

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**RICHARD APPEGATE**  
Claimant

**APPEAL NO: 15A-UI-07020-JE-T**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**ALL CLEAN OF IOWA INC**  
Employer

**OC: 05/31/15**  
**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 June 12, 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 June 12, 2015. The claimant participated in the hearing. Emmett Schnathorst, President, participated in the hearing on behalf of the employer. Employer's Exhibits One through Five 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 part-time hood cleaner for All Clean of Iowa from September 8, 2014 to November 5, 2014. He was discharged after failing to perform his job duties at an assignment November 4, 2014.

On November 4, 2014, the claimant and his crew partner, Jason Myers, were assigned to clean the Lucky Pig restaurant in Ogden, Iowa. The job was to start at 9:00 p.m. but the claimant did not arrive until 9:30 p.m. The claimant was the crew lead and indicated on his checklist/time sheet that he left the shop in Des Moines at 7:30 p.m. and picked up Mr. Myers but did not arrive at the job site until 9:30 p.m. The employer testified it generally takes 40 minutes to get to Ogden from the shop in Des Moines and Mr. Myers lives on the south side of Des Moines. He also indicated it took him three and one half-hours to get from Ogden to the shop on the way home (Employer's Exhibit Two).

The customer called the employer to complain about the mess left by the claimant and Mr. Myers, which was the claimant's responsibility as the crew lead. The claimant did not do a thorough cleaning and left water all over the floor. There was so much water on the kitchen floor it overflowed into the dining area. Because the employer cleans grease traps and grill hoods, the water in question was greasy and dirty. "The electrical was flooded behind the wall

and an electrical outlet was blown. The waitress station was also flooded and the ledge which holds the salamander was bent. The work area was left in very poor condition and not cleaned properly" (Employer's Exhibit One). The claimant was supposed to do a walk through with a checklist verifying that everything is done. The employer directs employees to initial each line of the checklist but instead the claimant initialed the first line and then drew a line down to the bottom of the page and initialed the last line (Employer's Exhibit Two).

Additionally, the claimant did not check his truck before he left for Ogden and was missing a key piece of equipment. Consequently, he had to leave the job site and drive to Grimes to meet another employee and pick up the needed piece of equipment. He was not prepared for the job. The employer was forced to pay the wages from the job to the claimant and his crewmate but after viewing the state the claimant and his crewmate left the job site in, he could not accept payment from the owners of Lucky Pig because he feared he would lose the contract.

The claimant received a final written warning October 16, 2014, after the claimant and his crew partner Bill Butler were assigned to clean the 5 and Diner restaurant beginning at 8:00 p.m. The claimant received a written warning following that job because he "did not lock up the restaurant and you left a terrible mess. The restaurant called and was not happy at all with you two. This puts our business in jeopardy of losing an account" (Employer's Exhibit One). Under "Terms" of the warning the employer indicated, "If incidences like these continue, it can be cause for immediate suspension or possibly dismissal. We urge you to be prompt, honest, and not negligent. Our policy is to provide our customers the best service possible without causing them any inconvenience. This kind of work is definitely not within policy. Please strive to correct these issues. A copy of this warning notice will be retained in your personal file" (Employer's Exhibit One). The claimant signed the warning.

After the claimant's performance at 5 & Diner and Lucky Pig, the employer determined it had no choice but to terminate the claimant's employment effective November 5, 2014.

The claimant has claimed and received unemployment insurance benefits in the amount of \$396.00 for the six weeks ending July 11, 2015.

The employer personally participated in the fact-finding interview through the statements of Emmett Schnathorst, 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 § 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 failed to meet the minimum expectations on the October 16, 2014, job site or the November 4, 2014, job site. The claimant received a final written warning October 17, 2014, but despite that warning his performance did not improve. The last assignment could hardly have been handled more poorly than it was by the claimant. It took him two hours to drive to a job site that would usually take 40 minutes. Even though it took him two hours to get to the job site, he still forgot a piece of equipment and had to drive to Grimes to meet another employee before returning to Ogden. Once at the Lucky Pig job site, the claimant failed to clean up after he was done and instead left so much greasy, oily, dirty water on the kitchen floor that it actually overflowed in the dining room. He also caused electrical problems by flooding the electrical behind a wall and blowing an electrical outlet. He made a large mess and did not clean it up. The employer provides an explicit checklist detailing items to be done on the job and has instructed employees they need to initial each line on the checklist. Instead, on the Lucky Pig job, the claimant initialed the first line and drew a line to the bottom where he initialed the last line. He clearly did not perform the tasks on the checklist or the restaurant would not have been left in such disarray and the employer would not have had to waive its fee.

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 § 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 President Emmett Schnathorst. Consequently, the claimant's overpayment of benefits cannot be waived and he is overpaid benefits in the amount of \$396.00 for the six weeks ending July 11, 2015. 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 personally participated in the fact-finding interview within the meaning of the law. Therefore, the claimant is overpaid benefits in the amount of \$396.00. for the six weeks ending July 11, 2015.

**DECISION:**

The June 12, 2015, 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 personally participated in the fact-finding interview within the meaning of the law. Therefore, the claimant is overpaid benefits in the amount of \$396.00.

---

Julie Elder  
Administrative Law Judge

---

Decision Dated and Mailed

je/pjs