

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

LAWRENCE J RAINE
Claimant

THE UNIVERSITY OF IOWA
Employer

APPEAL 16A-UI-05542-JCT

**ADMINISTRATIVE LAW JUDGE
DECISION**

**OC: 04/24/16
Claimant: Respondent (2)**

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Code § 96.5(1) – Voluntary Quitting
Iowa Code § 96.3(7) – Recovery of Benefit Overpayment
Iowa Admin. Code r. 871-24.10 – Employer/Representative Participation Fact-Finding Interview

STATEMENT OF THE CASE:

The employer filed an appeal from the May 12, 2016 (reference 01) unemployment insurance decision that allowed benefits based upon separation. The parties were properly notified about the hearing. A telephone hearing was held on June 2, 2016. The claimant participated personally. The employer participated through benefits specialist Mary Eggenburg. Jayne Nelson, human resources, also testified. Employer's Exhibits One and Two were admitted. The administrative law judge took official notice of the administrative record, including fact-finding documents. Based on the evidence, the arguments of the parties, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUES:

Was the claimant discharged for disqualifying job-related misconduct?

Has the claimant been overpaid any unemployment insurance benefits and, if so, can the repayment of those benefits to the Agency be waived?

Can any charges to the employer's account be waived?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed full-time as an environmental systems mechanic and was separated from employment on March 22, 2016, when he was discharged for falsification of his application.

The claimant was previously a temporary employee and applied for a permanent position with the employer in 2009 as an environmental systems mechanic. The claimant was "so happy for a permanent position to open" and applied. As part of the job requirements, the claimant was

required to possess a valid refrigeration certification, because of the chemicals (namely Freon) used on the job. The certification/licensure requirement was implemented by directive of the Environmental Protection Agency (EPA). The claimant did not possess a refrigeration license. In 1994, while working with his father, the claimant and his father, Richard Raine, took the refrigeration certification exam. The claimant admitted to taking the course "cold" without preparation. The claimant did not pass the test but his father did and received license number 059403215. The claimant was able to use his father's license previously when purchasing Freon, while employed with him, and wrote down his father's license number on the application for employment with the University of Iowa. The claimant stated he didn't think about it or the fact he had thrown away his letter in 1994 about not passing.

The employer has in its handbook and code of ethics, policies which require integrity and honesty while employed and permit discipline for falsification of records. The claimant was made aware of the employer's policies at hire. The employer reported that allowing an employee to knowingly continue to work without a valid license could expose the employer to potential legal concerns.

On March 7, 2016, the employer was conducting an internal audit and the claimant's immediate supervisor, Robert Lesley, was requested to conduct an audit of licenses in preparation for an external audit that was to be conducted. When Mr. Lesley attempted to verify the license number furnished by Mr. Raine at the time of hire on his application, it did not match his social security number but that of Robert Raine, the claimant's father. The claimant was confronted by the employer and he referenced using a family member's license for the family business during his prior employment. The evidence was disputed as to whether the claimant reported that he had failed or not. The claimant was suspended pending investigation on March 8, 2016, and elected to voluntarily take the refrigeration certification exam on March 14, 2016. The claimant was discharged on March 22, 2016 and learned he passed the exam on March 23, 2016.

The administrative record reflects that claimant has received unemployment benefits in the amount of \$2,155.00, since filing a claim with an effective date of March 24, 2016. The administrative record also establishes that the employer did participate in the fact-finding interview by way of writing by Mary Eggenburg, in advance of the May 11, 2016 fact-finding interview (Employer's Exhibit Two).

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment for disqualifying misconduct. Benefits are denied and the claimant has been overpaid benefits.

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.

The law defines misconduct as:

1. A deliberate act and a material breach of the duties and obligations arising out of a worker's contract of employment.
2. A deliberate violation or disregard of the standard of behavior the employer has a right to expect from employees. Or
3. An intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to the employer.

Inefficiency, unsatisfactory conduct, unsatisfactory performance due to inability or incapacity, inadvertence or ordinary negligence in isolated incidents, or good faith errors in judgment or discretion do not amount to work-connected misconduct. 871 IAC 24.32(1)(a).

