

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

CHRIS S FIELDS

Claimant

APPEAL NO. 09A-UI-01871-HT

**ADMINISTRATIVE LAW JUDGE
DECISION**

**MADISON SQUARE ASSISTED LIVING
CORPORATION**

Employer

**OC: 12/14/08 R: 02
Claimant: Respondent (2-R)**

Section 96.5(2)a – Discharge

STATEMENT OF THE CASE:

The employer, Madison Square Assisted Living Corporation (Madison Square), filed an appeal from a decision dated February 3, 2009, reference 03. The decision allowed benefits to the claimant, Chris Fields. After due notice was issued a hearing was held by telephone conference call on February 26, 2009. The claimant provided a telephone number where he could be reached. That number was dialed at 11:00 a.m. and 11:02 a.m. The only response was a voice mail and the administrative law judge attempted twice to leave a message but it is not certain it was actually recorded. By the time the record was closed at 11:30 a.m. the claimant had not contacted the Appeals Section and request to participate. The employer participated by Manager Elecia Henke, and Cooks Fran Garner, Phyllis Jones and Callahan Weaver. Exhibits One, Two, and Three were admitted into the record.

ISSUE:

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

FINDINGS OF FACT:

Chris Fields was employed by Madison Square from November 24, 2008 until December 9, 2008 as a part-time kitchen aide. He was given three days of training and then Manager Elecia Henke met with him on November 26, 2008. The job required him to be independent and do his duties without close supervision. She told him he would require more training as he did not appear to be "catching on" to the duties. He had been given detailed lists of the task he was to perform and expected to refer to the lists and only ask questions if he did not understand something.

The three cooks with whom Mr. Fields worked during his employment all had the same experience with him. He was capable of doing the work assigned as it was very basic, putting pitchers of water and coffee on the dining tables, bringing serving plates to the tables, taking dirty dishes to the kitchen, cleaning tables and mopping the floor, making toast and loading pans of food onto a cart to take to the salad bar. He would do these tasks only if someone

prompted him, otherwise he would be standing around and not doing anything. When told to take the trash out to the garage he was gone such a long time one cook had to leave her regular duties to check on him. She suspected he had been out smoking instead of taking out the trash and coming right back.

Other cooks found it difficult to have to manage him minute to minute, telling him everything he should be doing and taking time away from their own duties. Even though he had been given a very specific list of duties, he did not read it thoroughly or refer to it during his work shift. He spent a lot of time inquiring into what the wages were for the cooks and declaring he should not have to be doing this type of work but should be doing something else. After a second week of training the claimant was discharged by Ms. Henke for failing to do her duties as required.

The record was closed at 11:30 a.m. At 11:37 a.m. the claimant called and requested to participate. He had received the notice of the hearing, provided a telephone number where he could be contacted, but was outside working when the administrative law judge called at 11:00 a.m. and 11:02 a.m. and did not hear the phone.

Chris Fields has received unemployment benefits since filing a claim with an effective date of December 14, 2008.

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 was capable of performing his job duties, but he was unwilling to do so. He had his job duties printed on a list to which he could refer but did not do so. Instead he preferred to loiter until one of the cooks gave him specific instructions on what he should be doing at any given time during his shift. This is not a case of being unable to perform his job duties but being unwilling to do so, delaying the serving of meals and taking the cooks away from their job duties to closely monitor him. This is a violation of the duties and responsibilities the employer has the right to expect of an employee and conduct not in the best interests of the employer. The claimant is disqualified.

The next issue is whether the record should be reopened. The judge concludes it should not.

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.

The claimant had received the notice of the hearing and knew the time and date it was scheduled. Although the claimant may have intended to participate in the hearing, he failed to make sure he was by the phone at the scheduled time to receive the call. The claimant did not establish good cause to reopen the hearing. Therefore, his request to reopen the hearing is denied.

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 states pursuant to section 602.10101.

The claimant has received unemployment benefits to which he 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 February 3, 2009, reference 03, is reversed. Chris Fields is disqualified and benefits are withheld until he has earned ten times his weekly benefit amount, provided he 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/css