

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**JOSHUA A RUSTAN**  
Claimant

**APPEAL NO. 14A-UI-01092-VST**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**KUM & GO LC**  
Employer

**OC: 12/29/13**  
**Claimant: Respondent (2)**

Section 96.5-2-a – Discharge for Misconduct  
Section 96.3-7 – Overpayment of Benefits  
871 IAC R 24(10) – Employer Charge

**STATEMENT OF THE CASE:**

The employer filed an appeal from a representative's decision dated January 21, 2014, reference 01, which held that the claimant was eligible for unemployment insurance benefits. After due notice, a hearing was held on February 19, 2014, by telephone conference call. The claimant participated personally. Employer participated by Penny Marsh, general manager, and Cara Eplin, unemployment insurance consultant. The record consists of the testimony of Penny Marsh; the testimony of Joshua Rustan; the testimony of Cara Eplin; and Employer's Exhibits 1 and 2.

**ISSUES:**

Whether the claimant was discharged for misconduct;  
Whether the claimant has been overpaid unemployment insurance benefits;  
Whether the claimant is required to repay unemployment insurance benefits; and  
Whether the employer's account should be charged due to non-participation in fact finding.

**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 convenience store located in Waukee, Iowa. The claimant was hired on September 9, 2013, as a full-time kitchen associate. His last day of work was December 27, 2013. He was terminated on December 28, 2013.

The claimant was terminated for multiple instances of insubordination. Throughout his employment, the claimant frequently failed to follow safety rules such as handwashing; wearing gloves; filling out temperature logs; and consuming waste food without paying for it. During the last three days of employment, he was spoken to about failing to keep temperature logs. The

claimant also took a fresh pizza that was not cooked and rolled it into a ball; held it up to show other employees; put the ball of pizza in the oven; baked it; and then ate it without paying for it. This act was observed on surveillance cameras.

The claimant was given multiple verbal warnings by the employer. Signs were posted that listed requirements for maintaining proper food safety in the kitchen. The claimant knew that he was supposed to follow these rules and that his job was in jeopardy.

The claimant established an original claim for unemployment insurance benefits with an original claim date of December 29, 2013. He received a total of \$1218.00 in unemployment insurance benefits for the week ending January 4, 2014, through the week ending February 15, 2014. The employer participated in the fact-finding process.

#### **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.

Misconduct that leads to disqualification from receiving unemployment insurance benefits occurs when there are deliberate acts or omissions that constitute a material breach of the worker's duty to the employer. Insubordination, which is the continued failure to follow reasonable instructions, constitutes misconduct. See Gilliam v. Atlantic Bottling Company, 453 N.W.2d 230 (Iowa App. 1990) The employer has the burden of proof to show misconduct.

The claimant is not eligible for unemployment insurance benefits. The greater weight of the credible evidence shows that the claimant continuously and deliberately violated food safety rules that he was supposed to follow when working in the kitchen. Penny Marsh testified credibly that the rules were posted in the kitchen and that the claimant was observed on surveillance tape violating rules he claims he was following. The crassest example was the fresh pizza he rolled into a ball, which he then baked and consumed. The claimant admitted to having done this. He admitted to not always wearing gloves and taking food without paying for it. These multiple examples of deliberate violations of the employer's policies is insubordination, which is misconduct. Benefits are denied.

The unemployment insurance law requires benefits be recovered from a claimant who receives benefits and is later denied benefits even if the claimant acted in good faith and was not at fault. However, a claimant will not have to repay an overpayment when an initial decision to award benefits on an employment separation issue is reversed on appeal if two conditions are met: (1) the claimant did not receive the benefits due to fraud or willful misrepresentation, and (2) the employer failed to participate in the initial proceeding that awarded benefits. In addition, if a claimant is not required to repay an overpayment because the employer failed to participate in the initial proceeding, the employer's account will be charged for the overpaid benefits. Iowa Code Section 96.3-7-a, b.

The claimant received benefits but has been denied benefits as a result of this decision. The claimant, therefore, was overpaid benefits. The amount of the overpayment was \$1218.00.

Because the employer participated in the fact-finding process, the claimant is required to repay the overpayment and the employer will not be charged for benefits paid.

**DECISION:**

The decision of the representative dated January 21, 2014, 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. The claimant must repay \$1218.00 in unemployment insurance benefits. The employer's account will not be charged.

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Vicki L. Seeck  
Administrative Law Judge

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Decision Dated and Mailed

vls/pjs