

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

PEGGY S KACHER
Claimant

APPEAL NO. 09A-UI-19409-NT

**ADMINISTRATIVE LAW JUDGE
DECISION**

DES STAFFING SERVICES INC
Employer

OC: 11/08/09
Claimant: Respondent (2-R)

Section 96.5-2-a – Discharge
Section 96.3-7 – Benefit Overpayment

STATEMENT OF THE CASE:

Des Staffing Services, Inc. filed a timely appeal from a representative's decision dated December 15, 2009, reference 01, which held claimant eligible to receive unemployment insurance benefits. After due notice, a telephone conference hearing was held on February 5, 2010. Claimant participated personally. The employer participated by Ms. Amy Potratz, Human Resource Manager, and Mr. Jason Mucciarone, Director.

ISSUE:

The issue is whether the claimant was discharged for misconduct sufficient to warrant the denial of unemployment insurance benefits and whether the claimant is liable to repay an overpayment of unemployment insurance benefits.

FINDINGS OF FACT:

Having considered the evidence in the record, the administrative law judge finds: Peggy Kacher was employed by Des Staffing Services, Inc. from July 23, 2007 until November 9, 2009 when she was discharged from employment. Ms. Kacher held the position of Cedar Rapids facility manager and was paid by salary. Her immediate supervisor was Jason Mucciarone.

The claimant was discharged when she failed to follow a specific work-related directive that had been given to her on Wednesday, November 4, 2009 to discharge Heath Owen from his employment with the company. The claimant was discharged when Mr. Owen was observed reporting for work at the facility on Monday, November 9, 2009 contrary to the instructions that had been given to Ms. Kacher.

Ms. Kacher had initially indicated to company management that Mr. Owen, who is related to Ms. Kacher, was working as a "volunteer." Ms. Kacher had allowed Mr. Owen to perform services at the Cedar Rapids facility of Des Staffing Services to facilitate Mr. Owen's work release program. On Wednesday, November 4, the claimant was specifically instructed that Mr. Owen's services were not to be utilized. Ms. Kacher was informed that Mr. Owen could not

work in a "volunteer" status. Because of financial considerations the employer did not wish to expend any funds on the payment of Mr. Owen. Other employees had been released from work due to poor business conditions.

When Mr. Mucciarone visited the Cedar Rapids facility on Monday morning, November 9, 2009 and observed Mr. Owen working or reporting for work, he notified upper management of the claimant's failure to follow the directive that had been given to her. It was also noted that Ms. Kacher had authorized payment to Mr. Owen for approximately two weeks, the most recent week including overtime pay. Ms. Kacher was discharged by telephone.

It is the claimant's position that her discharge was not related to hiring her relative who was under work release but was related to a sexual harassment complaint about the conduct of another office staff member.

REASONING AND CONCLUSIONS OF LAW:

The question is whether the evidence in the record is sufficient to warrant the denial of unemployment insurance benefits. It is.

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 employer has established by a preponderance of the evidence in this matter that Ms. Kacher was given a reasonable and work-related directive on Wednesday, November 4,

2009 to immediately release from employment a relative that Ms. Kacher had allowed to work at the facility under a "work release" program. The claimant was aware at the time that she allowed her relative, Mr. Owen, to begin in employment that the company had released other workers and was attempting to minimize costs. It further appears that the claimant indicated that Mr. Owen was working as a "volunteer" when in fact he was being paid by the company. When Mr. Owen was observed working or reporting for work on Monday, November 9, 2009, the employer reasonably concluded that Ms. Kacher had not followed the work-related directive that had been given to her on Wednesday the preceding week and a decision was made to terminate Ms. Kacher from her employment. The claimant's failure to follow a reasonable work-related directive showed a disregard for the employer's interests and standards of behavior and thus was disqualifying conduct under the provisions of the Employment Security Act.

Although it appears that there may have been other issues at the time about Ms. Kacher's continuing employment, such as a sexual harassment complaint about a male worker, the employer has sustained its burden of proof in establishing that the claimant's failure to follow the directive to terminate Mr. Owen promptly when instructed to do so is sufficient to warrant the denial of unemployment insurance benefits.

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.

DECISION:

The representative's decision dated December 15, 2009, reference 01, is reversed. The claimant is disqualified and benefits are withheld until she has worked in and earned wages in insured work equal to ten times her weekly benefit amount, providing that she is otherwise eligible. The issue of whether the claimant must repay the unemployment insurance benefits is remanded to the UIS Division for determination.

Terence P. Nice
Administrative Law Judge

Decision Dated and Mailed

pjs/pjs