

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

JAMIE L FOBIAN
Claimant

APPEAL NO. 11A-UI-13305-NT

**ADMINISTRATIVE LAW JUDGE
DECISION**

KUM & GO LC
Employer

OC: 09/04/11
Claimant: Appellant (2)

Section 96.5-2-a – Discharge

STATEMENT OF THE CASE:

Jamie Fobian filed a timely appeal from a representative's decision dated September 27, 2011, reference 01, which held claimant not eligible to receive unemployment insurance benefits. After due notice, a telephone hearing was held on November 1, 2011. The claimant participated. Participating on behalf of the claimant was Mr. John Singer, Attorney at Law. Participating as witnesses were Dustin Jones, Jim Johnson, John Fobian and Michael Graf. The employer participated by Ms. Erin Weldon, Human Resource Generalist and Mr. Darin Nelson, District Supervisor. Employer's Exhibits A, B and C were received into evidence. Claimant's Exhibits One, Two, Four, Five, Six and Seven were received into evidence.

ISSUE:

The issue in this matter is whether the claimant was discharged for misconduct sufficient to warrant the denial of unemployment insurance benefits.

FINDINGS OF FACT:

The administrative law judge, having considered the evidence in the record, finds: Jamie Fobian was employed by Kum & Go LC from June 23, 2004 until September 8, 2011 when she was discharged from employment. Ms. Fobian last held the position of acting store manager. The claimant was employed full time and was paid by the hour. Her immediate supervisor at the time of discharge was John Banker.

Ms. Fobian was discharged when the employer believed that the claimant had engaged in intentional false reporting of working hours during the week of August 15 through August 18, 2011. The new store manager assigned to work at the facility where Ms. Fobian was employed had reported that the claimant had been manually entering her work hours and had some suspicions about the claimant's time reporting. The employer reviewed the manually inputted hours claimed by Ms. Fobian for the week in question and reviewed company surveillance tapes to determine whether the claimant was actually on duty at the time that she claimed that she had reported and on duty until the time that she claimed that her work had ended each day. Based upon the employer's observation the employer determined that it appeared that the claimant had claimed over eight hours of work time when she was not actually physically

present at the facility. The employer thus concluded that the claimant had engaged in intentional false reporting of her time.

Ms. Weldon, who assisted in the investigation, met with Ms. Fobian prior to the claimant's discharge and questioned the claimant about the hours reported and the manner in which she had reported them. Based upon the statements made to her by Ms. Weldon, the claimant concluded that she had been "wrong" in how she reported her hours and stated so to Ms. Weldon. Because the claimant had not entered her leaving and arrival times each day via computer, as required for other hourly employees, because of the claimant's admissions and the amount of time involved that week a decision was made to terminate Ms. Fobian from her employment.

Ms. Fobian had been assigned some weeks earlier to work as an interim general manager at the store facility. The claimant had been told that as an interim store manager she was authorized to manually report her time to reflect other duties performed for Kum & Go during the work week, that had not taken place during normal working hours or at the facility. Ms. Fobian, as the interim store manager, was required to perform a variety of additional duties while off the clock and away from the facilities. These duties included interviewing perspective employees, obtaining food stuffs and cleaning materials from other vendors, banking and a number of other similar duties. The claimant had also been encouraged by the company's district manager to report all hours worked off the clock or away from the facility. The company does not utilize a handbook for individuals in the position that Ms. Fobian held and it does not appear that the claimant was given specific training or clear expectations regarding the claiming of extra work time.

During the week in question Ms. Fobian informally interviewed a number of potential job applications, a number of which had not engaged in or completed the company's formal application process. The claimant had also performed a number of extra duties for the company that had not taken place in the facility or during normal working hours.

REASONING AND CONCLUSIONS OF LAW:

The question before the administrative law judge is whether the evidence in the record establishes sufficient intentional misconduct to warrant the denial of unemployment insurance benefits. It does not.

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 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 issue is not whether the employer made a correct decision in separating claimant, but whether the claimant is entitled to unemployment insurance benefits. Infante v. IDJS, 364 N.W.2d 262 (Iowa App. 1984). What constitutes misconduct justifying termination of an employee and what misconduct warrants denial of unemployment insurance benefits are two separate decisions. Pierce v. IDJS, 425 N.W.2d 679 (Iowa App. 1988). Misconduct serious enough to warrant discharge is not necessarily always serious enough to warrant a denial of job insurance benefits. Such misconduct must be "substantial." When based on carelessness, the carelessness must actually indicate a "wrongful intent" to be disqualifying in nature. Newman v. Iowa Department of Job Service, 351 N.W.2d 806 (Iowa App. 1984).

An employer may discharge an employee for any number of reasons or no reason at all if it is not contrary to public policy, but if it fails to meet its burden of proof to establish job-related misconduct as the reason for the separation, the employer incurs potential liability for unemployment insurance benefits related to that separation.

In this matter the evidence establishes that Ms. Fobian had been placed in a unique position of an acting store manager without the benefit of training, a handbook or specific instructions as to the types of outside work associated with her job that could be claimed when she reported her weekly work hours. The claimant was aware and had been instructed that as an acting manager she had the authority to manually enter her time each week and followed that practice. Although the company's area supervisor had been concerned in the past that the claimant might not be accurately reporting her hours or that the hours reported were excessive, the claimant was not officially warned or counseled and allowed to continue the practice.

After a permanent manager had been hired for the facility and had taken over the management of the facility, the company was again alerted to the possibility that Ms. Fobian was over reporting working hours and manually inputting them into the system. The employer checked the claimant's working hours for the week of August 15 through August 18, 2011 and when video surveillance tapes did not match the reported arrival and leaving times a decision was made to terminate Ms. Fobian from her employment. The employer also believed that the claimant had made an admission when being questioned about the manner in which she had entered her hours.

The administrative law judge concludes based upon the totality of the evidence in the record that the claimant's statement made during the investigation that she had been "wrong" was not

made in the form of an admission but was made as an effort to save her job after the correct procedure had been explained to the claimant.

The evidence in the record establishes that the claimant had engaged in substantial work activities that took place away from the employer's facility and during non-working hours during the week in question. The claimant had been instructed that when situations like that occurred to report the additional hours at the beginning or the end of her work shift and did so. Ms. Fobian had previously been considered a good and valued employee and had been considered for a permanent management position. The claimant had not been previously warned or sufficiently counseled that her time reporting procedures violated company policy although the claimant had reported her working hours in this manner for an extended period.

The question in this case is not whether Kum & Go LC has a right to discharge an employee for these reasons but whether the discharge is disqualifying under the provisions of the Employment Security Law. While the decision to terminate Ms. Fobian may have been a sound decision from a management viewpoint, for the above-stated reasons the administrative law judge concludes that the evidence in the record does not establish the requisite willful violation of the company rule to result in disqualification for unemployment insurance benefits.

For the reasons stated herein administrative law judge concludes that the claimant was discharged for no disqualifying reason. Unemployment insurance benefits are allowed providing the claimant meets all other eligibility requirements of Iowa law.

DECISION:

The representative's decision dated September 27, 2011, reference 01, is reversed. The claimant was discharged for no disqualifying reason. Unemployment insurance benefits are allowed, providing the claimant meets all other eligibility requirements of Iowa law.

Terence P. Nice
Administrative Law Judge

Decision Dated and Mailed

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