

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

BARBARA HENN
Claimant

APPEAL NO: 13A-UI-03708-BT

**ADMINISTRATIVE LAW JUDGE
DECISION**

KWIK TRIP INC
Employer

OC: 03/0313
Claimant: Appellant (1)

Iowa Code § 96.5(2)(a) - Discharge for Misconduct

STATEMENT OF THE CASE:

Barbara Henn (claimant) appealed an unemployment insurance decision dated March 26, 2013, reference 01, which held that she was not eligible for unemployment insurance benefits because she was discharged from Kwik Trip, Inc. (employer) for work-related misconduct. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on May 1, 2013. The claimant participated in the hearing with Attorney Christy Liss. The employer participated through Dave Wolter, District Leader; Jannan Marx, Store Leader; and Brooke Trochinski, Unemployment Specialist. Claimant's Exhibits A through D and Employer's Exhibits One through Seven were admitted into evidence. Based on the evidence, the arguments of the parties, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUE:

The issue is whether the claimant was discharged for misconduct sufficient to warrant a denial of unemployment benefits.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds that: The claimant was employed as a full-time guest service co-worker from July 19, 2011 through March 9, 2013 when she was discharged for insubordination and a repeated violation of the employer's code of conduct. One of the employer's defined core values is to show respect for others by words and actions. The Code of Conduct policy prohibits discourtesy or conduct that creates disharmony, irritation or friction, as well as behavior that is intimidating, threatening or coercive. The claimant was trained on the employer's code of conduct policy guide. However, she demonstrated an ongoing and consistent pattern of negative and unpleasant behavior which was documented in her first performance appraisal on October 28, 2011. Although she met the overall expectations, she was deficient in the one of the ten categories which the employer reviews in the evaluations. It was noted she sometimes reported to work and refused to speak to anyone, which left her co-workers wondering whether she was mad at them or simply having a bad day. She was

advised she needed to work on what she said at the register and how she presented herself to others.

In her next performance appraisal on February 2, 2012, the claimant was deficient in two categories. She only met some standards in the dependability and team player categories. One of the dependability issues could have been placed in the positive attitude category since it was reported the claimant never seemed "to be happy with the schedule" and she was advised to go to the supervisor with her complaints and "not tell everyone else about it." The claimant was considered to have met the standards in the positive attitude category but it was again reported that, "You come in days and don't speak to everyone or you come in and are snappy." With regard to the team player category, the supervisor advised the claimant that part of being a team was working together and getting along. She was specifically advised being a team player meant, "not talking behind someone's back or being mean to them when you work with them." The supervisor also noted that everyone has opinions of how things should be done and simply because someone does something differently does not mean it is wrong.

Supervisor Jannan Marx counseled the claimant on March 23, 2012 after receiving a complaint call that a guest saw her crying, angry and upset during her shift. Another complaint was that she was rude and everyone knows if she is having a bad day. The supervisor acknowledged the claimant might be going through a rough time but advised her she needed to keep her problems and attitudes at the door. The claimant admitted some of what was said was true and said she would work on it. The supervisor told her she needed to be professional and polite with every guest.

On August 21, 2012 the claimant went to the office upset because she thought a co-worker said something about her and she said she was tired of how a co-worker acted around her. Ms. Marx asked the claimant whether she told the co-worker to "get the f____ back in her kitchen" and whether she said she hated working with him. The claimant denied swearing but did admit she told the co-worker to get back in the kitchen and also admitted she said she hated working with this coworker. Ms. Marx advised the claimant she was not in any position to tell the co-worker what to do and the supervisor also documented in performance management notes that, "I then said to Barb that she has been coming into work and even I am afraid to talk to her because she seemed upset and mad." The claimant was again advised to keep her problems outside of work.

District Leader Dave Wolter met with the claimant on September 21, 2012 due to a complaint she emailed to human resources. After listening to her comments, Mr. Wolter asked her whether she had used the "F" word at work and she said she might have let it slip out a time or two but not around customers and she always apologized. Mr. Wolter told her this language was unacceptable and if she used it at work, she would receive a written warning. The claimant was then advised she needed to follow the employer's break policy which is two ten-minute breaks per an eight-hour shift. She asked how the employer can go against Iowa law and Mr. Wolter stated that he was pretty sure the company would not implement a policy that is against the law. A few days later, he dropped off a summary from the Iowa Department of Labor stating that employers in Iowa are not required to allow any paid breaks. The claimant had asked about her application for TOP CASL and/or transferring. Mr. Wolter advised her that a transfer or promotion would not be considered until there were several months with no issues.

