

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

LATANIA L ROBY
Claimant

APPEAL NO: 15A-UI-02294-DWT

**ADMINISTRATIVE LAW JUDGE
DECISION**

LABOR READY MIDWEST INC
Employer

OC: 01/25/15
Claimant: Respondent (2)

Iowa Code § 96.5(2)a – Discharge
Iowa Code § 96.3(7) – Overpayment of Benefits
871 IAC 26.14(7) b, c – Request to Reopen Hearing

PROCEDURAL STATEMENT OF THE CASE:

The employer appealed a representative's February 10, 2015 determination (reference 01) that held the claimant qualified to receive benefits and the employer's account subject to charge because the claimant had been discharged for nondisqualifying reasons. The claimant did not respond to the hearing notice and did not participate at the March 25 hearing. Nicole Petersmith appeared on the employer's behalf.

After the hearing had been closed and the employer had been excused, the claimant contacted the Appeals Bureau to participate at the hearing. The claimant requested that the hearing be reopened. Based on the claimant's request to reopen the hearing, the evidence, the arguments of the parties, and the law, the administrative law judge denies the claimant's request to reopen the hearing and concludes the claimant is not qualified to receive benefits.

ISSUES:

Did the claimant establish good cause to reopen the hearing?

Did the employer discharge the claimant for work-connected misconduct?

Has the claimant been overpaid any benefits?

If the claimant has been overpaid, is the claimant responsible for paying back benefits or will the employer's account be charged?

FINDINGS OF FACT:

The claimant started working for the employer's client in October 2013. The employer is an employment staffing agency. The employer considered the claimant a good employee and clients liked her work. The claimant completed a job assignment on July 20, 2014.

The employer sends individuals texts about job opportunities. Individuals are then to respond by a text to let the employer know if they will accept or decline an assignment. On July 26, 2015, the claimant sent the employer some inappropriate texts. The employer assumed the claimant made a mistake when she sent the texts. The employer talked to the claimant that day and cautioned her to be careful so the employer did not receive texts that were not meant for the employer.

The claimant became upset when the employer talked to her because she did not believe the text comments were inappropriate. Since the text messages were not intended for the employer, the claimant indicated the employer should just disregard the text messages. The text message the employer received were:

Why because almost everyone in this town got my tampax and can feel me having sex.
Watch all kinds of woman and kids start contacting you trying to have sex with you.

During the discussion the claimant started swearing at Petersmith and the branch manager. The claimant told both of them to, "Go f__ yourself." The branch manager then told the claimant that the employer would not talk or treat the claimant like that and neither the branch manager nor Petersmith needed to be treated like or talked to like that by the claimant. The branch manager discharged the claimant for using profanity and making vulgar comments to Petersmith and the branch manager. The employer discharged her on July 26, 2015. If the claimant had not made a vulgar comment and used profanity, the employer would not have discharged her for sending accidental texts messages the employer received from her.

The claimant established a claim for benefits during the week of January 25, 2015. Her maximum weekly benefit amount is \$91. She filed claims for the weeks ending January 31 through April 4, 2015. She received her maximum weekly benefit amount for each of these weeks. The employer participated at the fact-finding interview.

The claimant called the Appeals Bureau after the hearing was closed and the employer had been excused from the hearing. The claimant did not read and follow the hearing notice instructions. Instead, she assumed that since she had previously provided her phone number when she filed her weekly claims, she would be called for the hearing. When she was not called for the hearing, she then read the instructions and called the Appeals Bureau. The claimant called more than 30 minutes after hearing had been scheduled. The claimant requested that the hearing be reopened.

REASONING AND CONCLUSIONS OF LAW:

If a party **responds** to a hearing notice **after the record has been closed and the party who participated at the hearing is no longer on the line**, the administrative law judge **can only ask why the party responded late to the hearing notice**. If the party establishes good cause for responding late, the hearing shall be reopened. The **rule specifically states that failure to read or follow the instructions on the hearing notice does not constitute good cause to reopen** the hearing. 871 IAC 26.14(7) b, c. (Emphasis supplied.)

The claimant did not read and follow the hearing instructions. After the claimant read and followed the hearing notice instructions, she called the Appeals Bureau but she called after the hearing had been closed and the employer had been excused. Based on the **law**, the claimant did not establish good cause to reopen the hearing. Therefore, the claimant's request to reopen the hearing is denied.

A claimant is not qualified to receive unemployment insurance benefits if an employer discharges her for reasons constituting work-connected misconduct. Iowa Code § 96.5(2)a. The law defines misconduct as:

1. A deliberate act and a material breach of the duties and obligations arising out of a worker's contract of employment.
2. A deliberate violation or disregard of the standard of behavior the employer has a right to expect from employees. Or
3. An intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to the employer.

Inefficiency, unsatisfactory conduct, unsatisfactory performance due to inability or incapacity, inadvertence or ordinary negligence in isolated incidents, or good faith errors in judgment or discretion do not amount to work-connected misconduct. 871 IAC 24.32(1)(a).

The employer had no intention of discharging the claimant on July 26 when they initially met to discuss the inappropriate text messages. The employer only wanted to remind the claimant to be cautious when she sent text messages. Although the claimant sent inappropriate text messages to the employer, the employer assumed she inadvertently sent those two texts to the employer.

The claimant committed work-connected misconduct when she swore and made a vulgar remark to Petersmith and the branch manager. Even though the claimant was upset, this conduct amounts to an intentional and substantial disregard of the standard of behavior the employer has a right to expect from an employee. This isolated incident amounts to work-connected misconduct. As of January 25, 2015, the claimant is not qualified to receive benefits.

If an individual receives benefits she is not legally entitled to receive, the Department shall recover the benefits even if the individual acted in good faith and is not at fault in receiving the overpayment. Iowa Code § 96.3(7). Based on this decision, the claimant is not legally entitled to receive benefits as of January 25, 2015. She has been overpaid \$910 in benefits she has received for the weeks ending January 31 through April 4, 2015.

The unemployment insurance law requires benefits be recovered from a claimant who receives benefits and is later denied benefits even if the claimant acted in good faith and was not at fault. However, a claimant will not have to repay an overpayment when an initial decision to award benefits on an employment separation issue is reversed on appeal if two conditions are met: (1) the claimant did not receive the benefits due to fraud or willful misrepresentation, and (2) the employer failed to participate in the initial proceeding that awarded benefits. In addition, if a claimant is not required to repay an overpayment because the employer failed to participate in the initial proceeding, the employer's account will be charged for the overpaid benefits. Iowa Code § 96.3(7)a, b. The employer participated at the fact-finding interview. Therefore, the claimant is required to pay back the \$910 overpayment of benefits.

DECISION:

The claimant's request to reopen the hearing is denied. The representative's February 10, 2015 determination (reference 01) is reversed. The employer discharged the claimant after she committed work-connected misconduct. As of January 25, 2015, the claimant is disqualified from receiving unemployment insurance benefits. This disqualification continues until she has

been paid ten times her weekly benefit amount for insured work, provided she is otherwise eligible. The employer's account will not be charged.

The claimant has been overpaid \$910 in benefits she received for the weeks ending January 31 through April 4, 2015. The claimant is legally responsible for paying back the overpayment.

Debra L. Wise
Administrative Law Judge

Decision Dated and Mailed

dlw/css