

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

MELODY L JOHNSON
Claimant

APPEAL NO. 10A-UI-04591-H2T

**ADMINISTRATIVE LAW JUDGE
DECISION**

**DES MOINES INDEPENDENT COMMUNITY
SCHOOL DISTRICT**
Employer

OC: 02-21-10
Claimant: Respondent (2R)

Iowa Code § 96.5(2)a – Discharge/Misconduct
Iowa Code § 96.3(7) – Recovery of Benefit Overpayment

STATEMENT OF THE CASE:

The employer filed a timely appeal from the March 19, 2010, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on May 10, 2010. The claimant did participate. The employer did not participate but did submit records to be considered at the hearing. Employer's Exhibit One was entered and received into the record.

ISSUE:

Was the claimant discharged due to job-related misconduct?

Has the claimant been overpaid any unemployment insurance benefits?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed as a care giver for the metro kids program part time beginning in December 2007 through February 26, 2010 when she was discharged.

The claimant was discharged for violating the employer's mandatory child abuse reporting procedures. The claimant, an admitted mandatory reporter of suspected child abuse, worked as a care giver in the Metro Kids before and after school care program. She and the other care givers worked a split shift: 6:30 a.m. to 8:30 a.m. and then again from 3:00 p.m. until 6:00 p.m. On Tuesday, February 23 the claimant reported for work and was told by another employee, Charlene Lee, the head care giver that the previous Friday one of the children had reported to her that s/he was being hurt at home. The claimant immediately asked Ms. Lee if she had reported the incident to the Department of Human Services (hereafter DHS). Ms. Lee indicated she had not. Ms. Lee told the claimant that another employee Bailey B. had also heard the child report that s/he was being hurt at home and that Bailey would be in at 3:00 p.m. and they should discuss what to do at that time.

The claimant returned to her home during the break in her shift and called her son, a police officer for a city outside Des Moines, and told him what Ms. Lee had reported to her. The claimant had been given training on mandatory reporting and in the past had demonstrated an ability to report suspected child abuse to DHS. One week prior to this incident the claimant had correctly reported suspected child abuse to DHS when she learned of it without first consulting her son to ask what to do. On January 28 the claimant was given a reminder about the mandatory reporting requirements that she read and signed off on. The reminder specifically stated: **"All information is to be kept confidential-do not tell your co-workers, family and/or friends.** If you need support go to your Team Leader or call Jane or Naki." There is no exception in the policy that allows care givers to share information with their family members if those members happen to be police officers.

The claimant's son called the Des Moines Police Department and reported what his Mother had told him. The Des Moines police sent an officer to the school. When the claimant arrived back to work the second part of her split shift, a Des Moines police officer arrived and the child was interviewed along with the school counselor. The child reiterated the report that s/he was being hurt at home. The Des Moines police officer asked if DHS had been notified when he arrived at the school. After being told that they had not, the officer had DHS notified of suspected child abuse so they could do what they deemed necessary.

According to the claimant Ms. Lee also told two other care givers, Debra and Levee, about the child's allegations that s/he was not safe at home. The claimant was not at work when Ms. Lee allegedly told Debra and Levee about the child's allegations.

Both Ms. Lee and Bailey B were discharged for failure to follow the employer's mandatory reporting procedures when they learned of suspected child abuse and did not report it to DHS in accordance with the employer's policy.

The claimant was suspended pending the employer's investigation as to what occurred. The claimant was given her termination notice on February 26, 2010 clearly indicating that she was being discharged for her failure to follow the proper procedures, including telling a family member about the incident.

The claimant has applied for and received some unemployment insurance benefits since the discharge with an effective date of February 21, 2010.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment due to job-related misconduct.

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.

Generally, continued refusal to follow reasonable instructions constitutes misconduct. *Gilliam v. Atlantic Bottling Company*, 453 N.W.2d 230 (Iowa App. 1990). The question of whether the refusal to perform a specific task constitutes misconduct must be determined by evaluating both the reasonableness of the employer's request in light of all the circumstances and the employee's reason for noncompliance. *Endicott v. IDJS*, 367 N.W.2d 300 (Iowa App. 1985).

The claimant is a mandatory reporter under Iowa Law. The employer has clear, explicit policies in place in order to comply with the requirements of the law. One of those clearly prevents employees from revealing information to family members. There is no exception if the family member is a police officer. In the past the claimant had demonstrated an ability to follow the policy without revealing information to her family members or asking their opinion. If the claimant was unsure what to do, the employer provided support and resources she could turn to. The claimant may have felt it futile to report to DHS, but it was not her responsibility to determine what DHS should or should not do, only to report it to them. Once the claimant reported it, if DHS failed to take appropriate actions, then the consequences of that fall on DHS, not the claimant or the employer. The claimant revealed information about suspected child abuse to a family member which she knew was against the policy. Her actions amount to sufficient misconduct to disqualify her from receipt of unemployment insurance benefits.

Iowa Code § 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's separation was disqualifying, benefits were paid to which the claimant was not entitled. 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 § 96.3(7). In this case, the claimant has received benefits but was not eligible for those benefits.

DECISION:

The March 19, 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.

REMAND:

The matter of determining the amount of the potential overpayment and whether the overpayment should be recovered under Iowa Code § 96.3(7)b is remanded to the Agency.

Teresa K. Hillary
Administrative Law Judge

Decision Dated and Mailed

tkh/pjs