

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

DENNIS D BRU
Claimant

APPEAL NO. 14A-UI-07473-H2T

**ADMINISTRATIVE LAW JUDGE
DECISION**

**VERMEER MANUFACTURING COMPANY
INC**
Employer

OC: 06/29/14
Claimant: Respondent (2)

Iowa Code § 96.5(2)a – Discharge/Misconduct
Iowa Code § 96.3(7) – Recovery of Benefit Overpayment
871 IAC 24.10 – Employer Participation in the fact-finding Interview

STATEMENT OF THE CASE:

The employer filed an appeal from the July 16, 2014, (reference 01) unemployment insurance decision that allowed benefits. After due notice was issued, a hearing was held on August 12, 2014. The claimant did participate. The employer did participate through (representative) Cornie Van Wallbeek, Human Resources Business Partner; Carma Nicholson, Production Manager; Chad Wood, a production employee and Shane Bonnet, Area Manager. Employer's Exhibit One was entered and received into the record.

ISSUES:

Was the claimant discharged due to job connected misconduct?

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

Can any 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: The claimant was employed full time as a weld tech group leader beginning on June 8, 1993 through June 27, 2014 when he was discharged. The employer's policies, a copy of which had been given to the claimant require that all employees treat each other in a respectful manner. No employee is to be subjected to a work environment that is discriminatory or harassing. As a group leader, the claimant was responsible for ensuring that the employees who worked for him followed the employer's policies. The claimant himself was also obligated to follow the policies.

The employer began an investigation on June 12, 2014 after employee Chad Wood complained that the claimant was threatening him and other employees with being fired if they did not meet his expectations. During the investigation the employer learned that the claimant had on more

than one occasion and to more than one employee, threatened to fire them for not performing their job duties to his expectations. During the investigation the employer learned that employees were fearful about reporting the claimant as they believed he would retaliate against them and had threatened at least one employee with retaliation if the employee went forward with his complaint.

Of the four employees interviewed all confirmed that the claimant made disparaging comments to them and at least one of a sexual nature commenting on the size of a coworker's penis. The claimant did not have the authority to discharge any employee and had previously asked his supervisor to discharge an employee who did not meet his expectations. Mr. Wood decided to go forward with his complaint when he determined that he had had enough.

When the claimant was questioned he told the employer that he like the 'old school' way of doing things. The claimant did not have the right to violate any of the employer's policies to engage in his preferred method of handling the work load. The claimant called employees stupid and told them they were doing a "shitty job." Each of the employees interviewed all indicated they feared the claimant so had not come forward on their own. The claimant's direct supervisor, Shane Bonnet, had verbally spoken to the claimant prior to the investigation about how he spoke to his subordinates. The claimant knew or should have known that cussing at employees or threatening them with discharge. The claimant admitted that he had made a mistake in the way he treated the employees who worked for him.

It was common knowledge among employees that the claimant was a collector of firearms. They feared that the claimant would physically harm them if they complained. After Mr. Wood complained, he moved his wife and children out of their home for a period of time fearing that the claimant would go to his home when he was not there and injure his family. All of the employees interviewed expressed the same level of fear of the claimant.

The claimant went so far as to tell an employee that if he did not take his thumbs out of his pants pockets he would 'walk him out the door' or have him discharged. He told the employee, "you do not want to challenge my authority or you will go the hell home right now." He told Mr. Wood that he was stupid and could not weld correctly and to go over and work with another welder. The claimant then told Mr. Wood that he would "be his bitch" while working for the other welder. The claimant told Mr. Wood that he should learn how to say "would you like fries with that?" indicating that Mr. Wood was going to lose his job and would need to work at McDonalds. The claimant simply was repeatedly and regularly disrespectful to his coworkers and had all of them fearful of complaining about his behavior.

At the conclusion of the investigation the employer discharged the claimant for his repeated violation of their respectful workplace policy.

The employer provided their correct contact information for the fact finder, but the fact finder never contacted them to give them an opportunity to present their side of the story. Under these circumstances the employer is considered to have participated in the fact-finding interview.

The claimant has received unemployment benefits after the separation on a claim with an effective date of June 29, 2014.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment due to job-related 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).

Generally, continued refusal to follow reasonable instructions constitutes misconduct. *Gilliam v. Atlantic Bottling Company*, 453 N.W.2d 230 (Iowa App. 1990).

The administrative law judge is persuaded that the claimant regularly and repeatedly spoke to employees in a threatening, demeaning and disrespectful manner. As a work leader the claimant knew or should have known that he was obligated to follow the employer's policies. The claimant's actions are not in the employer's best interest as employees were moving out of that work area simply to get away from the claimant. The employer's policy provides that even one such violation of the policy could lead to discharge. The claimant's repeated actions are sufficient disqualifying misconduct to disqualify him from receipt of unemployment insurance benefits. Benefits are denied.

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.

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 § 96.8, subsection 5.

b. (1) 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 § 96.8, subsection 5. 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 § 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. The employer shall not be charged with the benefits.

(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 states pursuant to § 602.10101.

871 IAC 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 § 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 § 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 § 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 § 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 § 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 § 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 the claimant 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). In this case, the claimant has received benefits but was not eligible for those benefits. Since the employer intended to participate in the fact-finding interview but did not do so only because the fact-finder did not call them to provide the opportunity, the employer is considered to have participated in the fact-finding. The claimant is obligated to repay the benefits he received to the agency and the employer's account shall not be charged.

DECISION:

The July 16, 2014, (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 been overpaid unemployment insurance benefits in the amount of \$2,040.00 and he is obligated to repay the agency those benefits. The employer did participate in the fact-finding interview and their account shall not be charged.

Teresa K. Hillary
Administrative Law Judge

Decision Dated and Mailed

tkh/css