IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

AUSTIN P FLUGUM Claimant **WHIRLPOOL CORPORATION** Employer	**APPEAL 16A-UI-02091-JP** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 01/17/16** **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:

The employer filed an appeal from the February 11, 2016 (reference 01) unemployment insurance decision that allowed benefits. The parties were properly notified about the hearing. An in-person hearing was held on June 23, 2016 at 4444 1st Avenue Northeast, Lindale Mall, Cedar Rapids, Iowa. Claimant participated. Claimant subpoenaed four witnesses, continuous improvement organization Kerry Waddell, help chain specialist Josh Knight, value stream manager Audrey Brickman, and human resources generalist Sue Schoenfelder. Mr. Waddell, Mr. Knight, Ms. Brickman, and Ms. Schoenfelder all appeared and testified at the hearing. Employer participated through Ms. Schoenfelder. Claimant objected that the employer did not send a representative to participate at the hearing. However, although Ms. Schoenfelder was subpoenaed by claimant does not preclude her from participating on behalf of the employer. Claimant's objection was overruled, a hearing was held, and Ms. Schoenfelder testified on behalf of the employer.

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?

Can 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: Claimant was employed full time as a utility assembler from March 5, 2012 and was separated from employment on January 26, 2016, when he was discharged.

Claimant was discharged for violating the non-discrimination and anti-harassment policy. The employer has a written non-discrimination and anti-harassment policy that prohibits offensive comments about race or sex by employees. Claimant was aware of the policy. Claimant signed for the policy on March 5, 2012. It is a zero tolerance policy.

On January 18, 2016, claimant was coming off of a break with his coworkers and everyone was telling jokes. Claimant told two jokes to the "other employee". Claimant's jokes were: "Why don't you play UNO with a Mexican? They take all the green cards." and "What did the black boy say to his mother after he put flour on his face? The mother smacked him, then he went to his father, the father smacked him, then he went to his grandmother and his grandmother also smacked him, then went back to his mother she asked him what did he learn? The black boy said I have been white for five minutes and I don't like you black motherfuckers." After telling the jokes claimant started laughing.

On January 19, 2016, claimant worked his scheduled shift. Claimant was assigned to work a two-person job with the "other employee". While they were working, claimant did not think the "other employee" was performing his job correctly, which affected how claimant could perform his job. Claimant complained on more than one occasion to the employer about the "other employee". The "other employee" also complained to the employer about working with claimant. The "other employee" complained to Ms. Brickman that he was upset with claimant and brought up claimant's jokes. Ms. Brickman sent the "other employee" up to Ms. Schoenfelder s office. The "other employee" indicated to Ms. Schoenfelder that claimant told two jokes and the employee did not want to work with the claimant anymore. The "other employee" wrote a statement. Ms. Schoenfelder interviewed three witnesses but only one witness actually heard both jokes. The other two witnesses stated that they had heard claimant say jokes before, but they did not hear what happened on the January 18, 2016. One of the witnesses stated that jokes were being made in the area and it was common practice but claimant's jokes were above the normal jokes being made. The three witnesses wrote witness statements. Ms. Schoenfelder then spoke with Mr. Waddell, who is the union representative. Ms. Schoenfelder then met with Mr. Waddell and claimant on January 19, 2016. During the meeting, Ms. Schoenfelder asked if claimant stated the jokes. Claimant admitted to saying both of the jokes. Claimant stated he did not have problems with the "other employee" before. The employer then suspended claimant pending investigation, without pay. The employer reviewed all of the information and discharged claimant on January 26, 2016.

The administrative record reflects that claimant has received unemployment benefits in the amount of $8,865.00, since filing a claim with an effective date of January 17, 2016, for the 22 weeks ending June 18, 2016. The administrative record also establishes that the employer did not participate in 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 due to job-related misconduct. Benefits are denied.

It is the duty of an administrative law judge and 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, as the finder of fact, 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. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996). 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 evidence you believe; 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. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996).

The Iowa Supreme Court has ruled that if a party has the power to produce more explicit and direct evidence than it chooses to present, the administrative law judge may infer that evidence not presented would reveal deficiencies in the party's case. *Crosser v. Iowa Dep't of Pub. Safety*, 240 N.W.2d 682 (Iowa 1976). This administrative law judge assessed the credibility of the witnesses who testified during the hearing, considering the applicable factors listed above, and used my own common sense and experience. While the employer did not present the "other employee" or the three witnesses to provide sworn testimony or submit to cross-examination, the combination of Ms. Schoenfelder, Mr. Knight, Ms. Brickman, and Mr. Waddell's testimony, when compared to claimant's recollection of the event, establishes the employer's evidence as credible.

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 and (8) provides:

> Discharge for misconduct.
>
> (1) Definition.
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> 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).

> (8) Past acts of misconduct. While past acts and warnings can be used to determine the magnitude of a current act of misconduct, a discharge for misconduct cannot be based on such past act or acts. The termination of employment must be based on a current act.

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). "The use of profanity or offensive language in a confrontational, disrespectful, or name-calling context may be recognized as misconduct, even in the case of isolated incidents or situations in which the target of abusive name-calling is not present when the vulgar statements are initially made." *Myers v. Emp't Appeal Bd.*, 462 N.W.2d 734 (Iowa Ct. App. 1990).

The employer is entitled to establish reasonable work rules and expect employees to abide by them. The employer has a non-discrimination and anti-harassment policy. On January 18, 2016, claimant told two offensive and disrespectful jokes to the "other employee". Claimant's argument about when the jokes were told and that he did not use the phrase "black motherfuckers" is not persuasive. Claimant's two jokes, regardless of whether they were stated on January 18 or around January 14, were clearly offensive and disrespectful. Even if claimant did not use the phrase "black motherfuckers," it does not change the nature of the jokes and they would still be considered offensive and disrespectful. It is also not persuasive that the "other employee" waited until there was a disagreement with claimant about job performance before the incident was reported. When the incident was reported does not change the nature of the jokes and the incident was clearly reported to the employer less than a week after the jokes were told and is considered a current act.

The employer has presented substantial and credible evidence that claimant told two jokes to a coworker that were offensive and disrespectful. The employer has a duty to protect the safety and wellbeing of its employees. Claimant's conduct is considered disqualifying misconduct, even without prior warning. Benefits are denied.

Iowa Code § 96.3-7, as amended in 2008, provides:

> 7. Recovery of overpayment of benefits.
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> 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.
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> 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 section 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 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. The employer shall not be charged with the benefits.
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> (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 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.
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> This rule is intended to implement Iowa Code section 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 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. 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), Iowa Admin. Code r. 871-24.10. In this case, the claimant has received benefits but was not eligible for those benefits. Since the employer did not participate in the fact-finding interview the claimant is not obligated to repay to the agency the benefits he received and the employer's account shall be charged.

DECISION:

The February 11, 2016 (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.

Claimant has been overpaid unemployment insurance benefits in the amount of $8,865.00 and is not obligated to repay the agency those benefits. The employer did not participate in the fact-finding interview and its account shall be charged.

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Jeremy Peterson
Administrative Law Judge

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Decision Dated and Mailed

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