

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

KAREN R KINCADE
Claimant

APPEAL NO. 10A-UI-02629-N

**ADMINISTRATIVE LAW JUDGE
DECISION**

KINSETH HOTEL CORPORATION
Employer

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

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

STATEMENT OF THE CASE:

Kinseth Hotel Corporation filed a timely appeal from a representative's decision dated February 8, 2010, reference 01, which held claimant eligible to receive unemployment insurance benefits. After due notice, a hearing was held on July 20, 2010 in Dubuque, Iowa. Although duly notified, the claimant did not appear at the hearing or request a postponement. The employer participated by Mr. Jeff Cue, General Manager, and Ms. Kimberly Atchison, Supervisor. Employer's Exhibits One through Five were received into evidence.

ISSUE:

The issue is whether the claimant was discharged for misconduct sufficient to warrant the denial unemployment insurance benefits and whether the claimant has been overpaid job insurance benefits.

FINDINGS OF FACT:

Having considered all of the evidence in the record, the administrative law judge finds: Karen Kincade was employed by Kinseth Hotel Corporation from March 24, 2008 until October 31, 2009 when she was discharged for violation of a known company rule. Ms. Kincade worked as a part-time housekeeper and was paid by the hour. Her immediate supervisor was Kimberly Atchison.

Ms. Kincade was discharged for failure to perform routine room cleaning duties after being warned on numerous occasions. The claimant had demonstrated the ability to adequately perform the duties incident to her job but did not do so on a continuing basis. The claimant was discharged after she received a final warning from the company but continued to fail to perform routine cleaning duties. The final infraction took place when the claimant had verified that she had cleaned the rooms assigned to her. A review of the rooms by the claimant's immediate supervisor showed that the claimant had not performed routine cleaning duties in seven of the rooms leaving the rooms dirty and unfit for occupancy by guests.

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 evidence in the record establishes the claimant had demonstrated the ability to adequately perform the duties of her job but did not do so on a consistent basis. The evidence in the record also establishes that the employer had acted reasonably in repeatedly warning Ms. Kincade about her deficiencies and by warning the claimant that if she did not improve, she would be discharged from employment. Although adequately warned, the claimant continued to fail to perform routine cleaning duties but verified to her employer the duties had been completed.

The administrative law judge concludes based upon the evidence in the record that the claimant's conduct showed a willful disregard for the employer's interests and standards of behavior and thus was disqualifying conduct under the provisions of the Employment Security Act. Benefits are withheld.

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.

DECISION:

The representative's decision dated February 8, 2010, reference 01, is reversed. The 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, providing that she is otherwise eligible. The question of whether the claimant must repay unemployment insurance benefits is remanded to the UIS Division for determination.

Terence P. Nice
Administrative Law Judge

Decision Dated and Mailed

pjs/pjs