

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

KIMBERLI D REMALY
Claimant

APPEAL NO: 11A-UI-02265-ST

**ADMINISTRATIVE LAW JUDGE
DECISION**

**SUBWAY
R & K MANAGEMENT CORP**
Employer

**OC: 01/16/11
Claimant: Appellant (1)**

Section 96.5-2-a – Discharge
871 IAC 24.32(1) – Definition of Misconduct

STATEMENT OF THE CASE:

The claimant appealed a department decision dated February 21, 2011, reference 01, that held she was discharged for misconduct on January 17, 2011, and benefits are denied. A telephone hearing was held on March 21, and April 20, 2011. The claimant, her attorneys, Greg Humphrey, Robert Johnson, and former employee, Brandy Vincent, participated. Kevin Thie, Owner, participated for the employer. Employer Exhibits 1 & 2 was received as evidence.

ISSUE:

Whether the claimant was discharged for misconduct in connection with employment.

FINDINGS OF FACT:

The administrative law judge having heard the testimony of the witnesses, and having considered the evidence in the record, finds: The claimant began employment as a sandwich artist on January 25, 2000. She became an assistant manager and was promoted to manager on October 16, 2005 at a Fort Madison store where she worked during the last six years of employment. The Fort Madison store is one of fifteen stores owned by the employer.

The employer uses video cameras to monitor daily activity, and it reviews the video on a periodic basis. During the period the claimant managed the store from December 19, 2005 to January 17, 2011, the employer issued written job performance concerns to claimant that it reviewed with her. Most recently, on October 4, and October 7, 2010, it reviewed with claimant concerns that it observed on the October 1 & 7 video. On October 15, it reviewed some issues with claimant that needed to be addressed immediately. Claimant was told that it is time to be the store leader or a new leader will be found. On December 10, the employer observed claimant put her glove hand into an oven mitt and she failed to remove the gloves and rewash and put on new gloves. She went on to flip breads from their forms.

The employer issued claimant an employee handbook that contains the hand washing and glove (wearing) policy. It requires hand washing before putting on gloves, making any sandwich, preparing foods, and after placing hands in oven mitt. Any employee violating the

policy is subject to warning, suspension or termination. Temperature logs must be completed twice daily. The claimant signed for a special notice regarding hand washing on June 19, 2010.

Subway experienced a salmonella outbreak at some store locations in southern Illinois that had an adverse business sale(s) affect on the some of the employer-owned southeast Iowa stores that included claimant's location. Beginning in early January 2011, the employer began to closely monitor claimant's store for food safety handling procedures. It conducted video surveillance on January 4, 6, 8 and 11. Claimant failed to log any temperatures taken the morning of January 7. She violated the hand washing policy by not washing and putting on gloves after being on the register on the 11th. Her defense is that she was busy with customers that caused her to overlook the handling procedures. The employer concluded that claimant continued to violate safe food handling procedure and discharged her on January 17, 2011.

REASONING AND CONCLUSIONS OF LAW:

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.

The administrative law judge concludes the employer has established that the claimant was discharged for misconduct in connection with employment on January 17, 2011.

The claimant knew the employer food handling/washing policy due to being issued the policies, and receiving verbal warnings. The employer established the required standard of behavior by

periodic reviews and postings. Her repeated recent violations for the same offense constitute job disqualifying misconduct.

Although the claimant might not have been issued a formal, written warning her job was in jeopardy, she admitted she was subject to termination in October 2010 and January 2011. While the most recent incidents might have constituted minor food safety/handling issues, the employer made it clear in early January that it intended to enforce the policy. Being busy with customers does not justify a failure to observe the employer food handling policy.

DECISION:

The department decision dated February 21, 2011, reference 01, is affirmed. The claimant was discharged for misconduct on January 17, 2011. Benefits are denied until the claimant requalifies by working in and being paid wages for insured work equal to ten times her weekly benefit amount, provided the claimant is otherwise eligible.

Randy L. Stephenson
Administrative Law Judge

Decision Dated and Mailed

rls/pjs