

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

BRIAN J GAMBLETON
Claimant

APPEAL NO: 14A-UI-06984-DT

**ADMINISTRATIVE LAW JUDGE
DECISION**

APPLE CORPS L P
Employer

OC: 06/08/14
Claimant: Respondent (2)

Section 96.5-2-a – Discharge
Section 96.3-7 – Recovery of Overpayment of Benefits
871 IAC 24.10 – Employer Participation

STATEMENT OF THE CASE:

Apple Corps, L.P. (employer) appealed a representative's June 25, 2014 decision (reference 01) that concluded Brian J. Gambleton (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 July 30, 2014. 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 he could be reached for the hearing and did not participate in the hearing. Dean Dinning appeared on the employer's behalf and presented testimony from one other witness, Troy Essen. 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.

ISSUES:

Was the claimant discharged for work-connected misconduct? Was the claimant overpaid unemployment insurance benefits, and if so, is that overpayment subject to recovery based upon whether the employer participated in the fact-finding interview?

OUTCOME:

Reversed. Benefits denied. Benefits subject to recovery.

FINDINGS OF FACT:

The claimant started working for the employer on September 11, 2012. He worked part time as a server at the employer's Ottumwa, Iowa, and Davenport, Iowa restaurants. His last day of work at the Ottumwa location was May 4, 2014. The employer discharged him on May 7, 2014. The stated reason for the discharge was a guest complaint about discussing his sex life on the dining floor after having been given various warnings for other issues. His last day of work at the Davenport location was on or about May 22, 2014. The employer discharged him on or about that date. The stated reason for the discharge was the fact that he had already been

discharged from his overall employment with the employer and he had misrepresented why he was no longer working at the Ottumwa location.

The claimant's home area was in the Davenport, Iowa area, and he worked at the employer's location there when he was home on breaks. He otherwise primarily worked at the Ottumwa location while he was taking college classes. Dinning, the general manager of the Ottumwa location, had given the claimant numerous warnings for issues including attendance, misuse of a credit card, and most recently, for stealing food. When Dinning received the complaint on May 5 that the claimant had been discussing his sex life within the hearing of guests, even children, he determined to discharge the claimant, and so informed him on May 7.

The claimant contacted Essen, the general manager of the Davenport location, on or about May 10. He informed Essen that he would be returning to the Davenport location for break and would like to be scheduled. He did not inform Essen that his employment had already been terminated. The discharge had not yet shown up on the employer's master records at that time. Essen allowed the claimant to work on May 17, May 21, and May 22. He then learned that the claimant had already been discharged. As a result of the prior discharge and the claimant's failure to disclose this to the employer, the employer again discharged him.

The claimant established a claim for unemployment insurance benefits effective June 8, 2014. A fact-finding interview was held with a Claims representative on June 24, 2014. The employer, through Essen, participated directly in the fact-finding interview. The claimant has received unemployment insurance benefits after the separation in the amount of \$2,124.00.

REASONING AND CONCLUSIONS OF LAW:

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. Rule 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. Rule 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. Rule 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 talking about his sex life on the dining floor within the hearing of guests, particularly children, after his prior warnings, and his failure to disclose to the Davenport location

that he had been discharged at the Ottumwa location, 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. 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.

DECISION:

The representative's June 25, 2014 decision (reference 01) is reversed. The employer discharged the claimant for disqualifying reasons. The claimant is disqualified from receiving unemployment insurance benefits as of May 7, 2014. This disqualification continues until the claimant has been paid ten times his weekly benefit amount for insured work, provided he is otherwise eligible. The employer's account is not subject to charge. The claimant is overpaid \$2,124.00, which is subject to recovery.

Lynette A. F. Donner
Administrative Law Judge

Decision Dated and Mailed

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