

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

JULIE WETZEL

Claimant

APPEAL NO: 12A-UI-02537-BT

**ADMINISTRATIVE LAW JUDGE
DECISION**

DIVERSIFIED SERVICES FOR INDUSTRY

DSI CORPORATION

Employer

OC: 01/29/12

Claimant: Respondent (2/R)

Iowa Code § 96.5(2)(a) - Discharge for Misconduct

Iowa Code § 96.3-7 - Overpayment

STATEMENT OF THE CASE:

DSI Corporation (employer) appealed an unemployment insurance decision dated March 7, 2012, reference 01, which held that Julie Wetzel (claimant) was eligible for unemployment insurance benefits. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on March 29, 2012. The claimant participated in the hearing. The employer participated through Denise McDonald, Regional Operations Manager and Penny Johnston, Area Manager. Employer's Exhibits One through Seven were admitted into evidence. Based on the evidence, the arguments of the parties, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUE:

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

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds that: The claimant was employed as a part-time cleaner for this contract cleaning service from April 30, 2008 through January 31, 2012 when she was discharged for insubordination and repeated disciplinary problems. The employer issued the claimant a documented verbal reprimand on January 28, 2011 based on a customer complaint that the claimant was not completing her job duties. A written warning was issued on January 31, 2011 resulting from a customer complaint that she was taking too many breaks and taking breaks in an unauthorized area. The claimant refused to sign both warnings.

The employer's customer reported that the claimant left the work site on August 2, 2011 to run a personal errand. The customer also complained that the claimant was not productive and lacked initiative. If the claimant was told to do something she would do it but she did not take on any tasks on her own. She was a no-call/no-show on August 3, 2011. The building services

manager for one customer reported that the claimant's hair looked dirty, she looked unkempt and even smelled. The employer suspended the claimant for one day on August 6, 2011 and issued her a final warning on August 8, 2011.

A documented verbal warning was issued on November 21, 2011 for being late five days in a row. The employer documented that the claimant had been having complaints from every person who worked the opposite shift of the claimant. The customer contact complained that the claimant took too many smoke breaks and was always late to work in the mornings. She smelled of smoke and alcohol and was untidy. There were additional complaints about her quality of her work. On December 20, 2011 the claimant and co-worker Sandy were suspended for fighting. The claimant blocked Sandy from leaving a room and then got in Sandy's face and called her a "fucking bitch." Sandy pushed the claimant so that Sandy could leave the room. When the regional manager talked to both of them, the claimant "got right in her face." The regional manager had to tell the claimant to calm down twice and finally had to tell the claimant to sit down and be quiet or she would be fired for insubordination.

The area manager thought things were quiet after that and had a new employee train with Sandy in the morning on January 25, 2012. The new employee worked with the claimant one hour in the afternoon and refused to work with the claimant on the following day since she did not want to be trained by someone, "so hateful and mean." The new employee said the claimant called her co-worker a "fucking bitch" and was "bad-mouthing" the employer and the area manager. The regional and area managers suspended the claimant over the phone on January 27, 2012. The suspension was for three days and the claimant was directed to call the employer on January 31, 2012 to check on her job status. The claimant became very loud and irate. Shortly thereafter, the claimant texted the area manager to have her dismissal reason in writing at 1:00 p.m. The area manager replied that she could not get it done by that time but then was able to do so. The area manager texted the claimant that it was ready and the claimant said her daughter would pick it up but then her daughter never arrived.

The claimant filed a claim for unemployment insurance benefits effective January 20, 2012 and has received benefits after the separation from employment.

REASONING AND CONCLUSIONS OF LAW:

The issue is whether the employer discharged the claimant for work-connected misconduct. A claimant is not qualified to receive unemployment insurance benefits if an employer has discharged the claimant for reasons constituting work-connected misconduct. Iowa Code § 96.5-2-a.

Iowa Code § 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 to prove the discharged employee is disqualified for benefits for misconduct. *Sallis v. Employment Appeal Bd.*, 437 N.W.2d 895, 896 (Iowa 1989). The claimant was discharged on January 27, 2012 for insubordination and repeated disciplinary problems. Even after repeated warnings, her disruptive and offensive conduct continued. An employer has the 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 receipt of unemployment insurance benefits. *Henecke v. Iowa Department of Job Service*, 533 N.W.2d 573 (Iowa App. 1995).

The claimant's conduct shows a willful or wanton disregard of the standard of behavior the employer has the right to expect from an employee, as well as an intentional and substantial disregard of the employer's interests and of the employee's duties and obligations to the employer. Work-connected misconduct as defined by the unemployment insurance law has been established in this case and benefits are denied.

Iowa Code § 96.3(7) 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. The overpayment recovery law was updated in 2008. See Iowa Code § 96.3(7)(b). Under the revised law, a claimant will not be required to repay an overpayment of benefits if all of the following factors are met. First, the prior award of benefits must have been made in connection with a decision regarding the claimant's separation from a particular employment. Second, the claimant must not have engaged in fraud or willful misrepresentation to obtain the benefits or in connection with the Agency's initial decision to award benefits. Third, the employer must not have participated at the initial fact-finding proceeding that resulted in the initial decision to award benefits. If Workforce Development determines there has been an overpayment of benefits, the employer will not be charged for the benefits, regardless of whether the claimant is required to repay the benefits.

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.

DECISION:

The unemployment insurance decision dated March 7, 2012, reference 01, is reversed. The claimant is not eligible to receive unemployment insurance benefits because she was discharged from work for misconduct. Benefits are withheld until 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 is remanded to the Claims Section for investigation and determination of the overpayment issue.

Susan D. Ackerman
Administrative Law Judge

Decision Dated and Mailed

sda/pjs