

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

JEFF L BREES

Claimant

APPEAL NO. 09A-UI-10274-VST

**ADMINISTRATIVE LAW JUDGE
DECISION**

CDS GLOBAL INC

Employer

OC: 06/14/09

Claimant: Respondent (2R)

Section 96.5-2-a – Misconduct

Section 96.3-7 – Overpayment of Benefits

STATEMENT OF THE CASE:

Employer filed an appeal from a decision of a representative dated July 16, 2009, reference 01, which held claimant eligible for unemployment insurance benefits. After due notice, a telephone conference hearing was scheduled for and held on August 3, 2009. Claimant participated. Employer participated by Linda Burns, Employee Relations Specialist; Michelle Baumgardner, Customer Service Manager; and Shannon Parrish, Senior Manager Customer Service. The record consists of the testimony of Linda Burns; the testimony of Michelle Baumgardner; the testimony of Shannon Parrish; the testimony of Jeff Brees; and Employer's Exhibits 1-6.

ISSUE:

Whether the claimant was discharged for misconduct; and

Whether the claimant has been overpaid unemployment insurance benefits.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony of the witnesses and having considered all of the evidence in the record, makes the following findings of fact:

The employer is a magazine subscription fulfillment center. The claimant was a customer service representative and took calls concerning magazine subscriptions. He had worked for the employer since March 28, 1994.

The employer wanted to increase the number of sales and decided to have contest among its service representatives on new ways to offer its products to the public. Employees were to draft a marketing statement and post that statement on line where it could be seen by other employees. The fictitious product was pink igloo cooler. On June 17, 2009, the claimant posted a statement that contained offensive comments about gay people. This statement was seen by other employees and a couple of representatives reported the statement to management and indicated that they were disturbed by the comments in the statement. The statement was removed by management from the internet.

The employer has written policies that prohibit harassment and discrimination in the workplace. In addition, the claimant and other employees were given training on five different occasions about harassment in the workplace. The employer met with the claimant on June 18, 2009. The claimant told the employer that he was not taking the contest seriously and had posted the statement as a joke. The claimant was suspended and given the severity of the offense and a zero tolerance for this type of behavior, then terminated on June 19, 2009.

REASONING AND CONCLUSIONS OF LAW:

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.

Profanity or other offensive language in a confrontational or disrespectful context may constitute misconduct, even in isolated situations or in situations in which the target of the statements is not present to hear them. See Myers v. EAB, 462 N.W.2d 734 (Iowa App. 1990) The claimant conceded that the statement he made was offensive to gay people and he knew after he sent it that it was not an appropriate thing to have done. He did not, however, attempt to remove the statement from the internet nor did he go to management and ask that it be removed.

The claimant made the statement in response to an employer-sponsored contest that he did not take seriously but other employees did. Other employees read the statement and were sufficiently disturbed by the content to go to management about its offensive nature. There was testimony from the employer that potentially 500 people could read that posting from the

claimant. The employer had a zero tolerance for this type of harassing and discriminatory behavior and thus terminated the claimant.

An employer has an interest in providing a workplace free of offensive language and behavior. The employer in this case reiterated its policy against the type of behavior in which the claimant engaged by not only prohibiting this conduct in policy, but providing multiple training sessions to prevent just this sort of thing from occurring. The claimant deliberately violated the policy by posting an offensive statement. Misconduct has been established and benefits are denied.

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.

This matter is remanded to the Claims Section for determination of an overpayment.

DECISION:

The decision of the representative dated July 16, 2009, reference 01, is reversed. Unemployment insurance benefits shall be withheld until claimant has worked in and been paid wages for insured work equal to ten times claimant's weekly benefit amount, provided claimant

is otherwise eligible. This matter is remanded to Claims Section for determination of overpayment.

Vicki L. Seeck
Administrative Law Judge

Decision Dated and Mailed

vls/css