IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

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

JILL A GIBSON
Claimant

ART PAPE TRANSFER INC
Employer

APPEAL NO: 19A-UI-04883-JE-T

ADMINISTRATIVE LAW JUDGE DECISION

OC: 05/19/19
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 12, 2019, 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 July 11 and continued on July 12, 2019. The claimant is working at a new job and was not available to participate in the hearing. Sauny Tucker, Chief Executive Officer, participated in the hearing on behalf of the employer. 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 van operations manager for Art Pape Transfer from February 3, 2014 to May 3, 2019. The claimant was employed by the previous owner and her employment was maintained when the new owners bought the business July 2, 2018. She was discharged for being cited as the reason by drivers that 15 out of 20 of them voluntarily quit and for not being able to get along with and not being honest with the employer's biggest client.

When the employer took over the business in July 2018 it had 27 drivers and at the time of the claimant's termination it had between 50 and 55 as the employer was adding drivers and staff. The employer lost 15 drivers between January 2019 and May 3, 2019 who stated the claimant was the reason they were leaving because if she did not like a driver she would not assign him loads (Employer's Exhibit One). She was also known to yell and scream at drivers and call them names.

On January 22, 2019, the employer's client, Hormel, complained about the claimant failing to make an appointment on a load it sent her and then giving the load back to Hormel saying she could not schedule it because of problems with weather and a driver quitting which the employer stated was untrue (Employer's Exhibit Two, Page 11). In an email to the employer, Hormel told it if it did not want to cover the load that was fine but Hormel would take that into consideration for "future freight opportunities" (Employer's Exhibit Two, Page 11).

The employer offered sign on and referral bonuses to employees. The referring employee received cash after the new employee worked there seven days, one month and six months. The claimant referred one employee, Kevin, and the employer allowed Kevin to take three weeks off after he worked his first two weeks. The employer told him it would employ him the two weeks before his vacation and would consider him full-time once he started after his vacation September 17, 2018. The bonus payout schedule should have been the first payment on September 28, 2018; the second payment October 26, 2018; and the third and final payment March 29, 2019. The referral bonuses were a new concept to the employer's team and Kevin was their first one. Instead of paying on the dates listed above the employer paid all payments but the last at least two weeks early. On February 22, 2019 the claimant sent the controller an email saying, "The 6 month referral for Orth (Kevin) you said would pay this week. It isn't in there?" (Employer's Exhibit Three). President A.J. Tucker had to get involved when the claimant had a meltdown upon being told Kevin quit before earning the third installment of the referral money of $500.00. The claimant cried and screamed and made a huge scene until the employer gave her the referral bonus at which point the claimant complained the employer should have been clear on the number of days the employee had to work before she earned the bonuses and then she threw the money back at the employer and said she did not want it but after she walked out she texted the employer and directed it to cut her a check for $500.00.

Ashley Weiland, Logistics manager-Inbound Operations, for John Deere, the employer's biggest client had several issues with the claimant. On March 22, 2019, they had an email exchange where Ms. Weiland stated the claimant's tracking events were not updated and the claimant blamed the situation on a new employee who was being let go (Employer's Exhibit Two, Page Two).

Mr. Tucker directed the claimant and the employee that ran the open deck line to cross train so they could fill in for each other and help each other if one was overwhelmed with work. On April 15, 2019, the claimant refused to give up her password so the other employee could get on her machines, even when directed to do so by Mr. Tucker.

On April 17, 2019, the last driver before the claimant's separation quit citing the claimant as the reason.

On April 19, 2019, Ms. Wieland was very upset with the claimant about a load she was supposed to have delivered and sent her an email stating, "We need to know about these situations the next business day not 3 days later. Are you checking the Outstanding Pickups daily to make sure everything is aligned? Was it someone else that accepted the load in your system? The location is closed today so by the time we are able to recover this load it will be 4 days late picking up" (Employer's Exhibit Two, Page 8). The claimant responded that it was accepted in error and she was "double checking the new girl's work to fine tune what she is doing now" (Employer's Exhibit Two, Page 7). Ms. Weiland replied, "We have had discussions before that (John Deere) needs to be involved if you miss a load or you are trying to make arrangements on situations. If you knew yesterday you had missed the load we should have been involved in which we would have recovered the shipment yesterday. I have instructed Scott in our office to now begin checking your Outstanding Pickups daily until we see improvement. If he receives pushback he is to get me involved as these should be managed daily with tracking events added" (Employer's Exhibit Two, Page 6).

