IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

DELBERT AMSDEN
Claimant

HY-VEE INC
Employer

APPEAL NO: 14A-UI-12545-ET

ADMINISTRATIVE LAW JUDGE DECISION

OC: 11/09/14
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 25, 2014, 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 31, 2014. The claimant participated in the hearing. Kevin Mills, Store Director; Kevin Kisling, Store Operations Manager; Michele Wiese, C-Store Manager; Hunter Frescoln, Store Clerk; and Larry Lampel, Employer's Representative participated in the hearing on behalf of the employer. Employer's Exhibit One was admitted into evidence.

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 full-time assistant C-Store (Hy-Vee convenience store) manager for Hy-Vee from October 6, 2012 to November 7, 2014. He was discharged for sending inappropriate and disrespectful text messages and pictures of nude women to Store Clerk Hunter Frescoln.

On October 23, 2014, C-Store Clerk Hunter Frescoln approached C-Store Manager Michele Wiese with text messages and photographs of nude women he received from the claimant's cell phone. After looking at the nude photographs, but before reading the text messages, Ms. Wiese directed Mr. Frescoln to speak to Store Director Kevin Mills. Mr. Frescoln showed Mr. Mills the text messages and nude photographs and Mr. Mills noted the approximately five text messages he read from the claimant to Mr. Frescoln made vulgar and disparaging comments about Ms. Wiese, among other employees, and referred to Ms. Wiese and others as a "fucking bitch, a fat bitch, fucking idiots, lazy piece of shit" and "dipshits." He also observed several photographs of nude women sent to Mr. Frescoln by the claimant. Mr. Frescoln told Mr. Mills he was also concerned the claimant made another female employee very uncomfortable. The texts and photographs of nude women had been going on for several months, often with links to the claimant's Twitter feed, but Mr. Frescoln felt they were

accelerating and became more concerned after telling the claimant the texts and nude photographs made him uncomfortable but the claimant did not stop sending them.

Mr. Mills told Mr. Frescoln he would investigate the situation further. Due to work schedules and the fact that Mr. Mills was new to the store, Mr. Mills met with Ms. Wiese October 31, 2014, and she began crying regarding the pictures she had seen and told Mr. Mills that Mr. Frescoln had told her about the pictures and texts previously and she advised him to go to Mr. Mills but when she saw the pictures for herself October 23, 2014, she insisted he go to Mr. Mills.

Due to Mr. Mills schedule as the new store manager and the claimant's work schedule, Mr. Mills was not able to meet with the claimant until November 7, 2014. At that time Mr. Mills, with Store Operations Manager Kevin Kisling acting as a witness to the conversation, met with the claimant and told him there were serious allegations regarding him texting inappropriate messages and images to employees, the use of foul language and inappropriate advances toward women. Mr. Mills asked the claimant if he thought the texts were okay and the claimant said, "I thought it was to certain people. I also thought I could trust certain people." Mr. Mills reminded the claimant he signed the employer's policy regarding electronic communications which states that "electronic communications must be professional and courteous whether intended for internal or external reading. Harassing, defamatory, rude, vulgar and obscene communications and material is strictly prohibited." Mr. Mills told the claimant his actions were a "real problem" for the employer and he "wasn't going to allow it." The claimant removed his store key from his key ring and set it on Mr. Mills' desk and stated, "I understand," before leaving.

The claimant has claimed and received unemployment insurance benefits in the amount of $2154 since his separation from this employer.

The employer participated in the fact-finding interview personally through the statements of Store Manager Kevin Mills.

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 of omissions that constitute a material breach of the worker's duties and obligations to the employer. See 871 IAC 24.32(1).

While the claimant denies sending any inappropriate text messages or photographs of nude women to Mr. Frescoln, his testimony was not credible or persuasive. The messages observed by Mr. Frescoln, Ms. Wiese and Mr. Mills all showed that the messages and pictures were sent from the claimant's phone and all were sure of the content of the texts and photographs. The claimant could not identify any issues between himself and Mr. Frescoln that would have caused Mr. Frescoln to engage in a conspiracy with Ms. Wiese and the new store manager, Mr. Mills, which would have resulted in the claimant's termination.

During the hearing the topic of the claimant's Twitter account came up and he was asked about the content of that account. He indicated he had not been on that site for a long time and could not recall what was on it. He insisted he never sent nude photographs of women or made disparaging comments about his co-workers from his phone. Mr. Frescoln checked the claimant's Twitter account during the hearing and after a quick perusal came up with one photograph of a nude woman and one incident of name calling of an employee during his tenure with the employer. While it is possible he did not remember calling a co-worker a "jackass" on that account, it is unlikely the claimant could not recall posting photographs of nude women on his Twitter account, like those in Employer's Exhibit One. The claimant's testimony was not credible before receipt of the information from his Twitter account but that content demonstrated that it was even more likely the claimant was not forthcoming about the text messages and photographs he sent Mr. Frescoln.

The claimant's emails were completely inappropriate and unprofessional. He sent disrespectful and disparaging messages about other employees as well as photographs of nude women that made Mr. Frescoln, Ms. Wiese and Mr. Mills, all uncomfortable. His actions violated the employer's policy as well as common sense and common decency and there is no excuse for texting those comments or sending those pictures to any co-worker, especially a subordinate.

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 § 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.
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> (2) "A continuous pattern of nonparticipation in the initial determination to award benefits," pursuant to Iowa Code § 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.
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> (3) If the division administrator finds that an entity representing employers as defined in Iowa Code § 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 § 17A.19.
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> (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 § 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.
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> This rule is intended to implement Iowa Code § 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 § 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 Store Director Kevin Mills. Consequently, the claimant's overpayment of benefits cannot be waived and he is overpaid benefits in the amount of $2154.

DECISION:

The November 25, 2014, 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 her weekly benefit amount, provided he is otherwise eligible. The claimant has received benefits but was not eligible for those benefits. Therefore, the claimant is overpaid benefits in the amount of 2154.

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Julie Elder
Administrative Law Judge

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Decision Dated and Mailed

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