

IOWA WORKFORCE DEVELOPMENT
Unemployment Insurance Appeals Section
1000 East Grand—Des Moines, Iowa 50319
DECISION OF THE ADMINISTRATIVE LAW JUDGE
68-0157 (7-97) – 3091078 - EI

KENJA JACKSON
638 WESTGATE ST APT #44
IOWA CITY IA 52246

KUM & GO LC
D/B/A KUM & GO
C/o TALX UC EXPRESS
PO BOX 283
ST LOUIS MO 63166-0283

Appeal Number: 04A-UI-01275-RT
OC: 12-28-03 R: 03
Claimant: Respondent (2)

This Decision Shall Become Final, unless within fifteen (15) days from the date below, you or any interested party appeal to the Employment Appeal Board by submitting either a signed letter or a signed written Notice of Appeal, directly to the **Employment Appeal Board, 4th Floor—Lucas Building, Des Moines, Iowa 50319**.

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

STATE CLEARLY

1. The name, address and social security number of the claimant.
2. A reference to the decision from which the appeal is taken.
3. That an appeal from such decision is being made and such appeal is signed.
4. The grounds upon which such appeal is based.

YOU MAY REPRESENT yourself in this appeal or you may obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds. It is important that you file your claim as directed, while this appeal is pending, to protect your continuing right to benefits.

(Administrative Law Judge)

(Decision Dated & Mailed)

Section 96.5-2-a – Discharge for Misconduct
Section 96.3-7 – Recovery of Overpayment of Benefits

STATEMENT OF THE CASE:

The employer, Kum & Go LC, doing business as Kum & Go, filed a timely appeal from an unemployment insurance decision dated January 27, 2004, reference 01, allowing unemployment insurance benefits to the claimant, Kenja Jackson. After due notice was issued, a telephone hearing was held on February 26, 2004, with the claimant not participating. The claimant did not call in a telephone number, either before the hearing or during the hearing, where he or any of his witnesses could be reached for the hearing, as instructed in the notice of appeal. David Hingst, Manager of a store in Iowa City, Iowa, participated in the hearing for the employer. Debbie Draper was available to testify for the employer but not called because her testimony would have been unnecessary and repetitive. The administrative law judge takes

official notice of Iowa Workforce Development Department unemployment insurance records for the claimant.

FINDINGS OF FACT:

Having heard the testimony of the witness and having examined all of the evidence in the record, the administrative law judge finds: The claimant was employed by the employer as a part-time sales associate for two to three months until he was discharged on December 29, 2003. The claimant averaged between 16 and 30 hours per week. The claimant was discharged for selling age-restricted items, namely cigarettes, to a minor. On December 26, 2003, a female customer came into the employer's store and went up to the counter to purchase cigarettes. The claimant was at the counter and asked the minor for an identification. The minor female said it was in the car. The claimant then asked her if she was 18 and she said yes. The claimant then sold the cigarettes to the minor. Later that day or evening, the minor's father found the cigarettes and drove by the employer's location and the minor pointed out the claimant as the one who had sold her the cigarettes. The father then called the claimant and confronted him that day or evening. The next day the father also came into the store and confronted another employee. The employer's witness, David Hingst, Manager, learned of this on December 29, 2003 when he was informed by other employees. The claimant then called him on that day and asked if he still had a job and Mr. Hingst said no. The employer's cash registers have pop-up screens, which automatically come up when an age-restricted item is scanned. Then a birthday must be punched into the register. If the age is acceptable, the sale is completed. If the age is not acceptable, the register goes blank. The employer has a clear policy that an employee must "card" or ask for identification from anyone appearing under the age of 27. If someone appears much older, an employee can punch in his or her birthday and sell the item without checking an identification. This is probably what the claimant did when he sold the cigarettes to the minor. The employer's rules clearly prohibit selling age-restricted items to minors and provides for a discharge upon a violation. The employer's procedures and policies are discussed in an interview process and each employee is given training as was the claimant. This incident was captured on videotape and although it has now been taped over, Mr. Hingst viewed the tape and the female customer who purchased the cigarettes appeared to be younger than 27. The claimant had not been accused of this behavior before nor had he received any warnings or disciplines. The claimant admitted to other co-workers this sequence of events and that he had sold cigarettes to a minor. Pursuant to his claim for unemployment insurance benefits filed effective December 28, 2003, the claimant has received unemployment insurance benefits in the amount of \$976.00 as follows: \$244.00 per week for four weeks from benefit week ending January 3, 2004 to benefit week ending January 24, 2004.

