

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

HEIDI KING
Claimant

APPEAL NO: 16A-UI-08544-JE-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

DEFINITION SALON AND SPA LLC
Employer

OC: 07/17/16
Claimant: Respondent (2)

Section 96.5-2-a – Discharge/Misconduct
Section 96.3-7 – Recovery of Benefit Overpayment

STATEMENT OF THE CASE:

The employer filed a timely appeal from the August 3, 2016, reference 01, decision that allowed benefits to the claimant. After due notice was issued, a hearing was held by telephone conference call before Administrative Law Judge Julie Elder on August 24, 2016. The claimant participated in the hearing. Amanda Blohm, Manager, participated in the hearing on behalf of the employer.

ISSUE:

The issue is whether the employer discharged the claimant for work-connected misconduct.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed as a part-time stylist for Definition Salon and Spa from September 15, 2009 to June 30, 2016. She was discharged following three no-call no-show absences.

The claimant's work schedule was Monday through Wednesday from 9:00 a.m. to 1:30 p.m. and every other Saturday from 8:00 a.m. to 4:00 p.m. On June 25, 2016, the claimant did not report for work or call the employer to notify her she would be absent. The claimant was chronically tardy on Saturdays because she overslept. Consequently, employees attempted to call her June 25, 2016, to wake her up but did not get an answer. Employees then reported the claimant's absence to Manager Amanda Blohm. Ms. Blohm tried to call the claimant too but receiving no answer she called the jail and a local hospital in an effort to locate her. When that was unsuccessful she resorted to looking up the claimant's parent's address as the claimant lives in a structure behind their house. Ms. Blohm drove over to the claimant's parent's house and the claimant's mother told her the claimant was in the hospital and she assumed the claimant would be contacting Ms. Blohm. Ms. Blohm did not hear from the claimant June 27, 2016. At 4:47 p.m. on June 28, 2016, after missing her shift the claimant texted Ms. Blohm and indicated she was home but was not sure she still had a job. The claimant stated she had been in the hospital and had a doctor's note with a release. Ms. Blohm asked the claimant to come in at 9:30 a.m. June 30, 2016, at which time she notified the claimant her employment was

terminated. The claimant had her cell phone with her at the hospital but the battery was dead. She did not ask her parents to bring a charger and did not contact the employer any of the three consecutive days she was absent.

The claimant has claimed and received unemployment insurance benefits in the amount of \$1,090.00 for the five weeks ending August 20, 2016.

The employer personally participated in the fact-finding interview through the statements of Manager Amanda Blohm.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment for disqualifying job 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).

The employer has the burden of proving disqualifying misconduct. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). A claimant is not qualified to receive unemployment insurance benefits if an employer has discharged him for reasons constituting work-connected

misconduct. Iowa Code section 96.5-2-a. 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 duties and obligations to the employer. See 871 IAC 24.32(1).

The claimant was aware she was required to call or text the employer to report her absences. Despite that knowledge, however, she failed to notify the employer of her absences June 25, 27 or 28, 2016. While the claimant was in the hospital, she did have her cell phone but the battery died. She did not make any effort to charge her phone such as asking her parents to bring a charger with them to the hospital. She could have also simply looked the employer's number up in the phone book and called the shop directly but did not do that either.

While absences due to illness are not usually disqualifying events with regard to unemployment insurance benefits, those absences must be properly reported in order to be excused. In this case, the claimant did not properly report her absences and the employer did not know whether she was still in the hospital or not. For that reason, even though the claimant's absences were due to illness, they were not properly reported and consequently cannot be considered excused.

Under these circumstances, the administrative law judge concludes the claimant's conduct demonstrated a willful disregard of the standards of behavior the employer has the right to expect of employees and shows an intentional and substantial disregard of the employer's interests and the employee's duties and obligations to the employer. The employer has met its burden of proving disqualifying job misconduct. Cosper v. IDJS, 321 N.W.2d 6 (Iowa 1982). Therefore, benefits are denied.

Iowa Admin. Code r. 871-24.10 provides:

Employer and employer representative participation in fact-finding interviews.

