

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**FAITH K KERSEY**  
Claimant

**APPEAL NO: 13A-UI-12045-ST**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**APAC CUSTOMER SERVICES INC**  
Employer

**OC: 09/22/13  
Claimant: Respondent (4)**

Section 96.5-2-a – Discharge  
871 IAC 24.32(1) – Definition of Misconduct  
Section 96.3-7a,b – Recovery of Overpayment

**STATEMENT OF THE CASE:**

The employer appealed a department decision dated October 17, 2013, reference 01, that held the claimant was not discharged for misconduct on September 17, 2013, and benefits are allowed. A telephone hearing was held on November 19, 2013. The claimant did not participate. Turkessa Newsome, HR Generalist, and Micki Taylor, Representative, participated for the employer.

**ISSUES:**

Whether the claimant was discharged for misconduct in connection with employment.

Whether claimant is overpaid unemployment benefits.

Whether claimant is required to repay an overpayment.

Whether the employer participated at fact finding.

**FINDINGS OF FACT:**

The administrative law judge having heard the witness testimony and having considered the evidence in the record finds: The claimant was hired on November 6, 2012, and last worked for the employer as a full-time CSR on September 17, 2013. A customer complained to the employer amount not receiving a credit on September 17.

The employer discovered claimant had a telephone call with the customer on August 29 where she agreed to provide the customer with a \$165 credit. After the call, claimant changed the credit to her account number and she received the refund. The employer suspended claimant on September 17 and terminated her in an October 9 letter for credit fraud.

Claimant failed to respond to the hearing notice with a request to participate in this hearing. The UI Appeals C2T control system shows no call from claimant with a phone number to be called for the hearing.

Claimant has received benefits on her September 22 unemployment claim totaling \$920 through the week ending October 19, 2013.

The employer did not participate in the department fact finding proceeding. Claimant did not commit any act of misrepresentation or fraud in receiving unemployment benefits.

### **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 employer has established claimant was suspended and subsequently discharged for misconduct in connection with employment effective September 17, 2013 for customer credit/refund fraud.

The claimant's act of re-directing a customer \$165 refund to her personal account is fraud and it constitutes job disqualifying misconduct.

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 unemployment insurance law requires benefits be recovered from a claimant who receives benefits and is later denied benefits even if the claimant acted in good faith and was not at fault. However, a claimant will not have to repay an overpayment when an initial decision to award benefits on an employment separation issue is reversed on appeal if two conditions are met: (1) the claimant did not receive the benefits due to fraud or willful misrepresentation, and (2) the employer failed to participate in the initial proceeding that awarded benefits. In addition, if a claimant is not required to repay an overpayment because the employer failed to participate in the initial proceeding, the employer's account will be charged for the overpaid benefits. Iowa Code § 96.3-7-a, -b.

The matter of deciding the amount of the overpayment and whether the amount overpaid should be recovered from the claimant and charged to the employer under Iowa Code § 96.3-7-b is remanded to the Agency.

Since claimant is disqualified in this matter due to a misconduct discharge, she is not entitled to the unemployment benefits she has received totaling \$920 through the week ending October 19, 2013.

Claimant committed no act of fraud or misrepresentation to obtain unemployment benefits. Since the employer failed to participate at department fact finding claimant is not required to repay the \$920 overpayment and the employer's account is charged.

**DECISION:**

The department decision dated October 17, 2013, reference 01, is modified. The claimant was suspended and discharged for misconduct effective September 17, 2013. Benefits are denied until the claimant requalifies by working in and being paid wages for insured work equal to ten times her weekly benefit amount, provided the claimant is otherwise eligible. Claimant is not required to repay the \$920 overpayment, because the employer account is charged for failing to participate in fact finding.

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Randy L. Stephenson  
Administrative Law Judge

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Decision Dated and Mailed

rls/pjs