

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

MICHAEL P TEMPLETON
Claimant

APPEAL NO. 10A-UI-01136-H2T

**ADMINISTRATIVE LAW JUDGE
DECISION**

KINSETH HOTEL CORPORATION
Employer

**Original Claim: 11-08-09
Claimant: Respondent (2-R)**

Iowa Code § 96.5(2)a – Discharge/Misconduct
Iowa Code § 96.3(7) - Recovery of Benefit Overpayment

STATEMENT OF THE CASE:

The employer filed a timely appeal from the January 12, 2010, reference 02, decision that allowed benefits. After due notice was issued, a hearing was held on March 2, 2010. The claimant did participate. The employer did participate through Sal Martinez, Food and Beverage Manager, and was represented by Jeff Weyand of Employers Unity.

ISSUES:

Was the claimant discharged for work-related misconduct?

Has the claimant been overpaid any unemployment insurance benefits?

FINDINGS OF FACT:

Having reviewed the testimony and all of the evidence in the record, the administrative law judge finds: Claimant was employed as a line cook, full-time, beginning in November 13, 2008 through April 6, 2009, when he was discharged. The claimant was in a non-work-related car accident in December 2008 and fractured his arm. He was unable to work with one arm and his doctor took him off work. The last medical excuse the claimant provided to the employer was dated February 3, 2009 and did not provide any date when the claimant's lifting restrictions would be removed. The employer repeatedly asked the claimant to provide a work release from his treating physician that released him to return to work without restrictions. The last work restriction that the claimant provided (dated February 3) to the employer listed the claimant as not being able to lift over five pounds. With such a lifting restriction, he was unable to perform his job duties.

When the claimant brought in his last doctor's note dated February 3 (the one that had the five-pound lifting restriction), Sal Martinez told him that he had to have a full release from his doctor in order to be put back on the schedule. On March 10, the claimant spoke to the general manager, Greg Davis, who also told him that the employer would put him back on the schedule as soon as he provided a note from his doctor that indicated he had no work restrictions. When

the employer had not received any doctor's notes from the claimant by April 6, 2009, the claimant was discharged for failing to provide the needed work release.

The claimant has received unemployment benefits since filing a claim with an effective date of November 9, 2009.

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.

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.

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.

Generally, continued refusal to follow reasonable instructions constitutes misconduct. *Gilliam v. Atlantic Bottling Company*, 453 N.W.2d 230 (Iowa App. 1990). The claimant never provided a doctor's note to the employer that said he was released to return to work without any restrictions. The doctor's note of February 3 makes no mention of the work restrictions expiring. It was not unreasonable for the employer to ask for a full release before putting the claimant back to work. The claimant alleges that he was healed and able to return to work by at the latest March. If so then the claimant should have complied with Mr. Martinez's and Mr. Davis's request that he provide the required work release. The employer was patient in waiting for the claimant to recover; and when the claimant did not provide the needed release some three months after the accident, they discharged him. The claimant's failure to provide the employer

with the needed work release from his physician constitutes disqualifying misconduct. Benefits are denied.

Iowa Code § 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.

Because the claimant's separation was disqualifying, benefits were paid to which the claimant was not entitled. The unemployment insurance law provides that benefits must be recovered from a claimant who receives benefits and is later determined to be ineligible for benefits, even though the claimant acted in good faith and was not otherwise at fault. However, the overpayment will not be recovered when it is based on a reversal on appeal of an initial determination to award benefits on an issue regarding the claimant's employment separation if: (1) the benefits were not received due to any fraud or willful misrepresentation by the claimant and (2) the employer did not participate in the initial proceeding to award benefits. The employer will not be charged for benefits whether or not the overpayment is recovered. Iowa Code § 96.3(7). In this case, the claimant has received benefits but was not eligible for those benefits. The matter of determining whether the overpayment should be recovered under Iowa Code § 96.3(7)b is remanded to the Agency.

DECISION:

The January 12, 2010, reference 02, decision is reversed. The claimant was discharged from employment due to job-related misconduct. Benefits are withheld until such time as he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible. The claimant is overpaid benefits in the amount of \$1,980.19.

Teresa K. Hillary
Administrative Law Judge

Decision Dated and Mailed

tkh/kjw