

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

TAMARA L TERRY
Claimant

CASEY'S MARKETING COMPANY
Employer

APPEAL 20A-UI-12835-DZ-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 07/12/20
Claimant: Respondent (2)

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Code § 96.5(1) – Voluntary Quit
Iowa Admin. Code r. 871-24.10 – Payment – Employer representative participation in fact-finding interview
Public Law 116-136 § 2104(b) – Federal Pandemic Unemployment Compensation

STATEMENT OF THE CASE:

Casey's Marketing Company, the employer/appellant, filed an appeal from the October 6, 2020, (reference 02) unemployment insurance decision that allowed benefits based upon claimant, Tamara L. Terry, leaving employment with the employer because of sexual harassment reported to management but not resolved. The parties were properly notified of the hearing. A telephone hearing was held on December 10, 2020. The claimant did not participate. The employer participated through Jennifer Ross, store manager and the claimant's supervisor. The administrative law judge took official notice of the administrative record.

ISSUES:

Was the claimant discharged for disqualifying job-related misconduct or did the claimant voluntarily quit without good cause?
Should the claimant repay benefits or should the employer's account be charged?
Is the claimant eligible for Federal Pandemic Unemployment Compensation (FPUC) and/or Pandemic Emergency Unemployment Compensation (PEUC)?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: the claimant began working for employer on May 14, 2020. The claimant worked as a part-time cashier. The claimant's last day of work was June 9, 2020.

On, or about, June 7, 2020, the claimant made a complaint to Jennifer Ross, the store manager and her direct supervisor and to an assistant manager of sexual harassment. The claimant alleged that a male employee put his hand on claimant's back in a manner that made her uncomfortable. Ms. Ross and the assistant manager apologized to the claimant, pledged to investigate her complaint, and pledged to make sure this never happened again. Per the employer's policy, Ms. Ross investigated the complaint by reviewing camera footage and letting

her supervisor know about the complaint. Ms. Ross found the complaint to be unfounded. Ms. Ross also spoke to the male employee against whom the claimant had filed a complaint to make him “aware of what he does throughout the day and when he interacts with other people.”

The claimant was scheduled to work more than two shifts after June 7, 2020. The claimant never returned to work for any shift after she left work on June 7, 2020. Ms. Ross never told the claimant the outcome of the investigation since the claimant never returned to work after June 7, 2020. An assistant manager told Ms. Ross that the assistant manager texted the claimant before one of her scheduled shifts to ask if the claimant would be returning to work and the claimant said she would not because “she couldn’t do it anymore.” The assistant manager told Ms. Ross that the assistant manager told the claimant that if she did not come to work she would be considered a no-call/no-show. The employer’s policy is that an employee is discharged if they have two no calls-no shows. Soon after June 9, 2020, the claimant returned her key to the employer.

The administrative record shows that for the week ending July 18, 2020 to the week ending December 5, 2020, the claimant was paid \$2,551.49 in regular unemployment insurance (UI) benefits and \$2,034 in PEUC benefits.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment due to job-related misconduct and was overpaid \$4,585.49.

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 employer has the burden of proof in establishing disqualifying job misconduct. *Cosper v. Iowa Dep't of Job Serv.*, 321 N.W.2d 6 (Iowa 1982). The issue is not whether the employer made a correct decision in separating claimant, but whether the claimant is entitled to unemployment insurance benefits. *Infante v. Iowa Dep't of Job Serv.*, 364 N.W.2d 262 (Iowa Ct. App. 1984). The Iowa Court of Appeals found substantial evidence of misconduct in testimony that the claimant worked slower than he was capable of working and would temporarily and briefly improve following oral reprimands. *Sellers v. Emp't Appeal Bd.*, 531 N.W.2d 645 (Iowa Ct. App. 1995). Generally, continued refusal to follow reasonable instructions constitutes misconduct. *Gilliam v. Atlantic Bottling Co.*, 453 N.W.2d 230 (Iowa Ct. App. 1990). Misconduct must be "substantial" to warrant a denial of job insurance benefits. *Newman v. Iowa Dep't of Job Serv.*, 351 N.W.2d 806 (Iowa Ct. App. 1984). Poor work performance is not misconduct in the absence of evidence of intent. *Miller v. Emp't Appeal Bd.*, 423 N.W.2d 211 (Iowa Ct. App. 1988).

In this case, the record shows that the claimant made a complaint of sexual harassment to her direct supervisor. The claimant's allegation – that a male employee put his hand on claimant's back in a manner that made her uncomfortable – appears to have some merit. After Ms. Ross found the complaint unfounded, she spoke with the male employee to make sure he was "aware of what he does throughout the day and when he interacts with other people." Unfortunately, because the claimant did not participate in the hearing, the record does not reflect her version of what happened or how her sexual harassment complaint may have impacted her not returning to work.

If the claimant voluntarily quit her employment, she is not eligible for unemployment insurance benefits unless it was for good cause attributable to the employer. Iowa Code § 96.5-1. Intolerable or detrimental working conditions are good cause for quitting attributable to the employer. Rule 871 IAC 24.26(4). While a claimant does not have to specifically indicate or announce an intention to quit if her concerns are not addressed by the employer, for a reason for a quit to be "attributable to the employer," a claimant faced with working conditions that she considers intolerable, unlawful or unsafe must normally take the reasonable step of notifying the employer about the unacceptable condition in order to give the employer reasonable opportunity to address her concerns. *Hy-Vee Inc. v. Employment Appeal Board*, 710 N.W.2d 1 (Iowa 2005); *Swanson v. Employment Appeal Board*, 554 N.W.2d 294 (Iowa 1996); *Cobb v. Employment Appeal Board*, 506 N.W.2d 445 (Iowa 1993). If the employer subsequently fails to take effective action to address or resolve the problem it then has made the cause for quitting "attributable to the employer."

In this case, the claimant made her complaint but never gave the employer the reasonable opportunity address her concerns. After making her complaint, the claimant never returned to work. The employer never had the chance to tell the claimant that it had investigated her complaint or tell her about the outcome of the investigation. The claimant also did not call-in for at least two shifts. This violated the employer's no-call/no-show policy. Whether claimant quit because of intolerable or detrimental work conditions or her employment was terminated for violating the employer's no-call/no-show policy, the claimant not returning to work made her

quitting not attributable to her employer and was misconduct. The claimant is not eligible for regular UI benefits.

Regarding the overpayment issue, Iowa Code §96.3(7) provides, in pertinent part:

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) (a) 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.

Since the claimant has been found to be ineligible for regular UI benefits the claimant was overpaid regular UI benefits in the amount of \$2,551.49 and PEUC benefits in the amount of \$2,034 for a total of \$4,585.49.

DECISION:

The October 6, 2020, (reference 02) unemployment insurance decision is reversed. The claimant either quit for good cause not attributable to the employer or was discharged from employment due to job-related misconduct. Benefits are withheld until such time as she has worked in and been paid wages for insured work equal to ten times her weekly benefit amount, provided she is otherwise eligible. The claimant was overpaid regular UI benefits in the amount of \$2,551.49 and PEUC benefits in the amount of \$2,034 for a total of \$4,585.49.



Daniel Zeno
Administrative Law Judge

December 22, 2020
Decision Dated and Mailed

dz/scn