

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

JOLYNN M. MCCUEN
Claimant

APPEAL NO: 17A-UI-06467-JE-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

CASEYS MARKETING COMPANY
Employer

OC: 05/28/17
Claimant: Respondent (2)

Section 96.5-2-a – Discharge/Misconduct

STATEMENT OF THE CASE:

The employer filed a timely appeal from the June 15, 2017, reference 01, decision that allowed benefits to the claimant. After due notice was issued, a hearing was held by telephone conference call before Administrative Law Judge Julie Elder on July 13, 2017. The claimant participated in the hearing. Richard Reese, Store Manager and Alisha Weber, Unemployment Insurance Consultant, participated in the hearing on behalf of the employer.

ISSUE:

The issue is whether the employer discharged the claimant for work-connected misconduct.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed as a full-time lunch cook for Casey's from June 20, 2014 to May 29, 2017. She was discharged for stating she would not work Sunday, May 28, 2017, calling a store clerk, rather than a manager or assistant manager, May 27, 2017, to report she would not be at work May 28, 2017, and failing to report for work May 28, 2017.

The employer posts the schedule for the following two weeks on the preceding Friday. On May 26, 2017, before posting the schedule, the store manager told the claimant he needed her to work Sunday, May 28, 2017, and the claimant said, "No," and indicated she did not have childcare. The employer told the claimant she needed to "figure something out" about her childcare issues and the claimant walked away from the employer. The claimant routinely gave the employer the impression she believed she only worked Monday through Friday and no holidays. The claimant had never been told she would only work weekdays and would be off on holidays and as a convenience store, the employer did not offer any employees that type of schedule.

On Saturday, May 27, 2017, the claimant called the store and spoke to a clerk to state she would not be in on May 28, 2017, because her son was ill. Employees are required to notify the manager or an assistant manager of an absence. The claimant did not report for work May 28,

2017. She showed up May 29, 2017, and the employer terminated the claimant's employment for failing to work her scheduled shifts.

The claimant stated her three year old son was ill May 22 through May 25, 2017, and the claimant called in to report her absences. Her son went to daycare May 26, 2017, and the claimant worked on that date but said she did not have childcare for May 28, 2017, because her son was ill.

The claimant received a written warning November 25, 2016, after she arrived for work at 9:00 a.m. and stated she had to leave at 12:30 p.m. instead of 4:00 p.m. when her shift was scheduled to end. When the employer issued the warning it told her she needed to refrain from making loud remarks in the kitchen when she was dissatisfied with the schedule, work her scheduled shifts, demonstrate a good attitude and be a team player. The claimant chose not to write any comments in the section provided for employee comments but signed the warning.

The claimant was absent or tardy after using all of her sick leave and vacation time January 11, January 16, January 24, January 30, February 20, March 10, March 13, May 18, May 24, and May 25, 2017. The employer talked to her about those absences but did not issue another written warning. It did tell the claimant it could not schedule based on her daycare situation and it was her responsibility to secure alternative daycare.

The claimant has claimed and received unemployment insurance benefits in the amount of \$647.00 for the three weeks ending June 17, 2017.

The employer personally participated in the fact-finding interview through the statements of Unemployment Insurance Consultant Alisha Weber. The employer also submitted written documentation prior to the fact-finding interview.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment for disqualifying job misconduct.

Iowa Code § 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.

Iowa Admin. Code r. 871-24.32(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 Dep't of Job Serv.*, 275 N.W.2d 445, 448 (Iowa 1979).

The employer has the burden of proving disqualifying misconduct. *Cosper v. Iowa Department of Job Service*, 321 N.W.2d 6 (Iowa 1982). A claimant is not qualified to receive unemployment insurance benefits if an employer has discharged him for reasons constituting work-connected misconduct. Iowa Code section 96.5-2-a. Misconduct that disqualifies an individual from receiving unemployment insurance benefits occurs when there are deliberate acts or omissions that constitute a material breach of the worker's duties and obligations to the employer. See 871 IAC 24.32(1).

