

IOWA WORKFORCE DEVELOPMENT
Unemployment Insurance Appeals Section
1000 East Grand—Des Moines, Iowa 50319
DECISION OF THE ADMINISTRATIVE LAW JUDGE
68-0157 (7-97) – 3091078 - EI

JONATHON R MORRILL
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DES MOINES IA 50317

KUM & GO LC
c/o TALX UC EXPRESS
PO BOX 283
ST LOUIS MO 63166-0283

Appeal Number: 04A-UI-02576-DT
OC: 02/09/03 R: 02
Claimant: Respondent (1)

This Decision Shall Become Final, unless within fifteen (15) days from the date below, you or any interested party appeal to the Employment Appeal Board by submitting either a signed letter or a signed written Notice of Appeal, directly to the **Employment Appeal Board, 4th Floor—Lucas Building, Des Moines, Iowa 50319.**

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

STATE CLEARLY

1. The name, address and social security number of the claimant.
2. A reference to the decision from which the appeal is taken.
3. That an appeal from such decision is being made and such appeal is signed.
4. The grounds upon which such appeal is based.

YOU MAY REPRESENT yourself in this appeal or you may obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds. It is important that you file your claim as directed, while this appeal is pending, to protect your continuing right to benefits.

(Administrative Law Judge)

(Decision Dated & Mailed)

Section 96.5-2-a – Discharge
Section 96.7-2-a(2) – Charges Against Employer's Account

STATEMENT OF THE CASE:

Kum & Go, L.C. (employer) appealed a representative's February 26, 2004 decision (reference 05) under a claim year beginning February 9, 2003 that concluded Jonathon R. Morrill (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 March 30, 2004. This appeal was consolidated for hearing with one related appeal, 04A-UI-02577-DT. The claimant participated in the hearing. Brian Baumgartner appeared on the employer's behalf. 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:

Was the claimant discharged for work-connected misconduct?

FINDINGS OF FACT:

The claimant started working for the employer on November 17, 2003. He worked full time as a sales manager trainee in the employer's Des Moines, Iowa convenience store. His last day of work was January 28, 2004. The employer discharged him on that day. The reason asserted for the discharge was not being responsible and dependable.

The claimant's birthday is December 25. He was scheduled to work both December 25 and December 26, 2003, and he verbally expressed frustration about having to work when he had previously requested a day off. He ultimately arranged to switch shifts with someone who would work for him on December 26. However, that person had a last minute emergency and the claimant was summoned to work. The claimant then declined to work that shift. On or about January 2, 2004, the claimant was asked to do some cleaning and stocking, but he demurred, indicating that he was finishing some training. On January 8 he was verbally warned about the need to take care of those responsibilities.

The claimant reported for work at approximately 7:00 a.m. on January 26. At approximately 9:00 a.m. he received a personal call from his father, with whom the claimant still lived. The claimant's parents had been involved in some domestic court matter, and the claimant's father was upset with the position the claimant was taking. When he called, he told the claimant he was being kicked out of the home. The claimant became very upset and emotional, and became unable to continue to perform his duties. He called his manager and arrangements were made for someone else to cover for the claimant's shift. He left the store at approximately 11:00 a.m. He went to the home of an uncle; however, there was no place at the uncle's home to sleep. The claimant made arrangements to stay with friends from Knoxville, Iowa. Those friends worked in the Des Moines area but did not get off work until 2:30 a.m. They would not return to Des Moines until late in the day on January 27. The claimant did not drive himself, as he did not have sufficient gas money. He realized that he would not make it in to work by 7:00 a.m. on January 27, when he was scheduled to work. He tried to call the store the afternoon or evening of January 26 to report that he would not be at work on January 27. He reached the assistant store manager once, who told him he was busy and he should call back. However, the store's phones were malfunctioning, and although the claimant attempted to call the store again, he was unsuccessful. He also attempted to find a replacement worker by calling another employee, but that person declined. He did not have the phone number for the store manager or for Mr. Baumgartner, the district supervisor, available to him, so he did not call them. When he returned to work on January 28 to work a shift in place of the sick store manager, he was discharged by Mr. Baumgartner.

The claimant established a claim for unemployment insurance benefits effective February 9, 2003. He filed an additional claim effective during that claim year effective February 1, 2004. Upon expiration of the 2003 claim year on February 7, 2004, he filed for a second claim year effective February 8, 2004.

REASONING AND CONCLUSIONS OF LAW:

The issue in this case is whether the employer discharged the claimant for reasons establishing work-connected misconduct as defined by the unemployment insurance law. The issue is not whether the employer was right to terminate the claimant's employment, but whether the

claimant is entitled to unemployment insurance benefits. Infante v. IDJS, 364 N.W.2d 262 (Iowa App. 1984). What constitutes misconduct justifying termination of an employee and what is misconduct that warrants denial of unemployment insurance benefits are two separate questions. Pierce v. IDJS, 425 N.W.2d 679 (Iowa App. 1988).

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 Section 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 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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. Huntoon v. Iowa Department of Job Service, 275 N.W.2d 445, 448 (Iowa 1979).

The focus of the definition of misconduct is on acts or omissions by a claimant that "rise to the level of being deliberate, intentional or culpable." Henry v. Iowa Department of Job Service, 391 N.W.2d 731, 735 (Iowa App. 1986). The acts must show:

1. Willful and wanton disregard of an employer's interest, such as found in:
 - a. Deliberate violation of standards of behavior that the employer has the right to expect of its employees, or
 - b. Deliberate disregard of standards of behavior the employer has the right to expect of its employees; or
2. Carelessness or negligence of such degree of recurrence as to:
 - a. Manifest equal culpability, wrongful intent or evil design; or
 - b. Show an intentional and substantial disregard of:
 1. The employer's interest, or
 2. The employee's duties and obligations to the employer.

Henry, supra. The reason cited by the employer for discharging the claimant is his lack of responsibility and dependability, as finally demonstrated in his leaving work, and absence from work on January 26 and January 27. Under the circumstances of this case, the claimant's behavior was the result of inefficiency, unsatisfactory conduct, inadvertence, or ordinary negligence, and was a good faith error in judgment or discretion. The employer has not met its burden to show disqualifying misconduct. Cosper, supra. Based upon the evidence provided, the claimant's actions were not misconduct within the meaning of the statute, and the claimant is not disqualified from benefits.

The final issue is whether the employer's account is subject to charge. An employer's account is only chargeable if the employer is a base period employer. Iowa Code Section 96.7. The base period is "the period beginning with the first day of the five completed calendar quarters immediately preceding the first day of an individual's benefit year and ending with the last day of the next to the last completed calendar quarter immediately preceding the date on which the individual filed a valid claim." Iowa Code Section 96.19-3. The claimant's first base period began October 1, 2001 and ended September 30, 2002. His second base period began October 1, 2002 and ended September 30, 2003. The employer did not employ the claimant during either of these periods, and therefore, the employer is not currently a base period employer and its account is not currently chargeable for benefits paid to the claimant.

DECISION:

The representative's February 26, 2004 decision (reference 05) is affirmed. The employer did discharge the claimant but not for disqualifying reasons. The claimant is qualified to receive unemployment insurance benefits, if he is otherwise eligible. The employer's account is not subject to charge in the February 9, 2003 or February 8, 2004 benefit years.

ld/b