

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

HERBERT A LANGLEY
Claimant

WELLS ENTERPRISES INC
Employer

APPEAL 19A-UI-07821-SC-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

**OC: 09/08/19
Claimant: Respondent (2)**

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Code § 96.3(7) – Recovery of Benefit Overpayment
Iowa Admin. Code r. 871-24.10 – Employer/Representative Participation Fact-finding Interview

STATEMENT OF THE CASE:

On October 7, 2019, Wells Enterprises, Inc. (employer) filed an appeal from the September 26, 2019, reference 01, unemployment insurance decision that allowed benefits based upon the determination Herbert A. Langley (claimant) did not engage in willful or deliberate misconduct. The parties were properly notified about the hearing. A telephone hearing was held on November 15, 2019. The claimant participated personally. Keyan McNear, the claimant's former co-worker, participated on his behalf. The employer participated through Andrea Rollins, HR Business Partner, and Bob Vogt, Associate HR Business Partner, and was represented by Jackie Boudreaux, Hearing Representative with ADP-Equifax. The Employer's Exhibits 1 and 2 were admitted without objection. The Employer's Exhibits 3 through 6 were admitted over the claimant's objections on the basis of hearsay and relevance; although, exhibits 4 and 6 were not given any consideration in the decision that follows.

ISSUES:

Was the claimant discharged for disqualifying job-related misconduct?
Has the claimant been overpaid unemployment insurance benefits and, if so, can the repayment of those benefits to the agency be waived and the employer's account charged?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed full-time as Tank Hookup beginning on February 20, 2017, and was separated from employment on August 15, 2019, when he was discharged. The employer has a policy that states employees should show courtesy to others and prohibits sexual or other unlawful or unwelcome harassment.

On August 8, 2019, two female janitors were getting ready to clean the bathroom located in the men's locker room. The bathroom does not have a door but is an open entryway. There was an employee using a bathroom stall and they had placed a barricade in front of the bathroom entrance to prevent others from using the bathroom. The two employees were waiting outside

the opening to the bathroom for the last employee to finish so they could start cleaning. The claimant went past the barricades to use the bathroom. He elected to use a urinal to relieve himself. The two employees had to turn away to avoid seeing the claimant's genitalia.

Two or three days later, one of the janitors reported the incident to Human Resources. Bob Vogt, Associate HR Business Partner, collected statements from the janitors involved and the claimant. The claimant did not include in his statement any denial that the female employees had been present. He acknowledged he went into the bathroom while it was barricaded but did not think it delayed their ability to clean. The employer discharged the claimant for violation of its policy.

The claimant had one disciplinary action in the year before the final incident. He was suspended for five days for using profanity over the radio when speaking with a co-worker. The next step in the employer's progressive disciplinary process was termination.

The administrative record reflects that claimant has received unemployment benefits in the amount of \$2,075.00, since filing a claim with an effective date of September 8, 2019, for the five weeks ending October 12, 2019. Stacy Rupe, HR Service Center Representative, participated on behalf of the employer during the fact-finding interview.

REASONING AND CONCLUSIONS OF LAW:

1. Was the claimant discharged for disqualifying job-related misconduct?

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

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 proof in establishing disqualifying job misconduct. *Cosper v. Iowa Dep't of Job Serv.*, 321 N.W.2d 6 (Iowa 1982). The issue is not whether the employer made a correct decision in separating claimant, but whether the claimant is entitled to unemployment insurance benefits. *Infante v. Iowa Dep't of Job Serv.*, 364 N.W.2d 262 (Iowa Ct. App. 1984). Misconduct must be "substantial" to warrant a denial of job insurance benefits. *Newman v. Iowa Dep't of Job Serv.*, 351 N.W.2d 806 (Iowa Ct. App. 1984). Negligence does not constitute misconduct unless recurrent in nature; a single act is not disqualifying unless indicative of a deliberate disregard of the employer's interests. *Henry v. Iowa Dep't of Job Serv.*, 391 N.W.2d 731 (Iowa Ct. App. 1986).

It is the duty of the administrative law judge as the trier of fact in this case, to determine the credibility of witnesses, weigh the evidence and decide the facts in issue. *Arndt v. City of LeClaire*, 728 N.W.2d 389, 394-395 (Iowa 2007). The administrative law judge may believe all, part or none of any witness's testimony. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996). In assessing the credibility of witnesses, the administrative law judge should consider the evidence using his or her own observations, common sense and experience. *Id.* In determining the facts, and deciding what testimony to believe, the fact finder may consider the following factors: whether the testimony is reasonable and consistent with other believable evidence; whether a witness has made inconsistent statements; the witness's appearance, conduct, age, intelligence, memory and knowledge of the facts; and the witness's interest in the trial, their motive, candor, bias and prejudice. *Id.*

The findings of fact show how the disputed factual issues were resolved. After assessing the credibility of the witnesses who testified during the hearing, the reliability of the evidence submitted, considering the applicable factors listed above, and using her own common sense and experience, the administrative law judge attributes more weight to the employer's version of events. The employer's documents were kept during the normal course of business and the claimant, at times, was evasive when answering questions.

The employer has met the burden of proof to establish that the claimant acted deliberately or with recurrent negligence in violation of company policy, procedure, or prior warning. The employer has a duty and an interest in providing a safe and comfortable work environment for all employees. The claimant entered a barricaded bathroom and used a urinal which, required him to expose his genitalia, with female co-workers present. The claimant's conduct was a deliberate disregard of the employer's interest and outside the scope of behavior an employer can reasonably expect from its employees. This is disqualifying misconduct even without prior warning.

The claimant has raised the argument that other employees have engaged in the same conduct without discipline. However, he did not provide specific information about when these incidents occurred. Additionally, there was no information provided to indicate that management was

aware of the other alleged incidents. Therefore, the claimant's argument is not persuasive. Benefits are denied.

II. Has the claimant been overpaid unemployment insurance benefits and, if so, can the repayment of those benefits to the agency be waived and the employer's account charged?

For the reasons that follow, the administrative law judge concludes the claimant has been overpaid unemployment insurance benefits and the employer participated in the fact-finding interview. As a result, the claimant is obligated to repay the benefits he received and the employer's account cannot be charged.

Iowa Code section 96.3(7)a, b, as amended in 2008, provides:

Payment – determination – duration – child support intercept.

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.

b. (1) (a) 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 section 96.8, subsection 5. The employer shall not be relieved of charges if benefits are paid because the employer or an agent of the employer failed to respond timely or adequately to the department's request for information relating to the payment of benefits. This prohibition against relief of charges shall apply to both contributory and reimbursable employers.

(b) 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 section 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.

(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 state pursuant to section 602.10101.

Iowa Admin. Code r. 871-24.10(1) 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 un rebutted 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.

Because the claimant's separation was disqualifying, benefits were paid to which he 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. Iowa Code § 96.3(7). 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. Iowa Admin. Code r. 871-24.10(1). 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), Iowa Admin. Code r. 871-24.10.

In this case, the claimant has received benefits but was not eligible for those benefits. The employer provided a participant for the fact-finding interview. Since the employer participated in the fact-finding interview, the claimant is obligated to repay to the agency the benefits he received and the employer's account shall not be charged.

DECISION:

The September 26, 2019, reference 01, unemployment insurance 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 \$2,075.00 and is obligated to repay the agency those benefits. The employer participated in the fact-finding interview and its account shall not be charged.

Stephanie R. Callahan
Administrative Law Judge

Decision Dated and Mailed

src/scn