IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

AMANDA MOON
Claimant

AKRON CHILDRENS CENTER INC
Employer

APPEAL NO: 15R-UI-09175-JE-T

ADMINISTRATIVE LAW JUDGE DECISION

OC: 05/03/15
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 May 18, 2015, 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 September 2, 2015. The claimant participated in the hearing. Deb Kroksh, Director; Christina Lewison, AM Supervisor; and Curt Harris, Board President participated in the hearing on behalf of the employer. Claimant's Exhibits A through D and Employer's Exhibits One through Four 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 childcare worker for Akron Children's Center from August 21, 2014 to April 30, 2015. She was discharged for failure to report to work.

On April 28, 2015, the claimant approached Director Deb Kroksh at the end of the day about a phone call from a parent the claimant believed involved her but did not. Ms. Kroksh talked to the claimant for 20 minutes while the claimant raised her voice and used profanity in front of parents who were there to pick up their children for the day. The children could also overhear the claimant's comments and profanity. After 20 minutes Ms. Kroksh told the claimant she had to leave to attend an event at the high school for her son. The claimant became even more upset because she wanted Ms. Kroksh to contact the board and take immediate action. Ms. Kroksh did not believe the situation warranted immediate action but could wait until the next scheduled board meeting.

That evening the claimant texted Ms. Kroksh around 9:30 p.m. and stated she was upset Ms. Kroksh left for her meeting at the high school and she was taking the next day off. Ms. Kroksh wrote back that, "Someone's mom said these things. But missing work doesn't

solve it. I can't get to working on this if I'm covering for you. So I'd like a call as your boss out of respect please (Employer's Exhibit One). The claimant replied, "For documentation I am more comfortable using a written form of communication. What was said by 'someone's mom' that attacks my character as well as my reputation as a childcare provider and a mother is a big deal. Watching you pack up to leave because your shift was done showed very little respect for me and my concerns. I am taking tomorrow off to decide what my next step is in approaching the situation. I do not believe in acting in haste especially when it involves decisions that affect my children and I" (Employer's Exhibit One). Ms. Kroksh responded, "I had a meeting at 5:30 at the school so I couldn't stay because I had my son's high school meeting for all freshman parents. I got home late and started my calls. How could I do more?" (Employer's Exhibit One). The claimant did not report for work April 29, 2015.

The employer's policy states that if an employee is calling in to state she will not be in due to illness she needs to notify AM Supervisor Christina Lewison and if the employee is calling in for any other reason she need to notify the director (Ms. Kroksh) and receive approval for her absence. The claimant texted Ms. Lewison April 28, 2015, at 9:31 p.m. and said, "Hey I can't make it in tomorrow for personal reasons. Sorry" (Employer's Exhibit One). Ms. Lewison texted her back and said, "You need to call and talk to Deb (Kroksh) tonight about this" (Employer's Exhibit One). The claimant texted back, "Has something changed to where I'm not supposed to contact the morning supervisor if I am calling in?" (Employer's Exhibit One). Ms. Lewison responded, "Since there are two other staff off besides you…you need to call Deb and verify to her the reason you need the day off and she is the Director and your boss" (Employer's Exhibit One). The claimant replied, "I'm fully aware that she is my boss. I do not have her number. I am also aware that you do have her number. I also know that you are my morning supervisor and according to our center procedures I am to contact you if I am calling in. Which I have" (Employer's Exhibit One). Neither the claimant nor two other employees who were also upset about the comments made by another employee's mother regarding the care given at the center reported for work April 29, 2015. Two other employees were legitimately absent due to illness. Because of the claimant and other two employee's failure to report for work, in combination with the illness of the other two employees, the employer was forced to call another teacher to work the claimant's room, staff had to work longer hours and the employer called in other substitutes. The center was also unable to hold preschool that day. The claimant later texted Ms. Kroksh and stated she would not be in the remainder of the week. Ms. Kroksh responded by saying the claimant was off the schedule. Ms. Kroksh did not approve the claimant's time off. At that time, Ms. Kroksh believed the claimant would return the following week but due to the circumstances of the claimant and other two employees' absences, because they were upset by the co-worker's mother's comments, she spoke to Board President Curt Harris about the situation. Mr. Harris called a board meeting for April 30, 2015, at 9:00 p.m. The board voted to terminate the claimant's employment for refusing to report for work.

