

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

PATRICIA SCHMIT
Claimant

APPEAL NO: 10A-UI-03396-E

**ADMINISTRATIVE LAW JUDGE
DECISION**

FAREWAY STORES INC
Employer

OC: 01-17-10
Claimant: Respondent (2R)

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 February 25, 2010, reference 01, decision that allowed benefits to the claimant. After due notice was issued, a hearing was held in Waterloo, Iowa, before Administrative Law Judge Julie Elder on June 2, 2010. The claimant participated in the hearing and was represented by Attorney Erin O'Hern. Attorney Garrett Piklapp participated in the hearing on behalf of the employer. Employer's Exhibits One through Nine and Claimant's Exhibit A were admitted into evidence.

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 part-time cashier for Fareway from February 14, 2007 to January 13, 2010. The employer met with the claimant January 13, 2010, and asked if anything happened January 7, 2010. The claimant did not recall anything happening so the employer read her a letter written by a customer complaining of her treatment by the claimant (Employer's Exhibit Eight). The customer wrote that she was in one of three regular checkout lanes when the cashier told her to go to the express lane even though she had 15 items because there was no one waiting in express (Employer's Exhibit Eight). When the customer went to the express lane where the claimant was working she wrote she was turned away by the claimant for having too many items and went to a third checkout lane where she complained about the claimant's treatment of her to that cashier (Employer's Exhibits Eight and Nine). The employer's policy is to take customers with more than nine items through the express lane if there are no other customers waiting in express. On March 8, 2008, the employer received two phone calls from customers complaining about the claimant (Employer's Exhibit Two). The first customer stated the claimant did not greet her or speak to her during the entire time she was checking her out and was complaining to another cashier about how busy it was during the time the customer was being checked out (Employer's Exhibit Two). The second customer said he was trying to buy two 24 ounce six packs of Pepsi with a coupon that was four for \$10.00 (Employer's

Exhibit Two). The ad did not say the customer had to buy four six packs and the customer complained the claimant was “very short and abrupt in telling him he could not do that” (Employer’s Exhibit Two). On March 22, 2008, a customer told a manager the claimant was “very rude” to him in telling him he could not go through the express lane with 11 items and told the manager “four times he would never shop here again” (Employer’s Exhibit Two). On September 3, 2009, a customer complained about the claimant’s lack of customer service in the express lane because she was carrying on a conversation with another checker who was her son’s best friend’s mother (Employer’s Exhibit Three). The customer was forced to ask the claimant if she would check the customer out and although she said yes she continued her conversation with the other cashier (Employer’s Exhibit Three). In September 2009 Employee Laura Shepard wrote a letter to the employer complaining about the claimant stating she was “argumentative, rude and belligerent to co-workers and customers” and that her “presence created a hostile work environment (Employer’s Exhibit Four). Ms. Shepard indicated that one customer told her if she sees the claimant when she walks into the store she turns around and walks out (Employer’s Exhibit Four). Other customers refuse to go through her line and one man said when he tried to go through the express lane she “challenged his ability to count” and when he said he “only had eight items, is that okay?” she refused to answer him so he went to a different line (Employer’s Exhibit Four). Ms. Shepard complained to management about the problems with the claimant and was told they were aware of the problem but because the claimant’s behavior never changed she gave the employer her notice (Employer’s Exhibit Four). On October 9, 2009, Manager Allen Weimerskirch spoke to the claimant about the customer complaints about customer service and specifically mentioned the September 3, 2009, complaint (Employer’s Exhibit Five). The claimant said he may have been someone from her “former employer trying to cause trouble or the situation was a misunderstanding with the customers (Employer’s Exhibit Five). The employer told her customer service problems would not be tolerated (Employer’s Exhibit Five). The claimant stated she wanted more hours but the employer told her because of her limited availability, attitude, poor customer service and not being able to get along with others she would not be getting more hours and if she wanted more hours she should start being nicer to everyone, customers and co-workers alike (Employer’s Exhibit Five). She was told the employer had numerous complaints from other employees about her and she needed to quit making negative remarks about other employees and work on getting along (Employer’s Exhibit Five). The employer concluded by stating she “needed to become a better employee or risk losing her employment. She needs to repair her image with customers, management and fellow employees” (Employer’s Exhibit Five). On December 21, 2009, the claimant again requested more hours and was told “it was not going to happen in the near future. If she wanted more hours, she was going to have to improve her customer service skills, get along better with fellow employees and increase her availability. Also told Patti that she may want to look for another job as hours will not increase for some time and not at all if she does not improve” (Employer’s Exhibit Six). Following the customer complaint of January 7, 2010, the employer decided to terminate her employment for “discourteous treatment of customers and fellow employees and improper customer service” (Employer’s Exhibits One and Nine).

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 received at least seven complaints from customers about the claimant's customer service, as well as complaints from co-workers about the claimant's treatment of them. Despite being talked to about the problems with her customer service and treatment of co-workers the claimant's behavior did not improve. The claimant still does not recognize that her customer service performance did not rise to the employer's reasonable expectations and described her relationship with other employees as "fantastic." One of the employer's primary assets is its customer service and when one member of the team fails to consistently provide good customer service the store suffers as it is a business necessity to please the customers. Consequently, 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 February 25, 2010, reference 01, 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 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.

Julie Elder
Administrative Law Judge

Decision Dated and Mailed

je/css