It is the duty of the administrative law judge as the trier of fact in this case, to determine the credibility of witnesses, weigh the evidence and decide the facts in issue. *Arndt v. City of LeClaire*, 728 N.W.2d 389, 394-395 (Iowa 2007). The administrative law judge may believe all, part or none of any witness's testimony. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996). In assessing the credibility of witnesses, the administrative law judge should consider the evidence using his or her own observations, common sense and experience. *Id.* In determining the facts, and deciding what testimony to believe, the fact finder may consider the following factors: whether the testimony is reasonable and consistent with other believable evidence; whether a witness has made inconsistent statements; the witness's appearance, conduct, age, intelligence, memory, and knowledge of the facts; and the witness's interest in the trial, their motive, candor, bias, and prejudice. *Id.* After assessing the credibility of the witnesses who testified during the hearing, considering the applicable factors listed above, and using her own common sense and experience, the administrative law judge finds the evidence supports the claimant was discharged for an act of misconduct when the employer discharged the claimant for a falsification of his employment application with respect to possessing a valid refrigeration license.

871 IAC 24.32(6) provides:

- (6) False work application. When a willfully and deliberately false statement is made on an Application for Work form, and this willful and deliberate falsification does or could result in endangering the health, safety or morals of the applicant or others, or result in exposing the employer to legal liabilities or penalties, or result in placing the employer in jeopardy, such falsification shall be an act of misconduct in connection with the employer.

In this case, the determination of whether the claimant's actions would amount to disqualifying misconduct hinges upon whether the claimant's affirmative response to a question asking if he had a valid refrigeration certification/license constituted a "willful, deliberate false statement". Without proving the claimant made a willful or deliberate statement, the evidence cannot conclude the claimant's "willful and deliberate falsification does or could result in endangering the health, safety or morals of the applicant or others, or result in exposing the employer to legal liabilities or penalties, or result in placing the employer in jeopardy," as outlined in 871 IAC 24.32(6). Cognizant that the claimant may not have wanted to acknowledge that he had failed the refrigeration exam, because it would have precluded him from being hired in 2009, the administrative law judge is not persuaded that the claimant was unaware that he failed his refrigeration certification test in 1994, but rather, was able to utilize his father's license while working with him, when needed. There was no credible evidence presented that the claimant was misinformed by the licensure board that he had passed when he failed, or that he was

subject to a family membership by way of his father's licensure. Rather, the credible evidence presented is that the claimant misrepresented his licensure status when applying for the job, and simply did not get caught until a subsequent audit of licenses was performed in 2016. The administrative law judge concludes the weight of the evidence does support the claimant made a willful or deliberate false statement in his reply.

The next issue is whether the claimant's falsification put the employer at jeopardy. Not only was the licensure necessary because it ensured the claimant was knowledgeable in the safety components of his job, such as handling Freon. In addition, the claimant's working without valid certification or license was akin to unauthorized practice in a profession, such as medicine or law. If the employer allowed the claimant to continue to perform work without valid certification, it could be exposed to legal liabilities or penalties. Based on the evidence presented, the claimant knew or should have known his conduct was in disregard of the employer's interests and reasonable standards of behavior that the employer has a right to expect of its employees. Employees have a duty of honesty, even at the time of application for a job, and the claimant willfully misled the employer regarding his refrigeration certification status when applying for the job and continued to do so until it was discovered in 2016. Benefits are withheld.

The next issue is whether the claimant must repay the benefits he has been overpaid.

Iowa Code § 96.3(7)a-b 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) (a) 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 § 96.8, subsection 5. The employer shall not be relieved of charges if benefits are paid because the employer or an agent of the employer failed to respond timely or adequately to the department's request for information relating to the payment of benefits. This prohibition against relief of charges shall apply to both contributory and reimbursable employers.

(b) 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 § 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.

(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 states pursuant to § 602.10101.

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.

Because the claimant's separation was disqualifying, benefits were paid to which he was not entitled. The claimant has been overpaid benefits in the amount of \$2,155.00. 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. The employer will not be charged for benefits if it is determined that it did participate in the fact-finding interview. Iowa Code § 96.3(7), Iowa Admin. Code r. 871-24.10. In this case, the claimant has received benefits but was not eligible for those benefits. The administrative law judge is persuaded the employer satisfactorily participated in the fact-finding interview by way of written statement and that the information furnished, if unrefuted, would have been favorable to the employer. Since the employer did participate in the fact-finding interview the claimant is obligated to repay the benefits he received and the employer's account shall not be charged.

DECISION:

The May 12, 2016 (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 been overpaid unemployment insurance benefits in the amount of \$2,155.00 and is obligated to repay the Agency those benefits. The employer did participate in the fact-finding interview and its account shall not be charged.

Jennifer L. Beckman
Administrative Law Judge

Decision Dated and Mailed

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