused to use the emergency contact notebook at the time she discussed with Ms. Soat her desire to use the index cards. Ms. Sebek's conduct in soliciting information for the index cards was a second refusal to follow the employer's reasonable instructions to use the notebook. Ms. Sebek's insistence on using the index cards was based more on being set in her ways than on a concern for the children and was unreasonable under the circumstances.

Ms. Sebek's deliberate misrepresentation to Ms. Johnson was more egregious conduct. Ms. Sebek testified she was not thinking at the time she uttered the statement. However, the nature of the statement and the context in which it was uttered indicates intentional conduct on the part of Ms. Sebek. Ms. Johnson was questioning Ms. Sebek's need for additional information. Ms. Johnson was indicating concern for the safety of her child at the preschool. Ms. Sebek had worked as a preschool teacher for several years and a reasonable person with her experience would have readily understood Ms. Johnson's concern. Instead of stepping down from the request, Ms. Sebek preyed upon Ms. Johnson's concerns in an effort to get Ms. Johnson to fill out the index card. Ms. Sebek intentionally made Ms. Johnson believe that Ms. Sebek would not have appropriate emergency contact information in the event Ms. Johnson's child was injured and/or the preschool needed to contact Ms. Johnson. Ms. Sebek's lie further conveyed to Ms. Johnson that Quick Start could not be relied upon to exercise good judgment.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Ms. Sebek was discharged for misconduct. Accordingly, Ms. Sebek is disqualified for benefits 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 employer's account shall not be charged for benefits paid to Ms. Sebek.

Iowa Code section 96.3-7 provides:

7. Recovery of overpayment of benefits. 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.

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.

The benefits Ms. Sebek has received constitute an overpayment that the law requires Ms. Sebek repay.

DECISION:

The Agency representative's decision dated November 3, 2005, reference 03, is reversed. The claimant was discharged for misconduct. The claimant is disqualified for unemployment benefits until she has worked in and paid wages for insured work equal to ten times her weekly benefit allowance, provided she meets all other eligibility requirements. The employer's account shall not be charged. The claimant is overpaid \$970.00.

jt/kkf/pjs