

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

LOFTON D MORGAN
Claimant

APPLE CORPS L P
Employer

APPEAL 17A-UI-04895-SC-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 04/09/17
Claimant: Respondent (2)

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Code § 96.3(7) – Recovery of Benefit Overpayment
Iowa Admin. Code r. 871-24.10 – Employer/Representative Participation Fact-finding Interview

STATEMENT OF THE CASE:

Apple Corps L P (employer) filed an appeal from the May 1, 2017, reference 02, unemployment insurance decision that allowed benefits based upon the determination Lofton D. Morgan (claimant) was not discharged for willful or deliberate misconduct. The parties were properly notified about the hearing. A telephone hearing was held on May 25, 2017. The claimant did not answer when called at the phone number registered for the hearing and did not participate. The employer participated through General Manager Tim Kutcher and Kitchen Manager Scott Inman. Employer's Exhibit 1 was received.

ISSUES:

Was the claimant discharged for disqualifying job-related misconduct?
Has the claimant been overpaid unemployment insurance benefits and, if so, can the repayment of those benefits to the agency be waived?
Can charges to the employer's account be waived?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed full-time as a Cook beginning on August 24, 2011. He was promoted to a key holder position which gave him some supervisory duties over other employees. The claimant was separated from employment on March 20, 2017, when he was discharged.

The employer has an anti-harassment policy. The claimant received warnings for violation of this policy in November 2013 and April 2015. In April 2015, he also lost some of his key holder duties and another manager was demoted when they were observed having sexual contact in the restaurant after hours. It was also reported the claimant had called employees derogatory names. The claimant was told any further violations of the harassment policy could lead to termination of his employment.

On February 25, 2017, a 16-year-old female employee who worked in the kitchen with the claimant notified General Manager Tim Kutcher and Kitchen Manager Scott Inman that the claimant had touched her inappropriately, called her an “idiot” and “stupid,” and would use profanity towards her. The employee was afraid to come forward as she feared retaliation from the claimant. Inman spoke with other employees who confirmed they had witnessed the claimant’s conduct toward the employees. Kutcher and Inman met with the claimant who denied this conduct had occurred. He was told at that time if he engaged in the same conduct or retaliated towards the employee that he would be discharged.

On March 16, 2017, the same female employee reported to Inman that the claimant had asked if she was the one who reported him to management for touching her. During that same shift, while the employee was cleaning, the claimant pulled out his wallet, showed her some money, and said she could have the money if she had sex with him. At the end of the night, he asked her to pick him up. She did not pick him up and he continued to text her throughout the night. The claimant was discharged for violation of the anti-harassment policy.

The administrative record reflects that claimant has received unemployment benefits in the amount of \$827.00, since filing a claim with an effective date of April 9, 2017, for the three weeks ending April 29, 2017. The employer’s testimony establishes that Human Resources Director Lindsey Reed participated in the fact-finding interview.

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. Benefits are denied.

Iowa law disqualifies individuals who are discharged from employment for misconduct from receiving unemployment insurance benefits. Iowa Code § 96.5(2)a. They remain disqualified until such time as they requalify for benefits by working and earning insured wages ten times their weekly benefit amount. *Id.* Iowa Administrative Code r. 871-24.32(1)a states:

“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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. *Huntoon v. Iowa Dep’t of Job Serv.*, 275 N.W.2d 445, 448 (Iowa 1979).

The employer has the burden of proof in establishing disqualifying job misconduct. *Cosper v. Iowa Dep’t of Job Serv.*, 321 N.W.2d 6 (Iowa 1982). The issue is not whether the employer made a correct decision in separating the claimant, but whether the claimant is entitled to

unemployment insurance benefits. *Infante v. Iowa Dep't of Job Serv.*, 364 N.W.2d 262 (Iowa Ct. App. 1984). Misconduct must be "substantial" to warrant a denial of job insurance benefits. *Newman v. Iowa Dep't of Job Serv.*, 351 N.W.2d 806 (Iowa Ct. App. 1984). Generally, continued refusal to follow reasonable instructions constitutes misconduct. *Gilliam v. Atlantic Bottling Co.*, 453 N.W.2d 230 (Iowa Ct. App. 1990).

The employer has an anti-harassment policy. The claimant was given numerous warnings for his violations of that policy. The employer has presented substantial and credible evidence that the claimant continued to violate the anti-harassment policy after having been warned. This is disqualifying misconduct. Benefits are denied.

Because the claimant's separation was disqualifying, benefits were paid to which he 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. Iowa Code § 96.7. 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. Iowa Admin. Code r. 871-24.10(1). The employer will not be charged for benefits if it is determined that they did participate in the fact-finding interview. Iowa Code § 96.3(7), Iowa Admin. Code r. 871-24.10. In this case, the claimant has received benefits but was not eligible for those benefits. Since the employer did participate in the fact-finding interview, the claimant is obligated to repay to the agency the benefits he received and the employer's account shall not be charged.

DECISION:

The May 1, 2017, reference 02, unemployment insurance decision is reversed. The claimant was discharged from employment due to job-related misconduct. Benefits are withheld until such time as he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible.

The claimant has been overpaid unemployment insurance benefits in the amount of \$827.00 and is obligated to repay the agency those benefits. The employer participated in the fact-finding interview and its account shall not be charged.

Stephanie R. Callahan
Administrative Law Judge

Decision Dated and Mailed

src/rvs