

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

RONNIE WELLS

Claimant

APPEAL NO. 09A-UI-00318-ET

**ADMINISTRATIVE LAW JUDGE
DECISION**

ANNETT HOLDINGS INC

Employer

**OC: 08-17-08 R: 02
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 December 31, 2008, reference 05, 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 January 22, 2009. The claimant participated in the hearing. Janelle Umphfleet, Accounts Payable Supervisor, and Jeff Scher, Employer Representative, 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 full-time accounts payable clerk for Annett Holdings Inc. from September 8, 2008 to November 26, 2008. Accounts Payable Supervisor Janelle Umphfleet was off work from September 29 to November 3, 2008, and the controller was filling in for her. The controller sent the claimant an e-mail stating her personal calls needed to end because they were disrupting the department and the claimant e-mailed back stating it would not happen again and she was sorry. When Ms. Umphfleet returned November 11, 2008, she noticed a slight decrease in the claimant's personal call usage. On November 14, 2008, the claimant received a written warning for making and receiving personal phone calls and on November 15, 2008, the claimant sent her a return-email again stating it would not happen again and she was sorry. There seemed to be a decrease in the calls and then the claimant began asking if she could use the phone during her breaks. She was splitting her breaks, spending some time outside and the rest of the time on the phone but she was also taking her regular breaks and lunch as well. The employer's policy states that personal phone calls should be limited and planned around breaks or lunch.

When the employer reviewed the claimant's phone logs for the 58 days she was employed there it found she made and received 1,140 personal phone calls, for an average of 19.7 personal calls made per day. During the week of September 8 through September 12, 2008, she made and received 41 personal calls; during the week of September 15 through September 19, 2008, she made and received 66 personal calls; during the week of September 22 through September 26, 2008, she made and received 128 personal calls; during the week of September 29 through

October 3, 2008, she made and received 101 personal calls; during the week of October 6 through October 10, 2008, she made and received 165 personal calls; during the week of October 13 through October 17, 2008, she made and received 135 calls; during the week of October 20 through October 24, 2008, she made and received 171 personal calls; during the week of October 27 through October 31, 2008, she made and received 151 personal calls; during the week of November 3 through November 7, 2008, she made and received 60 personal calls; during the week of November 10 through November 14, 2008, she made and received 96 personal calls; during the week of November 17 through November 21, she made and received 14 personal calls; and during the week of November 24 through November 26, 2008, she made and received 12 personal calls.

The employer told her that her job was in jeopardy because of the number of phone calls she made and received. The claimant denied making and receiving that number of personal phone calls and testified most were made to vendors. In going through the claimant's phone log, however, the employer only counted those calls made to or from her home phone or local numbers, as most of her vendors were located out state.

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 employer warned the claimant about making and receiving an excessive number of personal phone calls during working hours. Despite those warnings, however, the claimant continued to make a high volume of calls; and while she says they were made during her lunch and break, it seems nearly impossible to make over 100 phone calls or even 41 phone calls over the course of a week during break and lunch times and still manage to go outside during break and lunch periods. While the claimant may have had some personal matters going on in her life, her first responsibility during work hours was to her 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). 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 December 31, 2008, reference 05, 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 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