Supervisor Marx and District Leader Wolter met with the claimant on February 18, 2013 regarding professionalism. She had called in and spoke to her co-worker regarding her schedule. It was reported and she admitted to have said the following after she heard what her schedule was, "That is bullshit, I told her 7 not 8. I'm not coming in to finish everyone's nigger

work, not gonna happen.” She also said, “She is not going to fuck me over on hours the next two weeks.....because I’m not putting up with this bullshit.” The employer advised the claimant that her attitude and demeanor about her job, co-workers and company had not been positive. She had complained about people, company policies and procedures. The written warning advised the claimant, “Barb, your attitude has to improve. You need to find a way to be happy and positive on the job, pleasant for others to work with, and positive about our company. If you are not able to make reasonable improvement, it will come to a point where it is not good for you or our company, that you continue employment.” The claimant refused to sign the warning even though the following is printed above the co-worker’s signature line, “I acknowledge my immediate supervisor discussed the above incident with me. My signature does not indicate agreement or disagreement.” The claimant told both supervisors she did not have respect for them.

The final performance appraisal was prepared on February 20, 2013 and reviewed with the claimant on March 4, 2013. She was deficient in three categories: positive attitude, team player and professionalism. It was noted that when the claimant was approached about any issue, she responded negatively, tried to bully her way around the situation and did not speak positively about her leaders or the company. She made it difficult for her team members by demanding that she get the schedule she wanted without caring about her co-workers’ feelings about hours being taken away from them. The claimant was advised she needed to get along with her co-workers, treat others professionally and not talk behind everyone’s back. She was also warned she needed to refrain from using profanity and refrain from abusing the company break policy. Her overall performance rating was that she ‘meets some standards.’ The claimant refused to sign the evaluation but did write on the appraisal in large bold print, “Do not agree. Very negative to me. Nothing positive. I refuse to sign.” The claimant told Ms. Marx that she was not happy with the review and Ms. Marx noted that she also said, “...the only leader she didn’t have respect for me was me and that she didn’t know how I could do an evaluation when I didn’t work with her often enough.” Ms. Marx told the claimant that where she was not meeting the standards was attitude, professionalism and being a team player and not her job performance. The claimant again said she had no respect for Ms. Marx and was not going to sign the evaluation.

Ms. Marx called the claimant on March 7, 2013 to ask her to meet with her and Mr. Wolter regarding the evaluation. The claimant said she could not meet because she had class so Ms. Marx asked her to come in on Friday, March 8 2013 and again the claimant refused. She said she did not want to meet with the two of them because it was too negative; she did not want to ruin her day off because of them being negative. The claimant testified in the hearing more than once that she could not come in on that Friday due to finals. She never said anything about this to the employer at the time. When the administrative law judge questioned the claimant about this based on information she provided to Iowa Workforce which confirmed her classes ran through May 2013, she then changed her testimony and said it was due to mid-terms.

The claimant returned to her regular shift on March 9, 2013 and was discharged at that time. The co-worker conference form stated that it had been a constant struggle for the claimant in the last few months and that she refused to sign a written conference and her recent appraisal. It was documented she was discharged because she was not happy there but was not willing to accept any responsibility for the way things were going.

REASONING AND CONCLUSIONS OF LAW:

The issue is whether the employer discharged the claimant for work-connected misconduct. A claimant is not qualified to receive unemployment insurance benefits if an employer has discharged the claimant for reasons constituting work-connected misconduct. Iowa Code § 96.5-2-a.

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.

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 employer has the burden to prove the discharged employee is disqualified for benefits for misconduct. *Sallis v. Employment Appeal Bd.*, 437 N.W.2d 895, 896 (Iowa 1989). The claimant was discharged on March 9, 2013 for insubordination and a repeated violation of the employer's code of conduct. Even though she had been repeatedly warned, her behavior did not improve. The claimant does not find anything wrong with her comments or actions which includes telling her supervisors she had no respect for them; telling a co-worker she was not going to "finish everyone's nigger work" and was not going to be fucked over by her supervisor; refusing to sign a written warning and a performance evaluation; and refusing to meet with her supervisors to discuss her final performance evaluation.

An employer has the right to expect decency and civility from its employees and an employee's use of profanity or offensive language in a confrontational, disrespectful, or name-calling context may be recognized as misconduct disqualifying the employee from receipt of unemployment insurance benefits. *Henecke v. Iowa Department of Job Service*, 533 N.W.2d 573 (Iowa App.

1995). Additionally, the failure to acknowledge the receipt of a written reprimand by signing it constitutes job misconduct as a matter of law. *Green v. IDJS*, 299 N.W.2d 651 (Iowa 1980). The employer has met its burden. The claimant's conduct shows a willful or wanton disregard of the standard of behavior the employer has the right to expect from an employee, as well as an intentional and substantial disregard of the employer's interests and of the employee's duties and obligations to the employer. Work-connected misconduct as defined by the unemployment insurance law has been established in this case and benefits are denied.

DECISION:

The unemployment insurance decision dated March 26, 2013, reference 01, is affirmed. The claimant is not eligible to receive unemployment insurance benefits because she was discharged from work for misconduct. Benefits are withheld 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.

Susan D. Ackerman
Administrative Law Judge

Decision Dated and Mailed

sda/css