

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

CARMELA C ALVA
Claimant

APPEAL NO. 13A-UI-13364-NT

**ADMINISTRATIVE LAW JUDGE
DECISION**

HEALTHCARE SERVICES GROUP INC
Employer

OC: 10/06/13
Claimant: Respondent (2-R)

Section 96.5-2-a – Discharge
Section 96.3-7 – Overpayment

STATEMENT OF THE CASE:

Healthcare Services Group, Inc. filed a timely appeal from a representative's decision dated November 27, 2013, reference 05, which held claimant eligible to receive unemployment insurance benefits. After due notice was provided, a telephone hearing was held on December 24, 2013. Claimant participated. The employer participated by Ms. Nicole Miller, Account Manager, and Mr. Joe Lawler, Area Supervisor. Employer's Exhibits A, B, C, D, E and F were received into evidence.

ISSUE:

The issue is whether the evidence in the record establishes misconduct sufficient to warrant the denial of unemployment insurance benefits and whether the claimant has been overpaid job insurance benefits.

FINDINGS OF FACT:

Having considered the evidence in the record, the administrative law judge finds: Carmela Alva was employed by the captioned employer from August 16, 2013 until October 8, 2013 when she was discharged from employment. Ms. Alva was employed as a part-time housekeeper averaging 28 hours of work per week and was paid by the hour. Her immediate supervisor was Nicole Miller.

Ms. Alva was discharged on October 8, 2013 after a number of other employees came forward reporting that the claimant was complaining about a change in job assignments/hours and making repeated negative comments about her supervisor, Ms. Miller. Employees also reported that Ms. Alva had made repeated negative comments about her supervisor referring to the supervisor as a "bitch" and making a racial reference.

The employer followed a reasonable course of action by having the coworkers provide written statements. The employer also had at least two coworkers verbally recite their complaints about Ms. Alva in her presence.

The claimant's supervisor also noted that on October 8, 2013, Ms. Alva had taken an extended break without authorization. Although the claimant's work performance as a housekeeper was considered good and satisfactory, a decision was made to terminate the claimant based upon what the employer considered to be negative and insubordinate statements about her manager and because of the claimant's failure to properly take work breaks.

It is the claimant's position that the allegations made against her by coworkers were fabricated and reflected the attitude and statements of the coworkers, not the claimant's. Ms. Alva asserts that on October 8, 2013, she was combining morning and afternoon breaks together although she had only worked a few hours that morning.

REASONING AND CONCLUSIONS OF LAW:

The question before the administrative law judge is whether the evidence in the record establishes misconduct sufficient to warrant the denial of unemployment insurance benefits. It does.

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 proof in this matter. See Iowa Code section 96.6(2). Misconduct must be substantial in order to justify a denial of unemployment insurance benefits. Misconduct that may be serious enough to warrant the discharge of an employee may not

necessarily be serious enough to warrant the denial of unemployment insurance benefits. See Lee v. Employment Appeal Board, 616 N.W.2d 661 (Iowa 2000). The focus is on deliberate, intentional or culpable acts by the employee. See Gimbel v. Employment Appeal Board, 489 N.W.2d 36, 39 (Iowa Ct. of Appeals 1992).

In this matter the evidence in the record establishes that the employer was reasonable in its conclusion that Ms. Alva had been making negative comments about scheduling and repeated negative comments about her supervisor. A number of other housekeepers had reported to the manager independently that Ms. Alva had referred to the account manager as a “bitch” and that the claimant had made numerous negative comments about the account manager’s scheduling. The claimant was given the opportunity to explain her side and two of the employer’s witnesses were called in to the meeting and at that time repeated their statements about Ms. Alva’s conduct in her presence. The employer also took written statements showing the claimant had made negative statements and comments about her supervisor. The claimant’s supervisor had also witnessed the claimant taking a double break during the morning of October 8, 2013 that was not authorized. The decision to terminate the claimant was not based upon unsatisfactory performance as a housekeeper during the probationary period but because the claimant had engaged in intentional misconduct in connection with her work.

The employer has a right to expect decency and civility from its employees and an employee’s use of profanity or offensive language in a confrontational, disrespectful or name-calling context may be recognized as misconduct disqualifying the employee from the receipt of unemployment insurance benefits. See Henecke v. Iowa Department of Job Service, 533 N.W.2d 573 (Iowa App. 1995). An isolated instance of vulgarity can constitute misconduct and warrant disqualification of unemployment insurance benefits if it serves to undermine a superior’s authority. Deever v. Hawkeye Window Cleaning, Inc., 447 N.W.2d 418 (Iowa Ct. of Appeals 1989).

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.

Because the claimant has been deemed ineligible for benefits, any benefits the claimant has received could constitute an overpayment. Accordingly, the administrative law judge will remand the matter to the Claims Division for determination of whether there has been an overpayment, the amount of the overpayment and whether the claimant will have to repay the benefits or whether the benefits will be charged to the employer's account based upon the employer's participation in the fact finding of this matter.

DECISION:

The representative's decision dated November 27, 2013, reference 05, is reversed. Claimant is disqualified. Unemployment insurance benefits are withheld, until the claimant has worked in and been paid wages for insured work equal to ten times her weekly benefit amount and is otherwise eligible. The issue of whether there has been an overpayment, the amount of the overpayment and whether the claimant will have to repay the overpayment or whether the overpayment will be charged to the employer's account based on the employer's participation at fact-finding is remanded to the Claims Division for determination.

Terence P. Nice
Administrative Law Judge

Decision Dated and Mailed

pjs/pjs