

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

TIFFANY D THOMAS
Claimant

APPEAL NO: 13A-UI-12198-DT

**ADMINISTRATIVE LAW JUDGE
DECISION**

THOMAS L CARDELLA & ASSOCIATES INC
Employer

OC: 12/16/12

Claimant: Respondent (2)

Section 96.5-2-a – Discharge
Section 96.3-7 – Recovery of Overpayment of Benefits
871 IAC 26.14(7) – Late Call

STATEMENT OF THE CASE:

Thomas L. Cardella & Associates, Inc. (employer) appealed a representative's October 28, 2013 decision (reference 01) that concluded Tiffany D. Thomas (claimant) was qualified to receive unemployment insurance benefits after a separation from employment. After hearing notices were mailed to the parties' last known addresses of record, a telephone hearing was held on November 21, 2013. A review of the Appeals Section's conference call system indicates that the claimant failed to respond to the hearing notice and provide a telephone number at which she could be reached for the hearing and did not participate in the hearing. Barb Toney of Equifax/TALX Employer Services appeared on the employer's behalf and presented testimony from one other witness, Jason Tylee. During the hearing, Employer's Exhibit One was entered into evidence. The record was closed at 2:28 p.m. At 3:19 p.m., the claimant called the Appeals Section and requested that the record be reopened. Based on the evidence, the arguments of the employer, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUES:

Should the hearing record be reopened? Was the claimant discharged for work-connected misconduct? Was the claimant overpaid unemployment insurance benefits, and if so, is the overpayment subject to recovery, based upon the employer's participation in the fact-finding interview?

OUTCOME:

Reversed. Benefits denied. Overpayment not subject to recovery.

FINDINGS OF FACT:

The claimant received the hearing notice prior to the November 21, 2013 hearing. The instructions inform the parties that if the party does not contact the Appeals Section and provide the phone number at which the party can be contacted for the hearing, the party will not be

called for the hearing. The first time the claimant directly contacted the Appeals Section was on November 21, 2013, over an hour after the scheduled start time for the hearing. The claimant had not read all the information on the hearing notice, and had assumed that the Appeals Section would initiate the telephone contact even without a response to the hearing notice.

A fact-finding interview was scheduled and conducted by a Claims representative on October 25, 2013. The employer's representative had responded to the notice of the fact-finding interview by sending in a letter to the Claims representative indicating that a witness could be reached at a specified phone number. However, when the Claims representative called that number at the specified time for the fact-finding interview, witness who was available had no information regarding the separation, so there was no live participation on the part of the employer. Additionally, the letter which had been submitted to the Claims representative had specified that "the claimant was discharged for unsatisfactory work performance, no misconduct."

The claimant started working for the employer on July 27, 2009. She worked full time as a customer care agent at the employer's Coralville, Iowa telemarketing call center. Her last day of work was October 7, 2013. The employer discharged her on October 8, 2013. The stated reason for the discharge was having her cell phone on the call floor.

On October 7 the claimant finished a call from which the customer disconnected, but the claimant's line remained open. The open line, still being recorded, captured the claimant asking a coworker to look at and read a text message on her phone, and then discussion about the text message, evidencing that the claimant had her phone on and out while on the call floor. The employer's policies strictly forbid employees from having powered-on cell phones on the call floor; this is primarily due to security concerns regarding access to customer credit card numbers and information, which could easily be copied by using a cell phone's camera. The employer's policy indicates that discharge can result from a single violation. The claimant was on notice of this policy. As a result, she was discharged prior to the start of her shift on October 8.

The claimant established a claim for unemployment insurance benefits effective December 16, 2012. She reactivated her claim by filing an additional claim effective October 6, 2013. The claimant has received unemployment insurance benefits after the separation.

REASONING AND CONCLUSIONS OF LAW:

The first issue in this case is whether the claimant's request to reopen the hearing should be granted or denied. After a hearing record has been closed the administrative law judge may not take evidence from a non-participating party but can only reopen the record and issue a new notice of hearing if the non-participating party has demonstrated good cause for the party's failure to participate. 871 IAC 26.14(7)b. The record shall not be reopened if the administrative law judge does not find good cause for the party's late contact. Id. Failing to read or follow the instructions on the notice of hearing are not good cause for reopening the record. 871 IAC 26.14(7)c.

The first time the claimant called the Appeals Section for the November 21, 2013 hearing was after the hearing had been closed. Although the claimant intended to participate in the hearing, the claimant failed to read or follow the hearing notice instructions and did not contact the Appeals Section prior to the hearing. The rule specifically states that failure to read or follow the instructions on the hearing notice does not constitute good cause to reopen the hearing. The

claimant did not establish good cause to reopen the hearing. Therefore, the claimant's request to reopen the hearing is denied.

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. Before a claimant can be denied unemployment insurance benefits, the employer has the burden to establish the claimant was discharged for work-connected misconduct. *Cosper v. IDJS*, 321 N.W.2d 6 (Iowa 1982); Iowa Code § 96.5-2-a.

In order to establish misconduct such as to disqualify a former employee from benefits an employer must establish the employee was responsible for a deliberate act or omission which was a material breach of the duties and obligations owed by the employee to the employer. 871 IAC 24.32(1)a; *Huntoon v. Iowa Department of Job Service*, 275 N.W.2d 445 (Iowa 1979); *Henry v. Iowa Department of Job Service*, 391 N.W.2d 731, 735 (Iowa App. 1986). The conduct must show a 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. 871 IAC 24.32(1)a; *Huntoon*, supra; *Henry*, supra. In contrast, 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(1)a; *Huntoon*, supra; *Newman v. Iowa Department of Job Service*, 351 N.W.2d 806 (Iowa App. 1984).

The claimant's having her cell phone out and on the call floor on October 7 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. The employer discharged the claimant for reasons amounting to work-connected misconduct.

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 claimant received benefits but has been denied benefits as a result of this decision. The claimant, therefore, was overpaid benefits. There has been no showing of fraud or willful representation on the part of the claimant. The employer did not participate in the fact-finding interview, as defined in 871 IAC 24.10. Because the claimant did not receive benefits due to fraud or willful misrepresentation and employer failed to participate in the fact-finding interview, the claimant is not required to repay the overpayment and the employer remains subject to charge for the overpaid benefits.

DECISION:

The representative's October 28, 2013 decision (reference 01) is reversed. The employer discharged the claimant for disqualifying reasons. The claimant is disqualified from receiving unemployment insurance benefits as of October 6, 2013. This disqualification continues until the claimant has been paid ten times her weekly benefit amount for insured work, provided she is otherwise eligible. Because of the failure to participate in the fact-finding interview, the employer's account will be charged for the benefits already paid.

Lynette A. F. Donner
Administrative Law Judge

Decision Dated and Mailed

ld/css