

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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

CLAIMANT

APPEAL NO: 19A-UI-01367-JE-T

EMPLOYER

**ADMINISTRATIVE LAW JUDGE
PUBLIC DECISION**

**OC: 01/20/19
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 February 8, 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 March 4, 2019. The claimant did not respond to the hearing notice and did not participate in the hearing. The employer participated in the hearing.

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 direct support professional from July 16, 2018 to January 24, 2019. He was discharged for sleeping on the job and being intoxicated at work.

The employer serves live-in clients with disabilities and two of three individuals in the house where the claimant worked require 24 hour supervision. On January 12, 2019, the claimant began his shift at 4:00 p.m. He was scheduled to work until Sunday, January 13, 2019, at 9:00 a.m. At approximately 6:45 p.m. one of the individuals came out of his room and found the claimant sleeping on the sofa. The stove was on and there was a pot on the stove. The individual tried to wake the claimant by shouting his name and poking him but the claimant did not wake up. The clients were concerned the claimant was dead and called 911. When the paramedics arrived they were also unable to wake the claimant up. Eventually the paramedics rolled the claimant on his side and he woke up. After observing him the paramedics thought the claimant was under the influence of alcohol and called the police. The police also believed the claimant was intoxicated because his eyes were bloodshot, his speech was slurred, and he could not stand up straight. The police asked the claimant to take a breathalyzer test but the claimant refused and the police told the claimant he needed to leave the premises and called the employer. The claimant indicated he wanted to drive home and the police told him if he

attempted to do so he would be arrested for OWI. The claimant called a member of his family for a ride and was gone by the time the employer arrived.

The employer attempted to contact the claimant January 12 and 13, 2019, to notify him he was suspended and reached him at 7:52 p.m. January 13, 2019. The employer asked the claimant what happened and he stated he had two beers the morning of January 12, 2019, but denied being under the influence. After speaking further with the police, interviewing the individuals in the house, and talking to the Department of Human Services, the employer made the decision to terminate the claimant's employment January 17, 2019, for denial of critical care by sleeping on the job and being under the influence of alcohol while at work. It attempted to contact the claimant several times each day between January 17 and January 24, 2019, and finally was able to reach the claimant January 24, 2019.

The claimant has claimed and received unemployment insurance benefits in the amount of \$1,980.00 for the four weeks ending March 2, 2019.

The employer participated in the fact-finding interview through written statements.

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 claimant was sleeping on the job where two of the three individuals he cared for require 24 hour supervision. While staff is allowed to sleep if the individuals are sleeping between 11:00 p.m. and 6:00 a.m., the individuals on January 12, 2019, were clearly not sleeping at 6:45 p.m. when one found the claimant sleeping and tried, unsuccessfully, to wake him. Both the paramedics and the police believed the claimant was under the influence when neither the individuals in the home or medical personnel could wake him up. It is much more likely than not that the claimant was unconscious from intoxication and that was why those parties could not wake him. Leaving aside whether the claimant was intoxicated, however, as he would not submit to a breathalyzer test, it is a major violation of the employer's policy to sleep on the job when the individuals require 24 hour supervision. Additionally, the claimant created a fire hazard when he left the stove on with a pot on it.

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 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 through detailed written statements that contained enough specific information regarding the events leading to the separation to find in favor of the employer. The employer's written statements constitute participation within the meaning of the law. Consequently, the claimant's overpayment of benefits cannot be waived and he is overpaid benefits in the amount of \$1,980.00 for the four weeks ending March 2, 2019.

DECISION:

The February 8, 2019, 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 participated in the fact-finding interview within the meaning of the law. Therefore, the claimant is overpaid benefits in the amount of \$1,980.00.

Julie Elder
Administrative Law Judge

Decision Dated and Mailed

je/scn