

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

SANDRA J MASON
Claimant

APPEAL NO. 10A-UI-09521-HT

**ADMINISTRATIVE LAW JUDGE
DECISION**

NSK CORPORATION
Employer

OC: 12/27/09
Claimant: Respondent (2-R)

Section 96.5(2)a – Discharge

STATEMENT OF THE CASE:

The employer, NSK, filed an appeal from a decision dated June 24, 2010, reference 02. The decision allowed benefits to the claimant, Sandra Mason. After due notice was issued, a hearing was held by telephone conference call on August 25, 2010. The claimant participated on her own behalf. The employer participated by Human Resources Manager Judy O’Grady and Business Unit Manager Mike Allbaugh.

ISSUE:

The issue is whether the claimant was discharged for misconduct sufficient to warrant a denial of unemployment benefits.

FINDINGS OF FACT:

Sandra Mason was employed by NSK from May 15, 2006 until June 3, 2010 as a full-time operator. Her regular work schedule was 11:00 p.m. until 7:10 a.m., beginning Sunday night and ending Friday morning.

Ms. Mason was interviewed and hired by Human Resources Manager Linda Swanson. At that time, the claimant was told what her work hours would be and that there was regularly overtime every other Saturday. The claimant notified Ms. Swanson she was a Seventh Day Adventist and could not work on Saturdays. Ms. Swanson consulted with someone else while the claimant waited in her office. When she returned, the claimant was notified it was “okay” but that she would have to find a substitute whenever she was scheduled to work on Friday evening into Saturday morning. The claimant agreed to this provision.

Ms. Mason generally found substitutes, but she did receive a warning in August 2008 for absenteeism. The employer issues progressive discipline based on a three percent absenteeism rate in a rolling six-month period. After that warning, the claimant did not receive any other warnings until a verbal on February 17, 2010. She then received a written warning on May 7, 2010, and a final written warning and five-day suspension on May 19, 2010.

On May 28, 2010, the claimant was scheduled to work at 11:00 p.m. until 7:10 a.m. on Saturday May 29, 2010. She called in absent because she could not find a substitute. This resulted in the next level of discipline, which was discharge. Supervisor Becky Leppeck notified her of the discharge on June 3, 2010.

Sandra Mason has received unemployment benefits since filing an additional claim with an effective date of May 30, 2010.

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.

871 IAC 24.32(7) provides:

(7) Excessive unexcused absenteeism. Excessive unexcused absenteeism is an intentional disregard of the duty owed by the claimant to the employer and shall be considered misconduct except for illness or other reasonable grounds for which the employee was absent and that were properly reported to the employer.

The claimant had made it known to the employer at the time of hire she could not work Saturdays because of her religious beliefs. The employer accepted this with the understanding Ms. Mason would find a replacement whenever she was scheduled to work on a Saturday. The claimant accepted the job offer and agreed to those terms. This agreement remained in full

force and effect throughout the course of her employment and evidence indicates it was viable solution, as the claimant did not have any warnings about absenteeism for over a year between August 2008 and February 2010.

The claimant began to miss more work due to not being able to find a substitute to work for her on Saturdays. She did not fulfill her end of the agreement and was issued warnings regarding unexcused absenteeism. The employer did not expect her to work on Saturdays, only to find a substitute for her shift. Her failure to work or find a substitute resulted in unexcused absenteeism and eventual discharge.

This case is distinguished from *Sherbert v Verner*, 374 U.S. 398 (1963) because in that case the claimant, a Seventh Day Adventist, had been disqualified from receiving unemployment benefits because she refused to accept a job that would require her to work on Saturdays. Benefits were allowed because a claimant could not be required to accept a job that violated her religious beliefs. That is not the situation in the present case. She did accept the job and failed to fulfill her obligation to find a substitute for her shift. Her failure to find the substitute resulted in excessive, unexcused absenteeism. Under the provisions of the above Administrative Code section, this is misconduct for which the claimant is disqualified.

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.

The claimant has received unemployment benefits to which she is not entitled. The question of whether the claimant must repay these benefits is remanded to the UIS division.

DECISION:

The representative's decision of June 24, 2010, reference 02, is reversed. Sandra Mason is disqualified and benefits are withheld until she has earned ten times her weekly benefit amount, provided she is otherwise eligible. The issue of whether the claimant must repay the unemployment benefits is remanded to UIS division for determination.

Bonny G. Hendricksmeier
Administrative Law Judge

Decision Dated and Mailed

bgh/kjw