

IOWA WORKFORCE DEVELOPMENT
Unemployment Insurance Appeals Section
1000 East Grand—Des Moines, Iowa 50319
DECISION OF THE ADMINISTRATIVE LAW JUDGE
68-0157 (7-97) – 3091078 - EI

KELLY UNDERWOOD
5345 SE 5th APT #208
DES MOINES IA 50315

JUHAK COMPANY
LITTLE ANGEL'S LEARNING CENTER
606 E ARMY POST RD STE 5
DES MOINES IA 50315

SECOND AMENDED
04A-UI-06910-E

Appeal Number:
OC: 02-22-04 R: 02
Claimant: Respondent (2)

This Decision Shall Become Final, unless within fifteen (15) days from the date below, you or any interested party appeal to the Employment Appeal Board by submitting either a signed letter or a signed written Notice of Appeal, directly to the **Employment Appeal Board, 4th Floor—Lucas Building, Des Moines, Iowa 50319.**

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

STATE CLEARLY

1. The name, address and social security number of the claimant.
2. A reference to the decision from which the appeal is taken.
3. That an appeal from such decision is being made and such appeal is signed.
4. The grounds upon which such appeal is based.

YOU MAY REPRESENT yourself in this appeal or you may obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds. It is important that you file your claim as directed, while this appeal is pending, to protect your continuing right to benefits.

(Administrative Law Judge)

(Decision Dated & Mailed)

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 June 16, 2004, reference 03, decision that allowed benefits. After due notice was issued, a hearing was held in Des Moines, Iowa, before Administrative Law Judge Julie Elder on July 28, 2004. The claimant participated in the hearing with former employee Shellaine Schnoor. Ok Ja Jeun, Director, and Dot Ware, Supervisor, participated in the hearing on behalf of the employer.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed as a full-time teacher helper for Little Angel's Learning Center from January 6, 2003 to April 2, 2004. On January 27, 2004, Director Ok Ja Jeun verbally warned the claimant about her handling of a child after seeing her "drop" a toddler into a crib. On February 26, 2004, Ms. Jeun and Supervisor Dot Ware met with the claimant to discuss terminating her employment after the employer received several reports the claimant had been using inappropriate language and profanity toward, and in front of, children and also toward Ms. Jeun. Other employees observed the claimant tell children to "shut-up" and reported that she asked other employees where "the fucking bitch" was in reference to Ms. Jeun and had done so in front of a pre-kindergarten classroom. The claimant was pregnant and asked Ms. Jeun if she could continue her employment for one month because her due date was April 6, 2004, and, after the claimant began crying, the employer agreed the claimant could remain as an employee until April 2, 2004. At the end of April 2004, the claimant stopped by the daycare center and asked Ms. Jeun to sign a Title 19 form indicating her last day of employment was April 2, 2004. On May 28, 2004, the claimant went back to the employer with a doctor's release and stated she could work part-time. Ms. Jeun told the claimant her employment was terminated April 2, 2004.

The claimant has claimed and received unemployment insurance benefits after the separation from employment.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment due to job-related misconduct.

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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. Huntoon v. Iowa Department of Job Service, 275 N.W.2d 445, 448 (Iowa 1979).

The employer has the burden of proving disqualifying job misconduct. Cosper v. IDJS, 321 N.W.2d 6 (Iowa 1982). While the claimant denies using profanity at any time, or that her language and behavior toward the children and Ms. Jeun was inappropriate, the administrative law judge did not find her testimony, especially regarding the profanity, to be credible or persuasive. As a childcare provider the claimant was required to act in a professional manner at all times and the claimant failed to do so by telling children to "shut up" and referring to Ms. Jeun as a "fucking bitch" in front of children and staff. The employer intended to terminate the claimant's employment February 26, 2004 but relented when the claimant cried and asked to stay until April 2, 2004. The claimant brought the employer a form to sign at the end of April 2004 stating her last day of employment was April 2, 2004 and did not talk to the employer about returning to work until she was unable to find another job by the end of May 2004. The claimant's actions in February 2004 were not isolated incidents and her 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. Consequently, the administrative law judge concludes the claimant was discharged by the employer April 2, 2004, and the employer has met its burden of proving disqualifying job misconduct. Cosper v. IDJS, 321 N.W.2d 6 (Iowa 1982). Benefits are denied.

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.

Because the claimant's separation was disqualifying, benefits were paid to which the claimant was not entitled. Those benefits must be recovered in accordance with the provisions of Iowa law.

DECISION:

The June 16, 2004, reference 03, 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 is overpaid benefits in the amount of \$820.00.

je/tjc/B/kjf