

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

EMILY MCCOY
Claimant

APPEAL NO. 10A-UI-02509-ET

**ADMINISTRATIVE LAW JUDGE
DECISION**

IOWA CITY COFFEE COMPANY
Employer

**Original Claim: 01-03-10
Claimant: Respondent (2-R)**

Section 96.5-2-a – Discharge/Misconduct
Section 96.3-7 – Recovery of Benefit Overpayment

STATEMENT OF THE CASE:

The employer filed a timely appeal from the February 9, 2010, 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 March 27, 2010. The claimant participated in the hearing. James Druschke, Operations Manager, 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 part-time barista for Iowa City Coffee Company from July 21, 2009 to January 13, 2010. On November 2, 2009, the claimant told a manager to make a raspberry steamer but the manager said, "We don't make that," because the employer's policy states it does not make that drink, as fruit juices cause the milk to curdle. The claimant said, "Just make it" in front of customers and co-workers and her statements were considered insubordinate even though she apologized for her "brusqueness" five minutes later (Employer's Exhibit Three and Claimant's Exhibit A). On November 9, 2009, the claimant received a verbal warning and had her bakery hours taken away for failing to perform her work in a timely manner in the bakery part of the business when she was without management supervision because she allowed her friends to be in the bakery, which was not open to the public, during work hours, late at night, sitting around, listening to music, and "hanging out" (Employer's Exhibit Three and Claimant's Exhibit A). On November 20, 2009, the claimant was heard at the register asking every guest if they would like only one shot of espresso instead of two in a single, even though all of the employer's drinks came with at least two shots of espresso, and told the customers the employer's drink "would give (them) a heart attack" because she thought two shots of espresso was too much, not realizing until four months after she started that two shots in a single was standard throughout the industry (Employer's Exhibit Three and Claimant's Exhibit A). On November 27, 2009, the claimant was "barking orders at fellow staff members and supervisors" and also "proceeded to slap a bagel on a plate and demand that a co-worker warm up the bagel and walked away" (Employer's Exhibit Three). On November 28, 2009, the employer issued the claimant a written warning after three managers met with her to

discuss her “inefficient work, insubordinate behaviors and poor counter guest experience” (Employer’s Exhibits One and Three). The claimant testified she did not receive the written warning and her signature is not on the warning submitted by the employer (Employer’s Exhibit One). On January 13, 2010, the employer terminated her employment because on January 11, 2010, the claimant was asked several times by a closing supervisor to perform a cleaning task and repeatedly said, “I will get to it” rather than simply doing it (Employer’s Exhibit Three). The closing supervisor reported she “displayed a constant abrasive attitude while intentionally avoiding the task at hand. Emily (the claimant) failing to perform her job timely precipitated this termination only after she was confronted November 11, 2009, by three managers about her attitude and failure to perform her tasks timely and respectfully” (Employer’s Exhibit Three).

The claimant has claimed and received unemployment insurance benefits since her separation from this employer.

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 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 the burden of proving disqualifying misconduct. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). The claimant was responsible for at least five incidents between her hire date July 21, 2009 and her termination date January 13, 2010, which was just short of six months of employment. She allowed her friends to “hang out” in the bakery in violation of the employer’s policy even though she was aware the bakery was closed to the public and the policy prohibited employees from having friends in the bakery. She “habitually” told customers the

employer's espresso would give them a heart attack, which was incorrect, and which she agreed during the hearing was not in the employer's best interest. She insisted that a manager make her a raspberry steamer, stating, "Just make it," in front of customers and other staff members after he told her the employer's policy states it will not make fruit flavored steamers because it causes the milk to curdle. She recognized that her behavior was inappropriate, as she apologized to the manager for being "brusque." She admits that she "slapped a bagel onto a plate and demanded" that a supervisor microwave it. When the supervisor said, "Emily, what do you want?" the claimant said, "Warm it up," which was an inappropriate statement to make to a supervisor. The final incident involved the claimant having a confrontation with the closing supervisor after failing to perform a cleaning duty as directed by the supervisor despite being asked to do so repeatedly and telling the supervisor, "I will get to it" several times rather than simply doing the task when asked to do so. The employer talked to the claimant on at least two occasions about violating its policies and being insubordinate and "inefficient." Despite being warned, however, the claimant's attitude and behavior did not improve and there was no indication it would in the future, either. 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). Benefits are denied.

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 section 96.3-7. In this case, the claimant has received benefits but was not eligible for those benefits. The matter of determining the amount of the overpayment and whether the overpayment should be recovered under Iowa Code section 96.3-7-b is remanded to the Agency.

DECISION:

The February 9, 2010, 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 matter of determining the amount of the overpayment and whether the overpayment should be recovered under Iowa Code section 96.3-7-b is remanded to the Agency.

Julie Elder
Administrative Law Judge

Decision Dated and Mailed

je/kjw