

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**TAYLOR M WORRALL**  
Claimant

**APPEAL NO: 15A-UI-12827-JE-T**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**THARALDSON EMPLOYEE MANAGEMENT**  
Employer

**OC: 10/18/15**  
**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 November 9, 2015, 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 December 9, 2015. The claimant participated in the hearing with witness/Front Desk Associate Sherri Schildgen. Connie Johnson, General Manager; Krystal Knox, Housekeeper; Helen Mitchely, Housekeeper; and Paige Christensen, Housekeeper; 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 housekeeper for Tharaldson Employee Management from March 18, 2014 to October 8, 2015. She was discharged because she failed to show up for work or notify the employer of her absences October 6 and 7, 2015.

October is always the employer's busiest month of the year with people traveling to the Dubuque area for various college parents' days, sporting events, and fall foliage viewing. On September 15, 2015, the employer posted a note above the time clock, where it posts all messages to employees, that it would not be able to honor any requests for time off in October 2015. General Manager Connie Johnson checked the days off book and noticed the claimant requested October 5 through 10 and 25 and 26, 2015 off work. Ms. Johnson told the claimant she needed to reread the note because they could not accommodate her time off requests. The claimant walked away from Ms. Johnson without commenting.

On October 6, 2015, the claimant was a no-call/no-show and Front Desk Associate Sherri Schildgen tried to call her in the afternoon but the claimant's phone message indicated her voice mail was not set up. The claimant was also a no-call/no-show October 7, 2015 and Ms. Schildgen again tried to call her but received the same message. The claimant came in to

work October 8, 2015 and because Ms. Johnson was not working at the time Ms. Schildgen called her at home to ask what she should do. Ms. Johnson instructed her to tell the claimant she no longer worked for the employer because of her no-call/no-shows and to send her home; which Ms. Schildgen did. The claimant contacted Ms. Johnson later that day and asked what was going on. Ms. Johnson explained that because of the no-call/no-show absences the employer considered her to have voluntarily given up her employment. The claimant stated she “talked to the other housekeepers and they said it was okay if I didn’t show up,” to which Ms. Johnson responded “Taylor, who is it that you work for?” The other three housekeepers confirmed the claimant asked them and they said they did not mind but they expected the claimant would at least call the employer to report her absences and agreed that none of them were in a supervisory position over the claimant. The claimant turned 21-years old on October 6, 2015 and that was her reason for failing to call or show up for work on that date. The employer usually allows employees to take their birthday off, or pays them time and one-half if they work on their birthday, but the employer could not allow any employee time off in October.

The claimant has claimed and received unemployment insurance benefits in the amount of \$2,180 since her separation from this employer.

The employer did not participate in the fact-finding interview.

#### **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 fully aware the employer was not granting any requests for time-off in October 2015. The employer posted the note by the time clock September 15, 2015, stating it would not allow any time off in October 2015 and also specifically told the claimant it could not grant her numerous requests for time off during that month. Despite that knowledge, the claimant chose not to call in or report for work October 6 and 7, 2015.

While a three day no-call no-show absence is considered a voluntary leaving under Iowa law, it does not preclude the employer from discharging an employee who fails to call or show up for work for two consecutive days. In this case the claimant intentionally ignored a clear directive from her general manager that her time off request was denied and she was needed at work. The claimant argues that her co-workers did not mind if she took the time off. Although, that may be true, it is irrelevant. Her co-workers did not hold any supervisory authority over the claimant and their consent has no bearing on the situation. She asked for time off for her 21<sup>st</sup> birthday, her request was denied, and she chose to disregard the employer's decision and take the time off anyway. She made a deliberate calculation that she would take the time off without the employer's permission. Because every decision has consequences, positive or negative, the claimant must accept that the consequence for this decision was the termination of her employment.

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 unrebutted 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 provides that benefits must be recovered from a claimant who receives benefits and is later determined to be ineligible for benefits, even though the claimant acted in good faith and was not otherwise at fault. However, the overpayment will not be recovered when it is based on a reversal on appeal of an initial determination to award benefits on an issue regarding the claimant's employment separation if: (1) the benefits were not received due to any fraud or willful misrepresentation by the claimant and (2) the employer did not participate in the initial proceeding to award benefits. In this case, the claimant has received benefits but was not eligible for those benefits. There is no evidence the claimant

received benefits due to fraud or willful misrepresentation. The employer did not participate in the fact-finding interview either personally or through written documentation. Consequently, the claimant's overpayment of benefits must be waived and the payments she has received to date, in the amount of \$2,180, shall be charged to the employer's account.

**DECISION:**

The November 9, 2015, 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 did not participate in the fact-finding interview within the meaning of the law. Therefore, the claimant's overpayment of benefits must be waived and the claimant's benefits to date, in the amount of \$2,180, shall be charged to the employer's account.

---

Julie Elder  
Administrative Law Judge

---

Decision Dated and Mailed

je/can