

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

KRISTINA L BRENNAN
Claimant

APPEAL NO. 13A-UI-10554-HT

**ADMINISTRATIVE LAW JUDGE
DECISION**

CUSTOM-PAK INC
Employer

**OC: 08/18/13
Claimant: Respondent (2)**

Section 96.5(2)a – Discharge
Section 96.3(7) – Overpayment
871 IAC 24.50(10) – Employer Participation

STATEMENT OF THE CASE:

The employer, Custom-Pak, filed an appeal from a decision dated September 12, 2013, reference 01. The decision allowed benefits to the claimant, Kristina Brennan. After due notice was issued a hearing was held by telephone conference call on October 9, 2013.

The claimant provided a telephone number to the Appeals Section. That number was dialed at 8:00 a.m. and the only response was a voice mail. A message was left indicating the hearing would proceed without the claimant's participation unless she contacted the Appeals Section prior to the close of the record. By the time the record was closed at 8:15 a.m. the claimant had not responded to the message and did not participate in the hearing or request a postponement of the hearing as required by the hearing notice.

The employer participated by Human Resources Coordinator Vicki Rixen.

ISSUE:

The issue is whether the claimant was discharged for misconduct sufficient to warrant a denial of unemployment benefits whether the claimant is overpaid unemployment insurance benefits and whether the employer's account is charged due to non-participation at the fact-finding interview.

FINDINGS OF FACT:

Kristina Brennan was employed by Custom-Pack from April 4, 2011 until August 22, 2013 as a full-time production worker. She received the employee handbook at the time of hire. The employer's policies prohibit the use of cell phones on the production floor. This is a safety issue as the production workers are using machinery.

Ms. Brennan received a written warning January 17, 2013, for using her cell phone while on the floor. The warning notified her any further violations could lead to discharge. On August 15, 2013, the claimant's co-workers reported to the supervisor they had seen her using her cell phone to text throughout the shift that day. Her supervisor said he would "keep an eye out."

On August 16, 2013, the supervisor saw Ms. Brennan using her cell phone again while at her work station. When the manager approached her she tried to hide the cell phone under some paperwork. When the manager moved the papers and saw the phone she asserted she had not been using it, only had taken it out of her pocket. The manager said he had seen her using it and sent her home pending further investigation.

The investigation involved interviewing witnesses and checking Ms. Brennan's personnel file for prior warnings. She was discharged by Vice President Ron Zimmer on August 22, 2013.

Kristina Brennan has received unemployment benefits since filing a claim with an effective date of August 18, 2013. The employer provided a phone number specifically for the fact-finding interview because the person listed on the notice of claim as the contact was going to be out of the office on the date of the interview. The fact-finder called the number on the notice of claim rather than the updated number. There is no way to determine if the updated information was actually received by the interviewer, but the employer was prepared to participate and was not able to do so.

The record was closed at 8:15 a.m. At 9:11 a.m. the claimant called in response to the voice mail message. She was using a cell phone and the call went directly to voice mail. Ms. Brennan had been aware her phone did not get good reception and was having technical problems but nonetheless chose to use it for the appeal hearing. In addition, she had been advised not to wait more than five minutes after the scheduled start time for the hearing and if the judge had not called by then, to contact the Appeals Bureau with her control number. She waited nearly an hour before calling.

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.

The claimant had been advised her job was in jeopardy as a result of her use of a cell phone on the work floor while she was on duty. In spite of this warning she continued to use it for calls and texts. This is a violation of a safety regulation, as well as misuse of the company time for personal business. It is conduct not in the best interests of the employer and the claimant is disqualified.

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 § 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.

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

871 IAC 26.14(7) provides:

(7) If a party has not responded to a notice of telephone hearing by providing the appeals section with the names and telephone numbers of its witnesses by the scheduled time of the hearing, the presiding officer may proceed with the hearing.

a. If an absent party responds to the hearing notice while the hearing is in progress, the presiding officer shall pause to admit the party, summarize the hearing to that point, administer the oath, and resume the hearing.

b. If a party responds to the notice of hearing after the record has been closed and any party which has participated is no longer on the telephone line, the presiding officer shall not take the evidence of the late party. Instead, the presiding officer shall inquire as to why the party was late in responding to the notice of hearing. For good cause shown, the presiding officer shall reopen the record and cause further notice of hearing to be issued to all parties of record. The record shall not be reopened if the presiding officer does not find good cause for the party's late response to the notice of hearing.

c. Failure to read or follow the instructions on the notice of hearing shall not constitute good cause for reopening the record.

Although the claimant may have intended to participate in the hearing, she did not follow the instructions given to her to avoid the use of cell phones and, in any event, not to wait more than five minutes after the scheduled start time before contacting the Appeals Bureau if the judge had not called. Failure to follow the hearing notice instructions does not constitute good cause to reopen the hearing. The claimant did not establish good cause to reopen the hearing. Therefore, her request to reopen the hearing is denied.

DECISION:

The representative's decision of September 12, 2013, reference 01, is reversed. Kristina Brennan is disqualified and benefits are withheld until she has earned ten times her weekly benefit amount in insured work, provided she is otherwise eligible. The claimant is overpaid unemployment benefits in the amount of \$2,510.00. This must be recovered in accordance with the provisions of Iowa law.

Bonny G. Hendricksmeier
Administrative Law Judge

Decision Dated and Mailed

bgh/pjs