Ms. Kroksh had retired May 9, 2014, but was asked to return by the board because there was a conflict between the teachers. Her instructions were that her first order of business was to address the situation that resulted in the teachers breaking into two camps, that of the claimant and the other of Keianna Merrick. It was Ms. Merrick's mother who reportedly gave a client's mother information about some of the teachers and because the claimant was upset that Ms. Kroksh did not react immediately to the information she just learned, she failed to show up for work April 28, 29 or 30, 2015. Ms. Kroksh had only returned to the center around April 13, 2015, approximately two weeks before this issue occurred.

Mr. Harris emailed the claimant April 30, 2015, stating he had contacted Ms. Merrick's mother personally by phone and demanded "she stop with these baseless remarks" (Employer's

Exhibit Three). Mr. Harris also sent Ms. Merrick's mother a certified letter (Employer's Exhibit Three). The last line of Mr. Harris' letter stated, "Let this letter serve as notice we will not tolerate further slanderous and defamatory statements regarding our staff or organization" (Employer's Exhibit Three). He copied the claimant on the April 29, 2015, letter (Employer's Exhibit Three).

The claimant has claimed and received unemployment insurance benefits in the amount of $322.00 for the two weeks ending May 16, 2015.

The employer personally participated in the fact-finding interview through the statements of Deb Kroksh, Director; Christina Lewison, AM Supervisor; Jamie Pearson, Office Administrator; and Curt Harris, Board President. 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).

The claimant was upset by Ms. Merrick's mother's statements and went to talk to Ms. Kroksh about the remarks at the end of the day on April 28, 2015. Ms. Kroksh listened while the claimant yelled and used profanity during the time parents were there to pick up their children. She attempted to explain to the claimant that although she could not do anything about the incident at that moment, she would address the situation as soon as possible. Ms. Kroksh listened to the claimant's inappropriate and unprofessional diatribe until she had to leave to attend a program at the high school regarding new students, of which Ms. Kroksh son was one. The claimant was dissatisfied with Ms. Kroksh response and the fact she had to leave to attend to another commitment and consequently she reacted by refusing to return to work the remaining three days of the week. Two other employees in the claimant's "clique" also did not report for work which caused the employer a great staffing hardship.

Ms. Kroksh did tell the board president about the situation and he responded harshly to Ms. Merrick's mother and sent her a certified letter telling her it would "not tolerate further slanderous and defamatory statements" regarding the employer's staff or the center itself." His letter was sent April 30, 2015. That fact alone demonstrates the employer did not take the situation lightly and was willing to back up its teachers and staff. The letter was also sent two days after the employer, and then the board, was made aware of the incident.

The claimant's refusal to return to work the rest of the week was inexcusable. She deliberately left the employer in a very difficult staffing situation and effectively went on strike because she was unhappy with Ms. Kroksh's reaction to her complaint. Her decision not to return to work that week, simply because she was upset Ms. Kroksh had to leave for a prior commitment and did not respond in the way the claimant wanted at that moment, and then refusal to contact Ms. Kroksh about her absence the rest of the week as required by the employer's policy, was insubordinate and disrespectful, not only to Ms. Kroksh but to the other staff members and the families who depended on the center for childcare. Her actions also could have affected the employer's license as it is required by the state to maintain a certain teacher to student ratio or send children home. In this situation, the employer was unable to open the preschool room because of the claimant's actions.

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 Deb Kroksh, Director; Christina Lewison, AM Supervisor; Jamie Pearson, Office Administrator; and Curt Harris, Board President. Consequently, the claimant's overpayment of benefits cannot be waived and she is overpaid benefits in the amount of $322.00 for the two weeks ending May 16, 2015.

DECISION:

The May 18, 2015, reference 01, decision is reversed. The claimant was discharged from employment due to job-related misconduct. Benefits are withheld until such time as she has worked in and been paid wages for insured work equal to ten times her weekly benefit amount, provided she 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 $322.00.

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Julie Elder
Administrative Law Judge

_____
Decision Dated and Mailed

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