Also on April 19, 2019, there was a problem with Hormel loads as the claimant failed to provide updates on eight loads of whether they were delivered or when delivery was anticipated (Employer's Exhibit Two, Page 14). Mr. Tucker emailed the claimant stating, "This is embarrassing. You ask people to come to you and not include me on things. They are going to continue to include me if we aren't meeting their expectations. Every load that is on her list (the eight loads from Hormel) along with every Hormel load that has delivered since needs to have the delivery times sent to (Hormel) by tomorrow at noon. Copy me on the email so that I know it

has been handled. This business is super important to us and our success. If we don't meet their expectations then we will lose it" (Employer's Exhibit Two, Page 13).

On April 20, 2019, Mr. Tucker sent the claimant and another employee an email about accepting a new client after explaining they were dry loads that did not leave a mess in the trailers (Employer's Exhibit Two, Page 16). The claimant responded, "I don't feel the alter loads fit well with the rest of our freight and we will have trailer issues" (Employer's Exhibit Two, Page 15). The employer felt the claimant was resistant to new business and only interested in doing things the way the previous employer did them.

On May 1, 2019, the claimant told Mr. Tucker she talked to Ms. Weiland and Ms. Weiland asked her when the employer was going to get her "some help that can actually do something?" Mr. Tucker indicated he did not believe Ms. Weiland said that and the claimant said they talk outside of work frequently and Mr. Tucker felt she was "insinuating that they have a great personal relationship and (Ms. Weiland) speaks very openly to her" (Employer's Exhibit Two, Page 3). Mr. Tucker called Ms. Weiland May 2, 2019, to ask her about the claimant's statement and she said she would never ask when the employer was going to get her more qualified help, that the claimant consistently blamed any issues on the "new people," and that she "avoids all communication with (the claimant) as much as she can and keeps any conversation to a minimum as, '(The claimant) burned that bridge' with her a long time ago'" (Employer's Exhibit Two, Page 3). Ms. Weiland also told the claimant to send her an email about an issue they were having as she preferred everything from the claimant is in written form after her previous dealings with the claimant where she felt she was dishonest with her (Employer's Exhibit Two Page 4).

The employer verbally warned the claimant on several occasions but did not document those conversations.

The employer terminated the claimant's employment for dishonesty, insubordination, and treating the drivers so badly that 15 of them quit citing the claimant as the reason for their leaving.

The claimant has claimed and received unemployment insurance benefits in the amount of $1,868.00 for the four weeks ending June 15, 2019.

The employer personally participated in the fact-finding interview through the statements of Chief Executive Officer Sauny Tucker. 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, 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.
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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 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).

An employee has a responsibility to be respectful of the employer, her co-workers and the employer's customers. In this case, the claimant was not. Her lack of respect toward the employer was apparent in the way she handled being told she would not receive a six month referral bonus because the driver quit before working six months, her resistance to bringing in new business, and her dishonesty with Mr. Tucker. Her lack of respect toward the drivers manifested itself in the fact that 15 drivers quit and said she was at least part of the reason they chose to leave. A problem with a couple drivers could be attributed to the drivers but when 15 drivers choose to leave their jobs at least partially because of the claimant it must be said that the common denominator in that situation is the claimant. Finally, the claimant was not respectful to the customers when she was dishonest with them. She blamed most of the issues the customers had on new employees. On April 19, 2019, the claimant made errors on both the Hormel and John Deere accounts. She failed to properly communicate with Hormel and let a John Deere load sit for three days without notifying John Deere of the problem. When Ms. Wieland asked what caused the problem with the load the claimant implied it was the fault of a new employee, a tactic she frequently employed when speaking to Ms. Wieland. On May 1, 2019, the claimant was dishonest with Mr. Tucker about a conversation she said she had with Ms. Wieland, the substance of which Ms. Wieland denied when contacted by Mr. Tucker. Additionally, the claimant acted as if she and Ms. Wieland enjoyed a close personal friendship outside of work and that Ms. Wieland spoke to her freely, both of which Ms. Wieland also denied. Ms. Wieland in fact so distrusted the claimant that she began to insist their communication take place only in writing through emails. The 15th driver quitting April 19, 2019, and the claimant's dishonesty May 1, 2019, were the two final straws for the employer.

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.
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> (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.
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> (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.
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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 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 employer participated in the fact-finding interview personally through the statements of Chief Executive Officer Sauny Tucker. Consequently, the claimant's overpayment of benefits cannot be waived and she is overpaid benefits in the amount of $1,868.00 for the four weeks ending June 15, 2019.

DECISION:

The June 12, 2019, 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 $1,868.00 for the four weeks ending June 15, 2019.

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Julie Elder
Administrative Law Judge

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Decision Dated and Mailed

je/scn