

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

SANTIAGO GOMEZ

Claimant

APPEAL 17A-UI-11454-LJ

**ADMINISTRATIVE LAW JUDGE
DECISION**

SWIFT PORK COMPANY

Employer

OC: 10/15/17

Claimant: Respondent (2)

Iowa Code § 96.5(2)a – Discharge for Misconduct

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 October 31, 2017 (reference 01) unemployment insurance decision that allowed benefits based upon a determination that the claimant was discharged and the employer failed to establish the discharge was for willful or deliberate misconduct. The parties were properly notified of the hearing. An in-person hearing was held in Des Moines, Iowa, on December 28, 2017. The claimant, Santiago Gomez, participated and was represented by Philip Miller, Attorney at Law. The employer, Swift Pork Company, participated through Nicolas Aguirre, Human Resources Manager; and Toni Daters, Work Comp Manager. Claimant's Exhibits A through G, I, J, and K and Employer's Exhibits 1 through 13 were received and admitted into the record. Claimant's Exhibits A, B, C, and D are all unemployment appeal decisions involving other claimants and they carry no evidentiary value for this matter. The administrative law judge took official notice of the fact-finding documentation and the administrative record.

The administrative law judge notes that this matter was set for hearing initially on December 7, 2017. Claimant requested a continuance at that time, as the employer had not yet responded to his subpoenas duces tecum. The employer explained that it had only recently received the subpoenas and did not have a full opportunity to respond to it. Because of this, the continuance request was granted, and the parties agreed to reschedule the hearing for December 28. During the December 28 hearing, claimant moved for sanctions against the employer for failing to fully comply with his subpoenas duces tecum. This motion was denied, as it was not brought at least five days prior to the hearing, as required by Iowa Administrative Code rule 871—26.11(4). Claimant's attorney also moved for a continuance and to consolidate this case with another appeal set for hearing on February 13, 2018. Claimant's attorney, Philip Miller, also represents the named claimant in that appeal hearing. This motion was denied, as it was not brought at least five days prior to the hearing and as it was raised for the first time after commencing the hearing on December 28, 2017. During testimony, claimant's attorney made standing objections to leading and suggestive questions and to hearsay, and made a standing motion to strike Aguirre's testimony.

ISSUES:

Was the claimant discharged for disqualifying job-related misconduct?

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

Can 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: Claimant was employed full-time, most recently as a general laborer, from May 2, 2012, until October 2, 2017, when he was discharged. On September 27 at 4:09 p.m., claimant used his wife's ID card to clock her into work. Claimant's wife was not with him at the time clock at the time this occurred. Claimant's wife arrived at work at 4:53 p.m. that day. The employer first learned about this when Daters was notified that claimant's wife missed her scheduled physical therapy appointment that day. Daters looked into the matter and determined that claimant's wife was clocked into work at the same time that she should have been at her appointment. She emailed the safety manager, who in turn emailed the human resources department.

Aguirre conducted an investigation by speaking with Daters as well as claimant and his wife. Claimant admitted that he clocked his wife into work on September 27. Claimant wrote a statement admitting that he punched in for his wife. (Exhibit 4) Claimant contends his wife told him that Daters told her she could have someone clock in for her. HR Assistant Manager Emily Pottorff spoke with claimant's wife during the investigation. She admitted having her husband clock her in when she started physical therapy because she did not want to receive attendance points. (Exhibit 7) Ultimately, claimant was discharged for the "major policy infraction" of clocking in another employee. The employer provided a copy of its employee handbook stating "punching or tampering with another employee's time reporting" is dishonesty and an infraction of the employer's work rules. (Exhibit 13)

As the work comp manager, Daters interacted with claimant's wife after she sustained a work-related injury. Daters gave claimant's wife instructions on procedures for attending her physical therapy appointments. If claimant's wife had a physical therapy appointment at the beginning of the workday, she was instructed to attend that appointment and then punch in at work when she arrived. Daters maintains an online calendar that payroll is able to access to see the medical appointments employees attend for work-related injuries. Payroll can then make necessary adjustments to ensure that employees are receiving pay for these appointments. If an issue arises, an employee is instructed to come to Daters so she can help resolve it. In the past, Daters helped claimant's wife get attendance points removed from her record, when they were erroneously issued to her related to her attending appointments for her work-related injury. Daters denies ever instructing claimant's wife to punch in before going to an appointment or ever authorizing claimant's wife to have someone else punch in for her.

The administrative record reflects that claimant has received unemployment benefits in the amount of \$4,900.00, since filing a claim with an effective date of October 15, 2017, for the ten weeks ending December 23, 2017. The administrative record also establishes that the employer did participate in the fact-finding interview. The employer provided the name and contact information for Aguirre, but he was not available when called for the hearing. The employer also submitted documentation for the fact-finding interview.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes claimant was discharged from employment for disqualifying, job-related misconduct. Benefits are withheld.

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.

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). Misconduct must be "substantial" to warrant a denial of job insurance benefits. *Newman v. Iowa Dep't of Job Serv.*, 351 N.W.2d 806 (Iowa Ct. App. 1984). When based on carelessness, the carelessness must actually indicate a "wrongful intent" to be disqualifying in nature. *Id.* Negligence does not constitute misconduct unless recurrent in nature; a single act is not disqualifying unless indicative of a deliberate disregard of the employer's interests. *Henry v. Iowa Dep't of Job Serv.*, 391 N.W.2d 731 (Iowa Ct. App. 1986). Poor work performance is not misconduct in the absence of evidence of intent. *Miller v. Emp't Appeal Bd.*, 423 N.W.2d 211 (Iowa Ct. App. 1988).

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 employer's testimony more credible than claimant's testimony. Claimant gave several inconsistent statements during his testimony that undermined his believability. In contrast, the employer presented reasonable, consistent, and believable testimony regarding claimant's actions leading to the end of his employment. The employer is entitled to establish reasonable work rules and expect employees to abide by them. The administrative law judge believes claimant knew he was not permitted to clock in for another employee when that employee was not present at work. Claimant's actions on September 27 amount to a deliberate disregard of the employer's interests. Benefits are withheld.

The next issues to be determined are whether claimant has been overpaid benefits, whether the claimant must repay those benefits, and whether the employer's account will be charged. Iowa Code § 96.3(7)a-b, as amended in 2008, 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 section 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 section 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 state pursuant to section 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 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 they 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. Since the employer did participate in the fact-finding interview the claimant is obligated to repay to the agency the benefits he received and the employer's account shall not be charged.

DECISION:

The October 31, 2017 (reference 01) unemployment insurance decision is reversed. 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 \$4,900.00 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.

Elizabeth A. Johnson
Administrative Law Judge

Decision Dated and Mailed

lj/scn