

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**TERRY L KELCHEN**  
Claimant

**APPEAL NO. 12A-UI-12822-VST**

**PAMIDA STORES OPERATING CO LLC**  
Employer

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**OC: 09/23/12**  
**Claimant: Respondent (2R)**

Section 96.5-2-a – Discharge for Misconduct  
Section 96.3-7 – Overpayment of Benefits

**STATEMENT OF THE CASE:**

The employer filed an appeal from a decision of a representative dated October 15, 2012, reference 01, which held that the claimant was eligible for unemployment insurance benefits. After due notice, a telephone conference hearing was scheduled for and held on November 27, 2012. The claimant participated personally. The employer participated by Brian Duff, ShopKo general merchandise manager; Ron Davenport, district manager ShopKo; and Dick Plautz, regional loss prevention supervisor. The record consists of the testimony of Ron Davenport; the testimony of Brian Duff; the testimony of Dick Plautz; the testimony of Terry Kelchen; and Employer's Exhibits 1-4.

**ISSUES:**

Whether the claimant was discharged for misconduct; and  
Whether the claimant has been overpaid unemployment insurance benefits.

**FINDINGS OF FACT:**

The administrative law judge, having heard the testimony of the witnesses and having considered all of the evidence in the record, makes the following findings of fact:

The employer is a discount retailer. Stores previously known as "Pamida" have now been converted into ShopKo stores. The claimant worked as the store manager in Dubuque, Iowa. He was a full-time employee. His last day of work was September 11, 2012. He was terminated on September 11, 2012.

The series of events that led to the claimant's termination began in July 2012. An inventory services was hired to take inventory of the store in Dubuque. The employees of this inventory service were not employees of Pamida/ShopKo. The employer got feedback from the inventory services that the claimant had used profanity; exhibited aggressive behavior; and made racial comments. An investigation was conducted. This led to a coaching session with the claimant. The recap of the discussion, which was dated July 10, 2012, was as follows:

"Terry tensions were high you weren't happy, (we weren't happy) and that came through whether profanity had been used or not. There were extensive accusations as you know, at this time we cannot corroborate most of them. So we will let this rest.

BUT if there are any accusations in the future of you using profanity (whether you think something is profanity or not is irrelevant (shit, dam, F word, hell) on this level and how you talk to teammates which will give more credibility to this claim. We will hold you accountable with corrective action with possible termination. This type of language is not acceptable as a manager in our stores to teammates, customer and vendors."

(Exhibit Two)

In mid August 2012, Brian Duffy, received complaints from four employees about the claimant using profanity after the coaching session. An investigation was done by the employee relations department. The claimant was aware that some complaints had been made and that the employer was looking into it. A second conversation was held with the claimant on September 9, 2012. The claimant was interviewed by Ron Davenport and Dick Plautz. The claimant first denied that he had been using profanity and then waffled and said that he may have used words in anger. He used the word "shit" when talking to a female employee. It also came to light that he had removed a customer's check from the store for six weeks; had been removing fixtures without approval from the Dyersville store; had been taking smoke breaks in an unauthorized area; and drinking and carrying beverages on the sales floor.

The employer elected to terminate the claimant on September 11, 2012. The reason for the termination was the claimant's use of offensive vulgarities in violation of the employer's anti-harassment policy and his use of profanity, demeaning and derogatory statements to teammates during conversation. (Exhibit 1A)

## **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.

871 IAC 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.

Misconduct occurs when there are deliberate acts or omissions that constitute a material breach of the worker's duty to the employer. Profanity or other offensive language in a confrontational or disrespectful context may constitute misconduct, even in isolated situations or in situations in which the target of the statements is not present to hear them. See Myers v. EAB, 462 N.W.2d 734 (Iowa App. 1990). In Henecke v. IDJS, 533 N.W.2d 573 (Iowa App. 1995), the Iowa Court of Appeals stated that an employer has the right to expect decency and civility from its workers. The employer has the burden of proof to show misconduct.

The claimant is not eligible to receive unemployment insurance benefits. The greater weight of the credible evidence established that the claimant used offensive, vulgar and profane language after he had been specifically told that such language was not acceptable. The claimant knew in July 2012 that if he were to use offensive language in the future when talking with teammates, that he would be terminated. The employer received multiple complaints from employees after that date that the claimant continued to use profanity when talking to teammates. During his testimony, the claimant was somewhat vague on whether he used profane words. Finally he admitted that he had used the word "shit" when talking to a female employee. When asked why there were so many complaints against him, his explanation was that it was retaliation. When asked for facts to support this conclusion, he had none. The administrative law judge does not find the claimant's denial credible.

The claimant breached his duty to be decent and civil in the workplace. He had been warned about this type of behavior previously and knew what was expected by his employer. He deliberately chose to use unacceptable language. This is misconduct. Benefits are denied.

The next issue is overpayment of benefits.

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.

The overpayment issue is remanded to the claims section for determination.

**DECISION:**

The decision of the representative dated October 15, 2012, reference 01, is reversed. Unemployment insurance benefits shall be withheld until claimant has worked in and been paid wages for insured work equal to ten times claimant's weekly benefit amount, provided claimant is otherwise eligible. The overpayment issue is remanded to the claims section for determination.

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Vicki L. Seeck  
Administrative Law Judge

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Decision Dated and Mailed

vls/pjs