

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

JOYCE DUNHAM
Claimant

APPEAL NO. 10A-UI-13279-ET

**ADMINISTRATIVE LAW JUDGE
DECISION**

**ABM JANITORIAL SERVICES
NORTH CENTRAL INC**
Employer

OC: 08-22-10
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 September 16, 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 November 8, 2010. The claimant participated in the hearing. Vince Woolums, Project Manager; Bob Mangold, Shift Supervisor; and Deniece Norman, Employer's Representative, participated in the hearing on behalf of the employer. Employer's Exhibits One through Eight were admitted into evidence.

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 cleaner for ABM Janitorial Services from May 25, 2006 to August 24, 2010. She was discharged for site specific and employer policy violations in four main areas. She violated Rule Number 1 regarding failure to complete jobs to satisfaction and received written warnings January 11, 2010, for failure to restock paper products in a restroom; February 11, and April 8, 2010, for the clean room facility paperwork being incomplete; and June 21, 2010, for the toilets being dirty, the cafeteria not being cleaned, and failure to use safety cones, the last of which the employer spoke to her about constantly. She violated Rule Number 9 regarding job assignments and responsibilities November 9, 2009, by creating a fire hazard when she emptied the cigarette ashes from the patio and by improper use of the lock-out/tag-out procedures on a piece of equipment. On November 25, 2009, she was warned for improper use of an acid-based toilet bowl cleaner after it spilled on toilet seats and the cleaning cart and she used it on a sink for which it was not approved. On February 11, 2010, she was told to use the wide attachment to the vacuum rather than the crevice attachments so she could work more quickly. She violated Rule Number 20 regarding break times by taking an extra smoking break a day on a regular basis. She violated Rule Number 22 regarding the time card policy when she failed to punch in or out for lunch or break January 5, February 11,

March 18 and March 26, 2010. The last rules violated, and the most important to the employer, were the rules regarding safety. On February 11, 2010, the claimant entered a confined space at client Rockwell Collins improperly, and on March 25, 2010, she failed to wear safety glasses in blue carpeted areas as required. On August 19, 2010, she was suspended for three days for failure to follow through on job assignments, responsibilities and to learn from the retraining the employer provided her. On August 4, and 5, 2010, she failed to use required safety equipment that Rockwell requested she used while vacuuming and she refused to use the proper equipment. On August 10, 2010, her routine cleaning tasks were not completed as assigned including cleaning the toilets in the restrooms, and she had problems starting and completing her vacuuming (Employer's Exhibit Two). The employer terminated her employment August 24, 2010.

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). While the claimant obviously failed to meet the employer's expectations, she does not recall most of the incidents cited by the employer or the warnings issued, despite the fact she signed almost all of them, and denies most of the charges.

She does agree the employer talked to her about safety concerns such as leaving cords out or not using safety cones and admitted she could have incorrectly used the safety cones even though the employer explained its safety concerns and retrained her several times. The claimant received four written warnings between January 11, 2010, and her suspension August 19, 2010. Unfortunately, the number and variety of incidents rises to the level of repeated carelessness or negligence that equals willful misconduct in culpability. Lee v. Employment Appeal Board, 616 N.W.2d 661, 665 (Iowa 2000). Consequently, 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 a 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 must be 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 September 16, 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