

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**MELISSA J ANDERSON**  
Claimant

**APPEAL NO. 08A-UI-00697-MT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**IA DEPT OF VETERANS  
AFFAIRS - MARSHALLTOWN**  
Employer

**OC: 12/02/07 R: 02  
Claimant: Respondent (2)**

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

**STATEMENT OF THE CASE:**

Employer filed an appeal from a decision of a representative dated January 10, 2008, reference 02, which held claimant eligible for unemployment insurance benefits. After due notice, a telephone conference hearing was scheduled for and held on February 5, 2008. Claimant participated personally. Employer participated by Donna Klauza, Hearing Representative, TALX with witnesses Joyce Myers, Assistant Director; Mark Freeland, Director Food Service; and Suzie Curley, Assistant Director. Exhibits One and A were admitted into evidence.

**ISSUES:**

The issues in this matter are whether claimant was discharged for misconduct and is overpaid unemployment insurance benefits.

**FINDINGS OF FACT:**

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds: Claimant last worked for the employer December 1, 2007.

Employer discharged claimant on December 1, 2007 because a coworker bared her breasts to other coworkers showing recently pierced nipples on November 23, 2007. Claimant was the supervisor on duty that day. Claimant did not counsel the employee after knowledge of the boisterous behavior. Claimant did not reprimand the conduct. Claimant did not report the inappropriate conduct to her supervisor in a timely manner. The showing of the breasts at work violated rule C7 which prohibits boisterous behavior. Claimant was aware of the rule.

Claimant had received a final warning and five-day suspension March 21, 2007. The warning indicated that claimant's job was in jeopardy. Claimant was previously warned about inappropriate behavior detrimental to the veteran's home image.

## REASONING AND CONCLUSIONS OF LAW:

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.

871 IAC 24.32(8) provides:

(8) Past acts of misconduct. While past acts and warnings can be used to determine the magnitude of a current act of misconduct, a discharge for misconduct cannot be based on such past act or acts. The termination of employment must be based on a current act.

The administrative law judge holds that the evidence has established that claimant was discharged for an act of misconduct when claimant violated the employer's policy concerning work rule C7. Claimant was warned concerning this policy.

The last incident, which brought about the discharge constitutes misconduct because claimant knowing failed to take action when informed of inappropriate behavior at work. Claimant took no action to stop, report or reprimand the behavior. Claimant's inaction demonstrates carelessness in her responsibilities. Claimant had a duty to take prompt remedial action to protect coworkers from inappropriate working conditions. The prior warning weighs heavily toward a finding of carelessness. This is an act of misconduct. Therefore, claimant was discharged for an act of misconduct and as such, is disqualified for the receipt of unemployment insurance benefits.

The next issue concerns an overpayment of unemployment insurance benefits.

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.

The administrative law judge holds that claimant is overpaid unemployment insurance benefits in the amount of \$2,429.00 pursuant to Iowa Code section 96.3-7 because a decision has determined the claimant to be ineligible to receive benefits due to a discharge for misconduct. Since claimant has been disqualified for the receipt of unemployment insurance benefits, the claim shall be locked until claimant has re-qualified or is otherwise eligible.

**DECISION:**

The decision of the representative dated January 10, 2008, reference 02, is reversed. Unemployment insurance benefits shall be withheld until claimant has worked in and been paid wages for insured work equal to ten times claimant's weekly benefit amount, provided claimant is otherwise eligible. Claimant is overpaid unemployment insurance benefits in the amount of \$2,429.00.

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Marlon Mormann  
Administrative Law Judge

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Decision Dated and Mailed

mdm/css