

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

CRYSTAL B PASCHKE
Claimant

APPEAL NO. 10A-UI-08319-HT

**ADMINISTRATIVE LAW JUDGE
DECISION**

**FRANCHISE MANAGEMENT SYSTEMS INC
ARBYS**
Employer

**OC: 04/25/10
Claimant: Respondent (2-R)**

Section 96.5(2)a – Discharge

STATEMENT OF THE CASE:

The employer, Arby's, filed an appeal from a decision dated June 7, 2010, reference 01. The decision allowed benefits to the claimant, Crystal. After due notice was issued a hearing was held by telephone conference call on July 28, 2010. The claimant participated on her own behalf. The employer participated by District Manager Kevin Ramirez and Director of Operations Randy Tucker. Exhibits One and A were admitted into the record.

ISSUE:

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

FINDINGS OF FACT:

Crystal Paschke was employed by Arby's from January 7, 2009 until April 28, 2010 as a full-time general manager. Starting in October 2009 the claimant had been talked to by District Manager Kevin Ramirez about her tendency toward verbal outbursts to him and her crew. She was notified in a letter of December 6, 2009, she needed to address this problem and needed to be "seen as someone calm and in control."

In January 2010 she was counseled about re-dating products rather than disposing of them when they had reached an expiration date. In February 2010, she was counseled when customers notified Mr. Ramirez they had heard Ms. Paschke verbally upbraiding one of her crewmembers in the back of the store. In March 2010, the district manager told her he was tired of "being seen as the root of all her problems" and was done with her "passive aggressiveness."

On April 10, 2010, staff members told Mr. Ramirez the claimant had made statements that she ought to be fired. On April 14, 2010, Ms. Paschke called the district manager to complain about one of her managers, Bethany, and said she was "tired of this fucking shit."

On April 25, 2010, the claimant left a voice mail message for Mr. Ramirez at 9:44 a.m. saying she could not reach Bethany and she needed to leave the store because she was sick. If he

wanted someone to open the store he might have to “come in and do it himself.” Her tone of voice was apparently strident and when Mr. Ramirez called the claimant back at 10:08 a.m. he asked her why she had been “yelling” on the voice mail message. She said she did not feel well and did not feel like dealing with his “fucking shit,” and hung up the phone. When Mr. Ramirez called her back she hung up on him again. She then told the crew member that if he called back, she would not talk to him. Eventually Ms. Paschke got another manager, Tammy, to come in and she left.

Mr. Ramirez sent an e-mail to the claimant saying they would meet about the “outburst” the next day, but later sent another message saying she was not to come in at all on April 26, 2010, and that he would meet her on April 27, 2010. In the meantime Ms. Paschke sent an e-mail to Director of Operations Randy Tucker accusing Mr. Ramirez of harassing and discriminating against her. The two managers met and discussed these issues on April 26, 2010.

Mr. Tucker met with the claimant on April 27, 2010, to discuss her complaint and her conduct on April 25, 2010. He allowed Mr. Ramirez to attend the meeting and respond to some of her allegations. The claimant was then sent home and Mr. Tucker investigated by talking with the other employees she had named. None of these other employees supported the claimant’s allegations. The crewmember who was present in the store on April 25, 2010, and heard Ms. Paschke’s end of the conversation with Mr. Ramirez, confirmed she had said she was tired of dealing with his “fucking shit” and had hung up on him. The crewmember also confirmed the claimant had said she was refusing to talk to Mr. Ramirez.

The claimant was called back to the store on April 28, 2010. Mr. Tucker informed her he had investigated her allegations against Mr. Ramirez and none of the people she designated as witnesses would confirm any of her complaints. She was told due to her long history of her outbursts and the final insubordination she was being fired.

Crystal Paschke has received unemployment benefits since filing a claim with an effective date of April 25, 2010.

REASONING AND CONCLUSIONS OF LAW:

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.

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 had every reason to know her behavior was unacceptable to the employer. The letter of December 6, 2009, specifically told her she needed to be seen as someone "calm and in control." The warning in February 2010 about the customer complaint of her reprimanding of a crewmember being heard in the customer portion of the store should also have been adequate notice there were problems with her conduct.

The final incident was insubordination and abusive language to her manager. She hung up on him after using obscenities. This is a violation of the duties and responsibilities the employer has the right to expect of an employee and conduct not in the best interests of the employer.

Ms. Paschke felt discriminated against and harassed by Mr. Ramirez but did not provide any evidence of this from corroborating witnesses either to the employer or at the appeal hearing. The district manager did admit to telling her to "stop it," or "you're doing it again" when she would be constantly responding to concerns he was attempting to discuss with her by repeatedly saying, "I don't know" and "It must be my fault." This does not constitute harassment or discrimination.

The record establishes the claimant was discharged for substantial, job-related misconduct. She is disqualified.

Iowa Code § 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 claimant has received unemployment benefits to which she is not entitled. The question of whether the claimant must repay these benefits is remanded to the UIS division.

DECISION:

The representative's decision of June 7, 2010, reference 01, is reversed. Crystal Paschke is disqualified and benefits are withheld until she has earned ten times her weekly benefit amount, provided she is otherwise eligible. The issue of whether the claimant must repay the unemployment benefits is remanded to UIS division for determination.

Bonny G. Hendricksmeier
Administrative Law Judge

Decision Dated and Mailed

bgh/pjs