

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

JESSIE WHEELER
Claimant

APPEAL NO: 15A-UI-09987-JE-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

TYSON FRESH MEATS INC
Employer

OC: 08/09/15
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 August 28, 2015, reference 01, decision that allowed benefits to the claimant. After due notice was issued, a telephone hearing was held before Administrative Law Judge Julie Elder on September 21, 2015. The claimant did not respond to the hearing notice and did not participate in the hearing or request a postponement of the hearing as required by the hearing notice. Kris Rossiter, Employment Manager; Mike Berry, Plant Engineer; and Kai Schmidt, Maintenance Supervisor participated in the hearing on behalf of the employer.

ISSUE:

The issue is whether the claimant was discharged from employment for disqualifying job misconduct.

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 building maintenance worker for Tyson Fresh Meats from May 17, 1990 to August 12, 2015. He was discharged for refusing to work required overtime August 10, 2015.

It is not uncommon for the employer to learn at the last minute it needs the maintenance staff or mechanics to stay and work up to a 12-hour shift rather than work an eight-hour shift if the equipment goes down and production is slowed or stopped because the employer must respond to that situation immediately in order to keep production going.

On August 10, 2015, the claimant was scheduled to work his regular shift of 5:00 a.m. to 1:30 p.m. At approximately 11:00 a.m. Maintenance Supervisor Kai Schmidt notified the claimant and two other building maintenance employees they needed to stay beyond their eight-hour shifts because the employer was experiencing problems with the trolley system and consequently was having production problems. One of the other team members threw her equipment on the ground and told the claimant she was not staying 12 hours and did not care

what happened as a result of her actions. Plant Engineer Mike Berry asked Engine Room Supervisor Carey Woodruff to walk over to the group and try to diffuse the situation and he did so, telling the employees they needed to get the trolleys running and the room cleaned. He indicated it may not take 12 hours but they needed to stay as long as it took to complete those tasks.

At 1:30 p.m. the three person crew, of which the claimant was a member, went to the office to have their paperwork signed and Mr. Schmidt reminded them they were working up to 12 hours or until everything was fixed and told them they needed to get back to the trolley room. The crew put their paperwork in the basket without a supervisor's signature and Mr. Schmidt told them they were placing their jobs in jeopardy and it would be considered job abandonment if they left. The claimant stated he did not care, threw his paperwork into the basket, punched out, and left. Mr. Schmidt called Mr. Berry on the radio and explained the situation and Mr. Berry said he was going to try to catch up to them and talk to them.

Around 1:45 p.m. Mr. Berry observed another team member leaving and he told Mr. Berry he was going home. Mr. Berry told him he needed to stay and the team member replied that he thought the statements about needing to work overtime were a joke. Mr. Berry reminded him that his supervisor had told him he needed to stay and informed him if he left he was placing his job in jeopardy and the team member returned to work. Mr. Berry did not see or talk to the claimant.

The claimant reported for work August 11, 2015, and the employer met with him, took his statement and suspended him. He was sent home for the day and the employer notified him August 12, 2015, that he had abandoned his job and the first offense results in termination of employment.

The claimant has claimed and received unemployment insurance benefits in the amount of \$1,456.00 for the five weeks ending September 12, 2015.

The employer personally participated in the fact-finding interview through the statements of Human Resources Clerk Kristi Fox. The employer also submitted written documentation prior to 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 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.

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).

Because the claimant was a building maintenance employee, overtime was a fairly common occurrence. If the line is stopped or slowed the problem causing that situation must be fixed and the claimant was responsible for participating in that process. The employer was experiencing a problem with its trolley system August 10, 2015, and because that was a crucial part of its operation Mr. Woodruff and Mr. Schmidt both notified the claimant and the other members of his crew they needed to work overtime. The second time he was informed he needed to stay beyond his regular eight hours the employer specifically told him that if he left anyway his actions would constitute job abandonment but despite that warning the claimant still knowingly chose to leave.

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.

871 IAC 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 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, was overpaid benefits.

Because the employer participated in the fact-finding interview, the claimant is required to repay the overpayment and the employer will not be charged for benefits paid.

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. While there is no evidence the claimant received benefits due to fraud or willful misrepresentation, the employer participated in the fact-finding interview personally through the statements of Human Resources Clerk Kristi Fox. Consequently, the claimant's overpayment of benefits cannot be waived and he is overpaid benefits in the amount of \$1,456.00.

DECISION:

The August 28, 2015, reference 01, decision is reversed. The claimant was discharged from employment due to job-related misconduct. Benefits are withheld until such time as he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he 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 \$1,456.00.

Julie Elder
Administrative Law Judge

Decision Dated and Mailed

je/css