Willful misconduct can be established where an employee manifests an intent to disobey a future reasonable instruction of his employer. *Myers v. IDJS*, 373 N.W.2d 507 (Iowa App. 1985). In this case the employer notified the claimant she needed to work Sunday, May 28, 2017, and the claimant said, "No." She was never guaranteed a Monday through Friday schedule with holidays off but behaved as if she were entitled to that schedule regardless of the employer's needs. While the claimant's son had been ill Monday through Thursday, May 22 through May 25, 2017, he did attend daycare May 26, 2017. The claimant called a store clerk May 27, 2017, and stated she would not be in May 28, 2017, because her son was ill but at that point in time she did not know if he would still be sick May 28, 2017, and failed to secure alternative childcare.

Under these circumstances, the administrative law judge concludes the claimant's conduct demonstrated a willful disregard of the standards of behavior the employer has the right to expect of employees and shows an intentional and substantial disregard of the employer's interests and the employee's duties and obligations to the employer. The employer has met its burden of proving disqualifying job misconduct. *Cosper v. IDJS*, 321 N.W.2d 6 (Iowa 1982). Therefore, benefits are denied.

Iowa Admin. Code r. 871-24.10 provides:

Employer and employer representative participation in fact-finding interviews.

(1) "Participate," as the term is used for employers in the context of the initial determination to award benefits pursuant to Iowa Code section 96.6, subsection 2, means submitting detailed factual information of the quantity and quality that if un rebutted would be sufficient to result in a decision favorable to the employer. The most effective means to participate is to provide live testimony at the interview from a witness with firsthand knowledge of the events leading to the separation. If no live testimony is provided, the employer must provide the name and telephone number of an employee

with firsthand information who may be contacted, if necessary, for rebuttal. A party may also participate by providing detailed written statements or documents that provide detailed factual information of the events leading to separation. At a minimum, the information provided by the employer or the employer's representative must identify the dates and particular circumstances of the incident or incidents, including, in the case of discharge, the act or omissions of the claimant or, in the event of a voluntary separation, the stated reason for the quit. The specific rule or policy must be submitted if the claimant was discharged for violating such rule or policy. In the case of discharge for attendance violations, the information must include the circumstances of all incidents the employer or the employer's representative contends meet the definition of unexcused absences as set forth in 871—subrule 24.32(7). On the other hand, written or oral statements or general conclusions without supporting detailed factual information and information submitted after the fact-finding decision has been issued are not considered participation within the meaning of the statute.

(2) "A continuous pattern of nonparticipation in the initial determination to award benefits," pursuant to Iowa Code section 96.6, subsection 2, as the term is used for an entity representing employers, means on 25 or more occasions in a calendar quarter beginning with the first calendar quarter of 2009, the entity files appeals after failing to participate. Appeals filed but withdrawn before the day of the contested case hearing will not be considered in determining if a continuous pattern of nonparticipation exists. The division administrator shall notify the employer's representative in writing after each such appeal.

(3) If the division administrator finds that an entity representing employers as defined in Iowa Code section 96.6, subsection 2, has engaged in a continuous pattern of nonparticipation, the division administrator shall suspend said representative for a period of up to six months on the first occasion, up to one year on the second occasion and up to ten years on the third or subsequent occasion. Suspension by the division administrator constitutes final agency action and may be appealed pursuant to Iowa Code section 17A.19.

(4) "Fraud or willful misrepresentation by the individual," as the term is used for claimants in the context of the initial determination to award benefits pursuant to Iowa Code section 96.6, subsection 2, means providing knowingly false statements or knowingly false denials of material facts for the purpose of obtaining unemployment insurance benefits. Statements or denials may be either oral or written by the claimant. Inadvertent misstatements or mistakes made in good faith are not considered fraud or willful misrepresentation.

This rule is intended to implement Iowa Code section 96.3(7)"b" as amended by 2008 Iowa Acts, Senate File 2160.

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 section 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.

Because the employer participated in the fact-finding interview, the claimant is required to repay the overpayment and the employer will not be charged for benefits paid.

Consequently, the claimant's overpayment of benefits cannot be waived and she is overpaid benefits in the amount of \$647.00 for the three weeks ending June 17, 2017.

DECISION:

The June 15, 2017, reference 01, decision is reversed. The claimant 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 has received benefits but was not eligible for those benefits. The employer personally participated in the fact-finding interview within the meaning of the law. Therefore, the claimant is overpaid benefits in the amount of \$647.00 for the three weeks ending June 17, 2017.

Julie Elder
Administrative Law Judge

Decision Dated and Mailed

je/scn