IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

MARILYN J SPARTZ
Claimant

PRAIRIE MEADOWS RACETRACK & CASINO
Employer

APPEAL NO. 14A-UI-05578-S2T

ADMINISTRATIVE LAW JUDGE DECISION

OC: 05/04/14
Claimant: Respondent (2)

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

STATEMENT OF THE CASE:

Prairie Meadows Racetrack & Casino (employer) appealed a representative's May 28, 2014 (reference 01) decision that concluded Marilyn J. Spartz (claimant) was discharged and there was no evidence of willful or deliberate misconduct. After hearing notices were mailed to the parties' last-known address of record, a telephone hearing was scheduled for June 23, 2014. The claimant did not provide a telephone number for the hearing and, therefore, did not participate. The employer participated by Gina Vitiritto, Employee Benefits Manager

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 March 11, 2013, as a full-time line cook. The claimant signed for receipt of the employer's handbook on March 11, 2013. Borrowing money from guests is not tolerated by the employer. On August 5, 2013, the employer issued the claimant a warning for poor performance. On January 13, 2014, the employer issued the claimant a warning for attendance. On January 7 and 15, 2014, the employer issued the claimant warnings for failure to follow instructions with regard to missing time punches. Each time the employer notified the claimant that further infractions could result in termination from employment.

On April 20, 2014, the claimant asked a guest for a $40.00 loan to pay for a cab. At the end of April 2014, the claimant asked the same guest for another $100.00 loan. On May 2, 2014, the guest complained to the employer because the claimant promised to pay back the loan by May 2, 2014, the claimant's payday. The employer suspended the claimant on May 2, 2014, and asked her if she borrowed money from the guest. The claimant admitted she borrowed money and paid the guest back with a money order. On May 6, 2014, the employer terminated the claimant.

The record closed at 12:15 p.m. on June 23, 2014. At 12:28 p.m. on June 23, 2014, the claimant called regarding the hearing. The claimant did not read the Notice of Appeal and Hearing before the hearing.

The claimant filed for unemployment insurance benefits with an effective date of May 4, 2014. She received no benefits after the separation from employment. The employer did not participate in the fact-finding interview on May 27, 2014

REASONING AND CONCLUSIONS OF LAW:

The first issue in this case is whether the claimant's request to reopen the hearing should be granted or denied.

Iowa Admin. Code r. 871-26.14(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 first time the claimant called the Appeals Section for the June 23, 2014, hearing was after the hearing had been closed. Although the claimant intended to participate in the hearing, the claimant failed to read or follow the hearing notice instructions and did not contact the Appeals Section prior to the hearing. The rule specifically states that failure to read or follow the instructions on the hearing notice does not constitute good cause to reopen the hearing. Intent alone is not sufficient. An intent must be accompanied by an overt act carrying out that intent. Local Lodge #1426 v. Wilson Trailer, 289 N.W.2d 608, 612 (Iowa 1980). In the case of an appeal hearing, that overt act is to call the Appeals Section and provide a telephone number where the party may be contacted. The claimant did not do this and therefore has not established good cause to reopen the hearing. The claimant's request to reopen the hearing is denied.

For the reasons that follow the administrative law judge concludes the claimant was not eligible to receive unemployment insurance benefits.

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).

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). Repeated failure to follow an employer's instructions in the performance of duties is misconduct. Gilliam v. Atlantic Bottling Company, 453 N.W.2d 230 (Iowa App. 1990). An employer has a right to expect employees to follow instructions in the performance of the job. The claimant disregarded the employer's right by repeatedly failing to follow the employer's instructions. The claimant's disregard of the employer's interests is misconduct. As such the claimant is not eligible to receive unemployment insurance benefits. The claimant has received no unemployment insurance benefits since her separation from employment.

DECISION:

The representative's May 28, 2014 (reference 01) decision is reversed. The claimant is not eligible to receive unemployment insurance benefits because the claimant was discharged from work for misconduct. Benefits are withheld until the claimant has worked in and has been paid wages for insured work equal to ten times the claimant's weekly benefit amount, provided the claimant is otherwise eligible. The claimant has received no unemployment insurance benefits since her separation from employment.

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Beth A. Scheetz
Administrative Law Judge

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Decision Dated and Mailed

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