

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

TAYLER MCCLAREY
Claimant

APPEAL NO. 16A-UI-10962-S1-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

BRODERICK KENNEL LLC
Employer

OC: 09/04/16
Claimant: Respondent (1)

Section 96.5-2-a – Discharge for Misconduct
Section 96.3-7 – Overpayment

STATEMENT OF THE CASE:

Broderick Kennel (employer) appealed a representative's October 3, 2016, decision (reference 01) that concluded Tayler McClarey (claimant) was eligible to receive unemployment insurance benefits. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was scheduled for October 25, 2016. The claimant did not provide a telephone number for the hearing and, therefore, did not participate. The employer participated by John Broderick, President, and Melissa Lindsey, Office Manager. Exhibit D-1 was received into evidence.

ISSUE:

The issue is whether the claimant was separated from employment for any disqualifying reason.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds that: The claimant was hired on February 11, 2016 as a full-time kennel manager. The claimant signed for receipt of the employer's handbook on March 31, 2016. On June 10, 2016, the employer issued the claimant a ninety-day performance appraisal. The employer decided to extend the "probation period" for two months and review the claimant again. The employer thought the claimant could have performed better. No warning that any consequences could result were given.

On July 28, 2016, the office manager had an informal meeting with the claimant about some performance issues. No warning was issued. On August 11, 2016, the employer prepared another performance appraisal to give to the claimant. No warning was included in the appraisal. On August 29, 2016, the employer issued the claimant another performance appraisal. The employer talked to the claimant about her attendance and performance issues. The employer told the claimant she was terminated. The employer indicated the claimant could work for the employer for two more weeks. The claimant chose not to do so.

The claimant filed for unemployment insurance benefits with an effective date of September 4, 2016. The employer did not effectively participate at the fact-finding interview on September 30, 2016. The fact finder called but the employer was not available. The fact finder left a voice message with the fact finder's name, number, and the employer's appeal rights. The employer did not respond to the message. The employer provided documents in lieu of personal participation in the fact-finding interview. The employer did not identify the dates and particular circumstances that caused the separation. The employer did not submit the specific rule or policy that the claimant violated or the dates of absences which caused the separation.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow the administrative law judge concludes the claimant was not discharged for misconduct.

Iowa Code § 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.

Iowa Admin. Code r. 871-24.32(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.

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).

Iowa Admin. Code r. 871-24.32(8) provides:

(8) Past acts of misconduct. While past acts and warnings can be used to determine the magnitude of a current act of misconduct, a discharge for misconduct cannot be based on such past act or acts. The termination of employment must be based on a current act.

The employer has the burden of proof in establishing disqualifying job misconduct. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). The employer must establish not only misconduct but that there was a final incident of misconduct which precipitated the discharge. The employer was not able to provide any evidence of a final incident of misconduct. The employer could not provide a date for a last incident of absence or poor performance. The employer has failed to provide any evidence of willful and deliberate misconduct which would be a final incident leading to the discharge. The claimant was discharged but there was no misconduct.

DECISION:

The representative's October 3, 2016, decision (reference 01) is affirmed. The employer has not met its burden of proof to establish job related misconduct. Benefits are allowed, provided claimant is otherwise eligible.

Beth A. Scheetz
Administrative Law Judge

Decision Dated and Mailed

bas/pjs