IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

GAYLEN LUNDGREN
Claimant

CITY OF SHENANDOAH
Employer

APPEAL NO: 14A-UI-03950-ET

ADMINISTRATIVE LAW JUDGE DECISION

OC: 03/23/14
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 April 9, 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 May 2, 2014, and continued May 20, 2014. The claimant participated in the hearing with Union Representative/Witness Michael Stanfill. Byron Harris, City Administrator; Mike Laughlin, Park and Recreation Director; and Jerry Josephson, Park Worker, participated in the hearing on behalf of the employer and were represented by Attorney Katherine Beenken. Claimant's Exhibit One and Employer's Exhibits A through E were 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 park employee for the City of Shenandoah from March 26, 1990 to February 6, 2014. He was discharged for misuse of city equipment and safety issues.

The claimant received a written warning January 29, 2008, for negligent driving of city equipment (Employer's Exhibit D). He received a verbal warning May 8, 2009, for insubordination after Park and Recreation Director Mike Laughlin spoke to him about standing around and visiting with members of the community during work hours (Employer's Exhibit D). The claimant was walking around or leaving the shop to talk to an individual and Mr. Laughlin told the claimant he needed to remember he was on the job and could not spend time with the public talking about personal issues (Employer's Exhibit D). On August 12, 2010, the claimant received a written warning and suspension for misuse of city equipment and driving recklessly after he rolled a zero turn riding lawn mower. The claimant was mowing a ditch and went the opposite manner of how he was trained to safely operate the mower (Employer's Exhibit D). On June 6, 2011, the claimant received a written warning and suspension after he neglected to walk a vacant lot checking for hazards in the tall grass before he mowed the lot which resulted

in damage to the mower blades (Employer's Exhibit D). On January 18, 2013, the claimant received a written warning and suspension for misuse of city funds because he had access to scrap metal in his position and took it to a local business and had the check made out to himself rather than the city and then cashed the check (Employer's Exhibit D). On March 7, 2013, the claimant received a written warning for hitting a building while using the sidewalk snow plow, causing damage, and failing to report the incident to the employer (Employer's Exhibit D).

The final incident occurred February 4, 2014, when the claimant was using a sidewalk snow removal plow and came to the end of the sidewalk at which point he needed to turn around in the street. While doing so he broadsided a passing vehicle. The damage to the vehicle was over $5,000.00. There was minimal damage to the snow plow. The claimant's response when questioned about the incident was "accidents happen" and he could not see. The employer had several specific discussions with the claimant about safety when using the mower or snow plow and told him to slow down and think about his actions and the results of his actions at all times. It also held formal safety conversations with employees every spring and fall. When pushing snow on a sidewalk, employees are taught to look and listen before proceeding and that they must be cautious at all times because the public often ignores the plows or tries to beat the equipment. Park employee Jerry Josephson testified it is not hard to see in the sidewalk snow plows because the drivers quickly become aware of where the blind spots are and the entire front windows, as well as the window on the right side of the plow are all Plexiglas and the left side has a window in the door.

The claimant has claimed and received unemployment insurance benefits since his separation from this employer.

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 § 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.
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> 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 claimant was warned on at least four occasions about safety and misuse of city equipment. Running city lawn mowers and sidewalk snow plows is an inherently dangerous job and the operator must always "look, listen and proceed" cautiously to avoid accidents, injuries, and property damage. The claimant neglected to do so several times resulting in damage to city equipment or private property. The final incident, when the claimant broadsided a vehicle in the street while in the sidewalk snowplow February 4, 2014, was the last in a string of accidents that demonstrate a pattern of carelessness and negligence on the part of the claimant. It would be irresponsible for the employer to allow the claimant to continue in his position after he demonstrated an inability to safely perform his job, a job which could result in serious injury or property damage.

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.

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.

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 employer participated in the fact-finding interview personally through the statements of City Administrator Byron Harris. Additionally, the employer provided documentation relating to this case at the fact-finding interview. Because the employer participated in the fact-finding meeting within the meaning of the law, the benefit overpayment cannot be waived. The claimant is overpaid benefits in the amount of $2,842.00.

DECISION:

The April 9, 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 his weekly benefit amount, provided he is otherwise eligible. The claimant is overpaid benefits in the amount of $2,842.00.

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Julie Elder
Administrative Law Judge

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Decision Dated and Mailed

je/pjs