(1) "Participate," as the term is used for employers in the context of the initial determination to award benefits pursuant to Iowa Code section 96.6, subsection 2, means submitting detailed factual information of the quantity and quality that if un rebutted would be sufficient to result in a decision favorable to the employer. The most effective means to participate is to provide live testimony at the interview from a witness with firsthand knowledge of the events leading to the separation. If no live testimony is provided, the employer must provide the name and telephone number of an employee with firsthand information who may be contacted, if necessary, for rebuttal. A party may also participate by providing detailed written statements or documents that provide detailed factual information of the events leading to separation. At a minimum, the information provided by the employer or the employer's representative must identify the dates and particular circumstances of the incident or incidents, including, in the case of discharge, the act or omissions of the claimant or, in the event of a voluntary separation, the stated reason for the quit. The specific rule or policy must be submitted if the claimant was discharged for violating such rule or policy. In the case of discharge for attendance violations, the information must include the circumstances of all incidents the employer or the employer's representative contends meet the definition of unexcused absences as set forth in 871—subrule 24.32(7). On the other hand, written or oral statements or general conclusions without supporting detailed factual information and information submitted after the fact-finding decision has been issued are not considered participation within the meaning of the statute.

(2) "A continuous pattern of nonparticipation in the initial determination to award benefits," pursuant to Iowa Code section 96.6, subsection 2, as the term is used for an entity representing employers, means on 25 or more occasions in a calendar quarter beginning with the first calendar quarter of 2009, the entity files appeals after failing to participate. Appeals filed but withdrawn before the day of the contested case hearing will not be considered in determining if a continuous pattern of nonparticipation exists. The division administrator shall notify the employer's representative in writing after each such appeal.

(3) If the division administrator finds that an entity representing employers as defined in Iowa Code section 96.6, subsection 2, has engaged in a continuous pattern of nonparticipation, the division administrator shall suspend said representative for a period of up to six months on the first occasion, up to one year on the second occasion and up to ten years on the third or subsequent occasion. Suspension by the division administrator constitutes final agency action and may be appealed pursuant to Iowa Code section 17A.19.

(4) "Fraud or willful misrepresentation by the individual," as the term is used for claimants in the context of the initial determination to award benefits pursuant to Iowa Code section 96.6, subsection 2, means providing knowingly false statements or knowingly false denials of material facts for the purpose of obtaining unemployment insurance benefits. Statements or denials may be either oral or written by the claimant. Inadvertent misstatements or mistakes made in good faith are not considered fraud or willful misrepresentation.

This rule is intended to implement Iowa Code section 96.3(7)"b" as amended by 2008 Iowa Acts, Senate File 2160.

The unemployment insurance law requires benefits be recovered from a claimant who receives benefits and is later denied benefits even if the claimant acted in good faith and was not at fault. However, a claimant will not have to repay an overpayment when an initial decision to award benefits on an employment separation issue is reversed on appeal if two conditions are met: (1) the claimant did not receive the benefits due to fraud or willful misrepresentation, and (2) the employer failed to participate in the initial proceeding that awarded benefits. In addition, if a claimant is not required to repay an overpayment because the employer failed to participate in the initial proceeding, the employer's account will be charged for the overpaid benefits. Iowa Code section 96.3(7)a, b.

The claimant received benefits but has been denied benefits as a result of this decision. The claimant, therefore, is overpaid benefits in the amount of \$1,090.00 for the five weeks ending August 20, 2016.

The employer participated in the fact-finding interview within the meaning of the law through the statements of Manager Amanda Blohm. Because the employer participated in the fact-finding interview, the claimant's overpayment of benefits cannot be waived and the claimant must repay those benefits. The account of the employer shall not be charged for benefits paid.

DECISION:

The August 3, 2016, reference 01, decision is reversed. The claimant was discharged from employment due to job-related misconduct. Benefits are withheld until such time as she has worked in and been paid wages for insured work equal to ten times her weekly benefit amount, provided she is otherwise eligible. The claimant has received benefits but was not eligible for those benefits. The employer personally participated in the fact-finding interview within the meaning of the law. Therefore, the claimant is overpaid benefits in the amount of \$1,090.00 for the five weeks ending August 20, 2016.

Julie Elder
Administrative Law Judge

Decision Dated and Mailed

je/pjs