

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

DANA R LIEBE
Claimant

APPEAL NO: 13A-UI-09510-DWT

**ADMINISTRATIVE LAW JUDGE
DECISION**

OKOBOJI GRILL OF ANKENY INC
Employer

OC: 07/23/13
Claimant: Respondent (2/R)

Iowa Code § 96.5(2)a – Discharge
Iowa Code § 96.3(7) – Overpayment of Benefits

PROCEDURAL STATEMENT OF THE CASE:

The employer appealed a representative's August 7, 2013 determination (reference 01) that held the claimant qualified to receive benefits and the employer's account subject to charge because the claimant's employment separation was for nondisqualifying reasons. The claimant did not respond to the hearing notice or participate in the hearing. Cindy Gessman, the general manager, appeared on the employer's behalf. Based on the evidence, the employer's arguments, and the law, the administrative law judge concludes the claimant is not qualified to receive benefits.

ISSUES:

Did the claimant voluntarily quit his employment for reasons that do not qualify him to receive benefits, or did the employer discharge him for reasons constituting work-connected misconduct?

Has the claimant been overpaid any benefits?

FINDINGS OF FACT:

The claimant started working for the employer in July 2000. He transferred to Gessman's restaurant in September 2012. Since the claimant worked at Gessman's restaurant, he has not completed the labor cards correctly.

Gessman gave the claimant a written warning on May 2, 2013. Gessman told the claimant in May that he needed to make changes or he would be discharged. These changes included: posting the schedules on time, on Tuesday instead of Thursday; completing labor cards correctly; not reporting to work with alcohol on his breath anymore; reporting to report to work on time even when Gessman was not at work; and treat his co-workers and customers with respect by promoting the employer's interests.

Gessman talked to the claimant again on June 13 because he was not posting schedules on Tuesdays and he still made mistakes on labor cards. The claimant told Gessman he was sorry about not getting schedules posted on Tuesday. He had gotten behind and had not gotten the schedules completed by Tuesdays.

On June 30, Gessman thought the claimant came to work after drinking beer. She believed his breath smelled of beer. When Gessman asked the claimant if he had anything to drink before he reported to work, he denied that he had anything to drink before he came to work. Gessman did not send the claimant home. She heard later that he was distant with his co-workers and had not worked as a team with other employees.

On July 17, Gessman received a customer complaint that the claimant had not stopped and talked to the customer the day before. The customer expected the claimant to stop at the table when the customer's drink was empty and the customer was ready to order. Gessman corresponded by email with the customer who identified the claimant as the employee who had not stopped at the customer's table. Gessman talked to the claimant about this customer complaint. He admitted that he had not stopped at the customer's table even though he knew he should have.

The employer discharged the claimant on July 18, 2013. The employer discharged the claimant because he repeatedly failed to post schedules timely, failed to work with employees as a team member and failed to treat customers in a way that promoted the employer's interests.

The claimant established a claim for benefits during the week of July 21, 2013. He filed claims for the weeks ending August 3 through September 21, 2013. He received his maximum weekly benefit amount of \$424 for each of these weeks. Gessman did not participate at the fact-finding interview and did not know if anyone on the employer's behalf participated.

REASONING AND CONCLUSIONS OF LAW:

A claimant is not qualified to receive unemployment insurance benefits if he voluntarily quits employment without good cause attributable to the employer, or an employer discharges him for reasons constituting work-connected misconduct. Iowa Code §§ 96.5(1), (2)a. During the hearing, Gessman testified that the employer discharged the claimant. Even if the claimant had been told he could resign or be discharged, the employer initiated the employment separation and discharged him.

The law defines misconduct as:

1. A deliberate act and a material breach of the duties and obligations arising out of a worker's contract of employment.
2. A deliberate violation or disregard of the standard of behavior the employer has a right to expect from employees. Or
3. An intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to the employer.

Inefficiency, unsatisfactory conduct, unsatisfactory performance due to inability or incapacity, inadvertence or ordinary negligence in isolated incidents, or good faith errors in judgment or discretion do not amount to work-connected misconduct. 871 IAC 24.32(1)(a).

The claimant knew or should have known his job was in jeopardy after Gessman gave him a written warning in early May 2013. She again talked to the claimant on June 13 about his failure to timely post schedules and complete labor cards correctly. The facts establish the final straw occurred after the employer received a customer complaint about the claimant's service on July 16. Instead of providing timely service to the customer, who needed another drink and was ready to order food, the claimant walked by the customer without saying anything or providing the customer with service. Since the claimant acknowledged he knew the employer required him to stop at this customer's table under these facts and did not, this was another example of the claimant's failure to treat customers in accordance with the employer's interests. The claimant's failure to serve customers when he knew his job was in jeopardy indicates the claimant intentionally disregarded the employer's interests. Without any explanation from the claimant, the evidence establishes that the claimant committed work-connected misconduct. As of July 21, 2013, the claimant is not qualified to receive benefits.

If an individual receives benefits he is not legally entitled to receive, the Department shall recover the benefits even if the individual acted in good faith and is not at fault in receiving the overpayment. Iowa Code § 96.3(7). Since the claimant is not qualified to receive benefits as of July 21, he has been overpaid a total of \$3392 in benefits he received for the weeks ending August 3 through September 21, 2013.

The issue of whether the employer participated at the fact-finding hearing will be remanded to the Claims Section to determine. If the employer participated at the fact-finding interview, the claimant will be required to pay back the overpayment. If the employer did not participate at the fact-finding interview, the employer's account will be charged for the overpayment.

DECISION:

The representative's August 7, 2013 determination (reference 01) is reversed. The employer discharged the claimant for reasons constituting work-connected misconduct. The claimant is disqualified from receiving unemployment insurance benefits as of July 21, 2013. This disqualification continues until he has been paid ten times his weekly benefit amount for insured work, provided he is otherwise eligible. The claimant has been overpaid \$3,392.00 in benefits he received for the weeks ending August 3 through September 21, 2013.

The issues of whether the employer participated at the fact-finding interview and whether the employer will be charged \$3,392.00 or the claimant is required to pay back this overpayment is **Remanded** to the Claims Section to determine.

Debra L. Wise
Administrative Law Judge

Decision Dated and Mailed

dlw/pjs