

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

NADIRAH L CHERUIYOT
Claimant

APPEAL NO. 09A-UI-15748-HT

**ADMINISTRATIVE LAW JUDGE
DECISION**

WEAVER ENTERPRISES LTD
Employer

**Original Claim: 09/13/09
Claimant: Respondent (2-R)**

Section 96.5(2)a – Discharge

STATEMENT OF THE CASE:

The employer, Weaver Enterprises Ltd. (Weaver), filed an appeal from a decision dated October 12, 2009, reference 01. The decision allowed benefits to the claimant, Nadirah Cheruiyot. After due notice was issued, a hearing was held by telephone conference call on November 23, 2009. The claimant participated on her own behalf. The employer participated by Director of Operations Terry Moffitt.

The claimant elected to use a cell phone. At the time her testimony was to begin, she asked to be called at another number because she had “run out of minutes” on her cell phone. The new number was dialed but no one answered the phone. A series of automated answering options were given and a message was left by the judge at 11:16 a.m. The record was closed at 11:17 a.m.

At 11:24 a.m., the claimant called in with yet a third phone number. She had not made adequate arrangements to use the phone system at her location and the judge’s second call did not go through to a phone that was taking calls.

ISSUE:

The issue is whether the claimant was discharged for misconduct sufficient to warrant a denial of unemployment benefits.

FINDINGS OF FACT:

Nadirah Cheruiyot was employed by Weaver Enterprises from December 5, 2008 until January 7, 2009 as a part-time crew member. She received a written warning on December 23, 2008, for insubordination. She would not follow the instructions of the assistant manager to close the drive-up window between customers. The warning notified her that her job was in jeopardy.

Ms. Cheruiyot had asked for additional hours and was scheduled 5:00 p.m. to 7:00 p.m. on January 7, 2009. She was no-call/no-show for that shift and she was notified by phone by the general manager and assistant manager she was fired.

Nadirah Cheruiyot has received unemployment benefits since filing a claim with an effective date of September 13, 2009.

REASONING AND CONCLUSIONS OF LAW:

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 claimant had been advised her job was in jeopardy as a result of her refusal to follow instructions. In spite of that warning, she was no-call/no-show to work for an extra shift she had requested. She did not offer an explanation to the employer for not being at work or failing to call in. This is a violation of the duties and responsibilities the employer has the right to expect of an employee and conduct not in the best interests of the employer. The claimant is disqualified.

Iowa Code section 96.3-7, as amended in 2008, provides:

7. Recovery of overpayment of benefits.

a. 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.

b. (1) 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. However, provided the benefits were not received as the result of fraud or willful misrepresentation by the individual, benefits shall not be recovered from an individual if the employer did not participate in the initial determination to award benefits pursuant to section 96.6, subsection 2, and an overpayment occurred because of a subsequent reversal on appeal regarding the issue of the individual's separation from employment. The employer shall not be charged with the benefits.

(2) An accounting firm, agent, unemployment insurance accounting firm, or other entity that represents an employer in unemployment claim matters and demonstrates a continuous pattern of failing to participate in the initial determinations to award benefits, as determined and defined by rule by the department, shall be denied permission by the department to represent any employers in unemployment insurance matters. This subparagraph does not apply to attorneys or counselors admitted to practice in the courts of this state pursuant to section 602.10101.

The claimant has received unemployment benefits to which she is not entitled. The question of whether the claimant must repay these benefits is remanded to the UIS division.

DECISION:

The representative's decision of October 12, 2009, reference 01, is reversed. Nadirah Cheruiyot is disqualified and benefits are withheld until she has earned ten times her weekly benefit amount, provided she is otherwise eligible.

Bonny G. Hendricksmeier
Administrative Law Judge

Decision Dated and Mailed

bgh/kjw