

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

WENDY M KNERR
Claimant

KUM & GO LC
Employer

APPEAL NO. 07A-UI-03840-H2T
ADMINISTRATIVE LAW JUDGE
DECISION

OC: 03-11-07 R: 02
Claimant: Respondent (2)

Section 96.5-2-a – Discharge/Misconduct
Section 96.3-7 – Recovery of Benefit Overpayment

STATEMENT OF THE CASE:

The employer filed a timely appeal from the April 2, 2007, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on May 15, 2007. The claimant did participate. The employer did participate through Andrew Downey, General Manager. Employer's Exhibit One was received.

ISSUE:

Was the claimant discharged for work-related misconduct?

Has the claimant been overpaid any unemployment insurance benefits?

FINDINGS OF FACT:

Having reviewed the testimony and all of the evidence in the record, the administrative law judge finds: Claimant was employed as a sales manager full time beginning April 6, 2005 through March 14, 2007, when she was discharged.

The claimant was discharged for kissing her boyfriend and allowing him to jump on the counter of the store where she was working on March 3, 2007. The employer's surveillance DVD clearly shows the claimant's boyfriend jumping up on the counter and the claimant kissing him several times while she was working and while customers were in the store. When a customer filed a written complaint about the behavior, the employer investigated and reviewed the surveillance DVD, which is found at Employer's Exhibit One. The DVD was reviewed by the administrative law judge and it does show the claimant kissing her boyfriend while he is at the counter. The claimant was talking to and kissing her boyfriend while her coworker handled the customers in the store.

Claimant has received unemployment benefits since filing a claim with an effective date of April 2, 2007.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment due to job-related misconduct.

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 claimant knew or should have known that having her boyfriend hang out at the counter and kissing him on the cheek and forehead while at the workplace was conduct that could offend the employer's customers. The claimant's actions while at work constitute disqualifying misconduct.

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.

Because claimant's separation was disqualifying, benefits were paid to which claimant was not entitled. Those benefits must be recovered in accordance with the provisions of Iowa law.

DECISION:

The April 2, 2007, reference 01, decision is reversed. The claimant was discharged from employment due to job-related misconduct. Benefits are withheld until such time as she has worked in and been paid wages for insured work equal to ten times her weekly benefit amount, provided she is otherwise eligible. Claimant is overpaid benefits in the amount of \$2,196.00.

Teresa K. Hillary
Administrative Law Judge

Decision Dated and Mailed

tkh/kjw