

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

BRIAN WENNINGHOFF

Claimant

APPEAL NO: 11A-UI-14765-ET

**ADMINISTRATIVE LAW JUDGE
DECISION**

KINSETH HOTEL CORPORATION

Employer

OC: 10-16-11

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 November 4, 2011, reference 02, 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 December 8, 2011, and continued January 10, 2012. The claimant participated in the hearing. Linda Skinner, Director of Operations; Shana Craven, General Manager; Chris Cole, Guest Services Manager; Lisa Westra, Director of Sales; and Todd Richardson, Employer Representative, participated in the hearing on behalf of the employer. Employer's Exhibits One through Five 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 general manager for Kinseth Hotel Corporation from September 22, 2004 to October 17, 2011. On July 8, 2011, the claimant was placed on an action plan due to performance issues. Employees and other department managers reported the claimant was not working the hours necessary to get the property turned around; staff members were calling Director of Operations Linda Skinner personally about issues the claimant was not handling; and most importantly, the staff was concerned and called Ms. Skinner about the chef sexually harassing a minor female and the claimant failing to act even though the situation was reported to him several times. Ms. Skinner directed the claimant to address the situation but he failed to do so. Ms. Skinner went to the property July 8, 2011, to issue the claimant's action plan and while there she spoke to the chef who admitted the incident and Ms. Skinner terminated his employment. The staff was also calling Ms. Skinner stating the claimant was not working his scheduled hours, they did not know where he was or that he was not coming in, they could not reach him by phone when they had questions and he did not designate a person to be in charge during his absences from the hotel. On July 11, 2011, the property failed a Hilton inspection and the employer attributed the failure to the claimant's poor

performance and follow up. One of the main reasons for the hotel's failure was the fact that the employee training binders were not in order. Every employee in the hotel is expected to be Hilton certified and the inspector checks the training binders to insure that all employees have received the required training. Because of the failed inspection the employer had to prepare for a re-inspection by Hilton. On October 5, 2011, one of the employer's biggest clients was holding a banquet and there was no bartender, not enough coverage and the food went out five minutes late. The claimant was responsible for overseeing the event and when questioned about the situation at the time the claimant stated, "Don't worry about it. They drink a lot. They won't notice." On August 2, 2011, the employer issued a second action plan to the claimant. The employer was preparing for the re-inspection and the claimant assured Ms. Skinner everything was ready and the property would do well. Ms. Skinner originally told Hilton the training would be completed by October 1, 2011, but had to ask for an extension to October 15, 2011. On October 13, 2011, Ms. Skinner told the claimant she was coming over and bringing Shana Craven, who was a general manager of another Hilton property, to go over the training binders to insure the hotel was ready for the re-inspection. The claimant notified Ms. Skinner he was ill and could not attend the meeting and Ms. Skinner and Ms. Craven went to check the training binders anyway. When they examined the binders they discovered required training had not been done and the property was consequently not ready for inspection. Ms. Skinner called the claimant and said the binders were not complete and the claimant said they were "almost done" and that it was "no big deal." Some of the training that had not been done included food safety and alcohol awareness which were both very important, especially given the fact the hotel was on the "hot seat" with Hilton. The employer was in the running to take over a hotel in Kansas and the deal was contingent on this property passing the inspection. Ms. Skinner asked two other employees to help put together the training binders and called the claimant October 13, 2011, and asked him to meet with her October 14, 2011. Ms. Skinner planned to terminate the claimant's employment because of his failure to have the training binders ready for an inspection that could occur any day and because she believed he was "not passionate and did not understand the responsibility and was too immature to handle the responsibility" of running the hotel but the claimant called in sick that day as well. Ms. Skinner had to ask Hilton for another extension because of the training binders not being in order. Ms. Skinner monitored the hotel over the weekend of October 15 and 16, 2011, to see if the claimant would come in and catch up on the required work but he did not do so and Ms. Skinner terminated his employment October 17, 2011, for failing the first action plan because he was not working the hours required for his position and inadequate banquet planning and for failing the second action plan for failing to complete the training binders which the employer considered critical to the success of the hotel.

The claimant has claimed and received unemployment insurance benefits since his 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 not working the hours required to perform his job and failed to keep employees informed about his schedule, respond to their phone calls when away from the job or leave another manager in charge when he was gone. Additionally, he failed to address a very serious sexual harassment complaint that could have resulted in a lawsuit against the employer. Those issues resulted in the claimant's first action plan. Following the action plan the claimant's performance did not improve and the employer failed a Hilton inspection July 11, 2011, in large part because the claimant had not performed all of the required training and updated the training binders, despite telling Ms. Skinner everything was ready for the re-inspection and the hotel would do fine. The claimant continued not to work the hours necessary to make the hotel successful or follow the directives in the first action plan and received another action plan August 2, 2011, for not having the training binders done after failing the inspection and facing an imminent re-inspection. When Ms. Skinner scheduled a meeting with the claimant to review the training binders October 13, 2011, he did not attend, citing illness, but Ms. Skinner went to the hotel and checked the binders and found they were incomplete and if another inspection occurred the hotel would fail again, jeopardizing their deal to buy the Kansas property. The claimant did not take the action plans or his job duties seriously and failed to perform the essential functions of his job. 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). Therefore, 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 November 4, 2011, 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 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/css