IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

REGINA HYDE
Claimant

WALGREEN CO
Employer

APPEAL NO: 17A-UI-02020-JE-T

ADMINISTRATIVE LAW JUDGE DECISION

OC: 01/29/17
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 14, 2017, 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 16, 2017. The claimant participated in the hearing. Tara Reicks, Store Manager and Tom Kuiper, Employer Representative, participated in the hearing on behalf of the employer. Employer's Exhibits 1, 2 and 3 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 beauty adviser for Walgreen Company from July 24, 1999 to January 13, 2017. She was discharged for violating a last chance agreement (Employer's Exhibit 1).

On November 30, 2016, the employer had a reasonable suspicion the claimant had been drinking and after having a second observer speak to the claimant and come to the same conclusion the employer notified the corporate employee relations department and it sent an employee who administers breathalyzer tests to the store. The claimant tested at .079 percent at 6:36 p.m. and .077 percent at 6:37 p.m. in violation of the employer's policy.

The employer met with the claimant December 5, 2016, and presented her with the options of termination or being placed on a last chance agreement (Employer's Exhibit 1). The claimant chose to accept the last chance agreement which required her to schedule an assessment within 72 hours, call an 800 number daily to see if she was scheduled for a drug/alcohol screening test, and to comply with any treatment plan recommended (Employer's Exhibit 1).

On January 11, 2017, the employer's third party administrator sent the claimant a warning letter stating she needed to "contact Workplace Services within 24 hours of receipt of the letter to remain in compliance" (Employer's Exhibit 2). The claimant received the letter January 11,

2017, but failed to contact Workplace Services as of January 13, 2017, at which time the third party administrator sent the employer a letter stating the claimant was noncompliant with the program and that her employment was terminated. The employer does not know what the claimant failed to comply with other than contacting Workplace Services within 24 hours.

The claimant stated she was required to attend 90 Alcoholics Anonymous meetings in 90 days, attend individual and group therapy, see a psychiatrist, see a medical doctor, and call the 800 number daily to see if she needed to submit to testing. She stated she did not attend meetings everyday, but went twice per week and had difficulty attending all of her scheduled appointments. Because she failed to comply with the program requirements she had to start the program again and consequently had not completed her treatment by her return to work date of January 9, 2017. The employer's third party administrator then sent the warning letter instructing the claimant to contact it within 24 hours and when the claimant failed to do so she was notified her employment was terminated.

The claimant has claimed and received unemployment insurance benefits in the amount of $1,776.00 for the six weeks ending March 11, 2017.

The employer personally participated in the fact-finding interview through the statements of Store Manager Tara Reicks. 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 signed a last chance agreement December 5, 2016, after the employer discovered she was under the influence of alcohol at work November 30, 2016. In order to retain her job the claimant was obligated to comply with all requirements of treatment after the assessment determined she needed to undergo treatment for a dependence on alcohol. The claimant testified she did not call the 800 number daily to see if she was scheduled to be tested every day, did not attend Alcoholic Anonymous meetings every day, and did not show up for all of her therapy and medical appointments as required. When the employer's third party administrator notified her she needed to contact it within 24 hours the claimant failed to do so and the third party administrator notified the claimant her employment was terminated.

While the claimant stated when she complained about attending 90 meetings in 90 days and the number of psychiatric and medical appointments she was required to attend her counselor and psychiatrist told her she could go to two meetings per week, that information must not have been conveyed to the third party administrator or it is unlikely the claimant would have been found to be out of compliance with the treatment program and last chance agreement. Additionally, the claimant, who is still attending the treatment program, did not provide any documentation from a counselor confirming she was told she did not have to go to 90 meetings in 90 days. Furthermore, she stated she did not have to call the 800 number until after she completed treatment but could not explain if that was the case why she called the number three or four times in December 2016 and January and February 2017 and she did not provide any documentation in support of that assertion either. The last chance agreement specifies the claimant was required to call the 800 number both before and after returning to work and she did not do so. A key aspect of treatment is insuring the client is not continuing to engage in the behavior that landed her in treatment in the first place. As a result it strains credibility to believe the claimant was not required to submit to testing while undergoing treatment.

Under these circumstances, the administrative law judge concludes the claimant violated the last chance agreement and her 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 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 Store Manager Tara Reicks. Consequently, the claimant's overpayment of benefits cannot be waived and she is overpaid benefits in the amount of $1,776.00 for the six weeks ending March 11, 2017.

DECISION:

The February 14, 2017, 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 $1,776.00 for the six weeks ending March 11, 2017.

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Julie Elder
Administrative Law Judge

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Decision Dated and Mailed

je/rvs