REASONING AND CONCLUSIONS OF LAW:

The questions presented by this appeal are as follows:

1. Whether the claimant's separation from the employment was a disqualifying event. It was.
2. Whether the claimant's is overpaid unemployment insurance benefits. He is.

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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. Huntoon v. Iowa Department of Job Service, 275 N.W.2d 445, 448 (Iowa 1979).

In order to be disqualified to receive unemployment insurance benefits pursuant to a discharge, the claimant must have been discharged for disqualifying misconduct. The administrative law judge concludes that the employer has met its burden of proof to demonstrate by a preponderance of the evidence that the claimant was discharged for disqualifying misconduct. The employer's witness, David Hingst, Manager of the employer's store in Iowa City, Iowa, credibly testified that on December 26, 2003, the claimant sold an age-restricted item, namely cigarettes, to a minor improperly. Mr. Hingst testified from hearsay, but it is reliable hearsay, and the claimant did not participate in the hearing to provide evidence to the contrary. A female customer approached the claimant to purchase cigarettes. The claimant asked for identification and the female minor customer stated that it was in the car. The claimant then asked her if she was 18 and she responded yes. The claimant then sold the cigarettes to the minor. The employer has a clear policy that anyone appearing under the age of 27 must be "carded" or asked for an identification. The identification then provides a birthday, which is punched into the register, and then the sale is completed. The policy clearly prohibits sales of age-restricted items to minors and provides for a discharge upon violation. Whenever an age-restricted item is entered into the register, a pop-up screen appears indicating to the employee that it is an

age-restricted item and requires that a birthday be punched into the register. The claimant must have punched in a birthday that was acceptable.

Under the evidence here, the administrative law judge must conclude that the claimant willfully and deliberately violated the employer's rules. The evidence establishes that the claimant first asked the female minor customer for an identification. Since the claimant did so, the female customer must have appeared to be less than 27. The claimant then should have insisted on an identification card. Instead he accepted the female customer's statement that her identification was in the car and that she was 18. The claimant then sold the age-restricted item. In compliance with the employer's policy, the claimant should have demanded an identification and had the female minor go out to the car and get an identification but he did not do so. Mr. Hingst also testified credibly that he viewed the videotape of this matter and that the minor female in question appeared to be younger than 27.

Accordingly, and for all the reasons set out above, the administrative law judge is constrained to conclude that the claimant's act was a deliberate act or omission constituting a material breach of his duties and obligations arising out of his workers' contract of employment and evinced a willful or wanton disregard of the employer's interests and was disqualifying misconduct. It is true that the claimant had never received any warnings or disciplines before. On the evidence here, the administrative law judge must conclude that the claimant deliberately sold cigarettes to a person he believed to be a minor. Even if the claimant reasonably believed the person to be an adult, the administrative law judge concludes that the claimant deliberately violated the employer's policy by failing to insist on identification from someone appearing younger than the age of 27. Therefore, the administrative law judge concludes that the claimant was discharged for disqualifying misconduct, and, as a consequence, he is disqualified to receive unemployment insurance benefits. Unemployment insurance benefits are denied to the claimant until or unless he requalifies for such benefits.

Iowa Code Section 96.3-7 provides:

7. Recovery of overpayment of benefits. 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.

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.

The administrative law judge concludes that the claimant has received unemployment insurance benefits in the amount of \$976.00 since separating from the employer herein on or about December 29, 2003 and filing for such benefits effective December 28, 2003, to which he is not entitled and for which he is overpaid. The administrative law judge further concludes that these benefits must be recovered in accordance with the provisions of Iowa law.

DECISION:

The representative's decision of January 27, 2004, reference 01, is reversed. The claimant, Kenja Jackson, is not entitled to receive unemployment insurance benefits until or unless he requalifies for such benefits. He has been overpaid unemployment insurance benefits in the amount of \$976.00.

pjs/b