

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

DEBRA S SHANNON

Claimant

APPEAL NO. 11A-UI-05284-VS

**ADMINISTRATIVE LAW JUDGE
DECISION**

APAC CUSTOMER SERVICES OF IOWA

Employer

OC: 03/20/11

Claimant: Respondent (2R)

Section 96.5-2-A – Discharge for Misconduct
Section 96.3-7 – Overpayment of Benefits

STATEMENT OF THE CASE:

Employer filed an appeal from a decision of a representative dated April 8, 2011, reference 01, which held claimant eligible for unemployment insurance benefits. After due notice, a hearing was scheduled for and held on June 7, 2011, in Davenport, Iowa. Claimant participated. Employer participated by Chris Volker, Operations Manager, and Turkessa Newsone, Human Resources Generalist. The record consists of the testimony of Chris Volker; the testimony of Turkessa Newsone; and the testimony of Debra Shannon.

ISSUES:

Whether the claimant was discharged for misconduct; and

Whether the claimant has been overpaid unemployment insurance benefits.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony of the witnesses and having considered all of the evidence in the record, makes the following findings of fact:

The employer contracts to provide customer service support. The claimant was hired as a full-time customer service representative on May 12, 2008. Her last day of work was March 11, 2011. She was terminated on March 18, 2011.

The incident that led to the claimant's termination occurred on March 11, 2011. The employer has a written policy, of which the claimant was aware, that personal cell phones were not allowed on the calling floor and in the training rooms. The claimant was in training on March 11, 2011. She had her cell phone with her in the training room. She received a photograph from someone. The photograph showed a woman naked from the waist down, who was bent over. A gas pump was pointed at the woman. The claimant showed this photograph to a co-worker. She then showed it to the employer's client, who was conducting the training.

The client complained to the employer and the claimant was placed on suspension while an investigation was conducted. The claimant knew her job was in jeopardy when she was placed on suspension. The claimant had been given a final written warning on December 20, 2010, for

having a cell phone on her person on the calling floor. The claimant was informed at that time that any further violations of the cell phone policy could lead to termination.

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.

Misconduct that disqualifies an individual from receiving unemployment insurance benefits occurs when there are deliberate acts or omissions that constitute a material breach of the worker's duty to the employer. An employer is entitled to establish reasonable work rules and can expect that its employees will follow those rules. The failure to follow reasonable instructions is considered insubordination, which is misconduct. See Gilliam v. Atlantic Bottling Company, 453 N.W.2d 230 (Iowa App. 1990) The employer has the burden of proof to show misconduct.

The evidence in this case showed that the claimant knowingly violated the employer's prohibition against cell phones in training rooms. The claimant had been previously warned against having a personal cell phone on the calling floor. She was informed on December 20, 2010, that any further violations could lead to termination. Despite this knowledge, the claimant did not put her cell phone in her locker but carried it with her. She further compounded the situation by showing an utterly inappropriate photograph on her cell phone to a co-worker and a client of the employer who was conducting the training. The administrative law judge concludes that the claimant's actions on March 11, 2011, are more than a momentary lapse of judgment. The claimant chose to deliberately violate a known policy on the possession of cell phones, with full awareness that she could lose her job as a result. This is insubordination, which is misconduct. Benefits are denied.

The next issue is overpayment of benefits.

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 overpayment issue is remanded to the Claims Section for determination.

DECISION:

The decision of the representative dated April 8, 2011, reference 01, is reversed. Unemployment insurance benefits shall be withheld until claimant has worked in and been paid wages for insured work equal to ten times claimant's weekly benefit amount, provided claimant is otherwise eligible. The overpayment issue is remanded to the Claims Section for determination.

Vicki L. Seeck
Administrative Law Judge

Decision Dated and Mailed

vls/css