

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

KATHY A THOMPSON
Claimant

APPEAL NO. 08A-UI-03632-HT

**ADMINISTRATIVE LAW JUDGE
DECISION**

KIEWIT INDUSTRIAL CO ET AL
Employer

**OC: 02/24/08 R: 01
Claimant: Respondent (2)**

Section 96.5(2)a – Discharge
Section 96.34(7) – Overpayment

STATEMENT OF THE CASE:

The employer, Kiewit Industrial Company et al (Kiewit), filed an appeal from a decision dated April 3, 2008, reference 01. The decision allowed benefits to the claimant, Kathy Thompson. After due notice was issued a hearing was held by telephone conference call on April 29, 2008. The claimant participated on her own behalf. The employer participated by Assistant Business Manager Matt Pappas and Project Business Manager Russell Ortmeier.

ISSUE:

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

FINDINGS OF FACT:

Kathy Thompson was employed by Kiewit from July 9, 2007 until February 22, 2008, as a full-time warehouse lead working 7:00 a.m. until 4:30 p.m. She had received a written warning on February 7, 2008, for attendance and failure to perform her duties by not having the tool room open during the posted hours.

On February 15, 2008, her supervisor, Dan Debo, requested her to talk to other warehouse workers and give them a general explanation of her job duties to enable others to substitute for her in case of absence. She refused, stating she was not a foreman and did not need to train others. Mr. Debo notified Project Business Manager Russell Ortmeier of this and he noted the incident of insubordination in the claimant's file.

On February 21, 2008, Ms. Thompson called Mr. Ortmeier at his home while both of them were off duty. She had been drinking and was very angry and upset about a change in company policy. The new policy, instituted the week before, prohibited any of the warehouse workers from coming into the office. Ms. Thompson felt this would interfere with her ability to do her job although all she had to do in the office was to make copies of receiving documents. Other copiers were available to her within the facility.

Also during the call she used a racial slur about another employee calling him a “fucking Indian.” Mr. Ortmeier admonished her not to use such language. She then threatened to take the receiving documents in her possession home with her and burn them. The employer told her at that time she was going “past the line” and notified her that her job was in jeopardy. The claimant then made negative comments about the warehouse manager, Tim Scharnhorst, saying he was “worthless,” did not do his job and was “screwing up the process.” She stated he should not be in that job.

On February 22, 2008, Ms. Thompson was summoned to Mr. Ortmeier’s office where he and Project Manager Mike Ferry discussed her conduct during the phone call the night before and her previous disciplinary actions. She was presented with a document notifying her of her discharge and was told verbally by Mr. Ferry she was fired.

Kathy Thompson has received unemployment benefits since filing a claim with an effective date of February 24, 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 discharged for several things, the insubordination in refusing to discuss her job duties with co-workers when directed to do so by her supervisor. She compounded this misconduct by making racial slurs against a co-worker and threatening to destroy company

property while speaking with Mr. Ortmeier. The employer has the obligation to provide a safe and harassment-free work environment for all employees and the claimant's conduct interfered with its ability to do so as regards the racial remarks. In addition, the threat to destroy the company documents in her possession is a violation of the duties and responsibilities the employer has the right to expect of an employee. This is conduct not in the best interests of the employer and the claimant is disqualified.

Iowa Code section 96.3-7 provides:

7. Recovery of overpayment of benefits. 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.

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.

The claimant has received unemployment benefits to which she is not entitled. These must be recovered in accordance with the provisions of Iowa law.

DECISION:

The representative's decision of April 3, 2008, reference 01, is reversed. Kathy Thompson is disqualified and benefits are withheld until she has earned ten times her weekly benefit amount, provided she is otherwise eligible. She is overpaid in the amount of \$3,123.00.

Bonny G. Hendricksmeier
Administrative Law Judge

Decision Dated and Mailed

bgh/pjs