

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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

ANDREW K MOENK
Claimant

APPEAL NO: 20A-UI-07025-JE-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

SYSTEMS UNLIMITED INC
Employer

OC: 05/17/20
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 June 18, 2020, 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 August 3, 2020. The claimant participated in the hearing. Mary Bartachek, Human Resources Manager, participated in the hearing on behalf of the employer.

ISSUE:

Whether the employer discharged the claimant for work-connected misconduct as defined by Iowa law and whether he is overpaid benefits.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant worked as a part-time direct support professional for Systems Unlimited from January 22, 2020 to May 21, 2020. He was discharged for failing to complete progress notes.

On April 28, 2020, the employer gave the claimant a first written warning for failing to complete his progress notes and agreed to cover his shifts through May 1, 2020, at which time the employer expected the progress notes to be done. The claimant did not have the progress notes done by May 1, 2020, and on May 2, 2020, the employer agreed to cover the claimant's 6:00 a.m. to 2:00 p.m. shift so he could work on his notes but the claimant left shortly after the start of his shift. After he left he sent a message to his supervisor's supervisor and said he was upset with his supervisor and wanted to talk to human resources. The supervisor said the claimant still needed to catch up on his progress notes. On May 4, 2020, Human Resources Manager Mary Bartachek called the claimant and left a voice mail. The claimant called her back May 6, 2020, and the claimant said he wanted to transfer because he was upset with his supervisor. Ms. Bartachek told the claimant he could not transfer until he was caught up on his progress notes and needed to be done by May 11, 2020.

On May 11, 2020, the claimant was not caught up and the employer issued him a critical second written warning. The employer told the claimant he needed to be done with his progress notes by May 13, 2020, or the employer would take another disciplinary action. The progress notes are done electronically and the employer can see when an employee logs in to the system. The claimant did not log in until May 13, 2020, and then stated he was having problems with his computer. The employer provided the claimant with the information for the computer support team and told him he needed to complete his progress notes by May 15, 2020. The employer checked the system May 15, 2020, and the claimant's notes were still not done. The employer emailed and texted the claimant but he did not respond until May 18, 2020, at 5:30 a.m. when he stated he would start working on his notes "ASAP." The claimant had not completed his notes by the end of the day May 18, 2020, and the employer emailed him it was issuing him an agreement for continued employment (ACE) or final written warning and told him the final deadline was 5:00 p.m. on May 20, 2020. The claimant emailed the employer May 20, 2020, at noon and said he was having problems with the computer and the employer gave him the computer support number again. On May 21, 2020, at 9:30 a.m. Ms. Bartachek emailed the claimant and said the final deadline passed and asked him what was going on. The claimant said he had until May 20 of the year 2021. Ms. Bartachek looked at the ACE and saw there was a typographical error saying 2021 but told the claimant that was a typo and he knew the deadline. She sent the claimant an email notifying him that his employment was terminated and also sent a letter to his home informing him of his discharge.

The claimant has claimed and received unemployment insurance benefits in the amount of \$2,720.00 for the ten weeks ending August 1, 2020.

The employer did not participate in the fact-finding interview. The fact-finder called the human resources help desk and there was no one there to answer the phone. Human Resources Manager Mary Bartachek was waiting on her cell phone for the employee at the front desk to call her cell phone but the call did not go through the front desk.

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, regardless of the source of the individual's wage credits:

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 disqualification shall continue 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 employer gave the claimant several opportunities to complete his progress notes and covered some of his shifts so he could work on his notes but the claimant failed to complete them and did not appear to recognize the urgency of doing so. The employer issued the claimant three written warnings and extended his deadline numerous times but instead of taking advantage of the employer's generosity the claimant further procrastinated.

The claimant stated he had computer issues and places the responsibility of resolving those issues on the employer. However, the employer gave the claimant the phone number for the computer support staff and reasonably relied on him to work with the computer employees to correct his computer problems.

The employer was pushing the claimant's deadlines back a few days at a time but there was a typographical error in his ACE stating he had until May 21, 2021, to complete his progress notes. Rather than realizing it was a typo or asking the employer for clarification the claimant asserted he did not have to turn in his notes until one year from the date the employer had given him as a final deadline. The claimant knew or should have known the employer was not giving him one year to complete progress notes that are supposed to be done within 24 hours of every shift so the employer can bill for its services.

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.

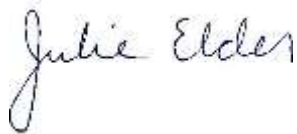
The unemployment insurance law requires benefits be recovered from a claimant who receives benefits and is later denied benefits even if the claimant acted in good faith and was not at fault. However, a claimant will not have to repay an overpayment when an initial decision to award benefits on an employment 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 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 claimant did not receive benefits due to fraud or willful misrepresentation and the employer failed to participate in the fact finding interview, the claimant is not required to repay the overpayment and the employer remains subject to charge for the overpaid benefits.

DECISION:

The June 18, 2020, 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 did not participate in the fact-finding interview within the meaning of the law. Therefore, the claimant's overpayment shall be charged to the employer's account.



Julie Elder
Administrative Law Judge

August 14, 2020
Decision Dated and Mailed

je/sam