

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

ERIC P PLOWMAN
Claimant

REMBRANDT ENTERPRISES INC
Employer

APPEAL 17A-UI-00013-JCT

**ADMINISTRATIVE LAW JUDGE
DECISION**

**OC: 12/04/16
Claimant: Respondent (1)**

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 December 23, 2016, (reference 01) unemployment insurance decision that allowed benefits. The parties were properly notified about the hearing. A telephone hearing was scheduled to be held on January 24, 2017. The hearing was continued to allow the claimant and his attorney to both have a copy of employer exhibits which consisted over 100 pages. A second hearing was scheduled for February 9, 2017 and due notice was issued. The claimant participated personally and was represented by Andrea Buckley, Attorney at Law. The employer participated through Pamela Winkel, HR Administrator. Sara Fassler, QA Manager. Approximately three and a half hours prior to the hearing, the employer requested a postponement due to scheduled layoffs. The request was denied by the administrative law judge as untimely. Employer Exhibits 1 through 11 were admitted into evidence. The administrative law judge took official notice of the administrative records including the fact-finding documents. Based on the evidence, the arguments presented, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUES:

Was the claimant discharged for disqualifying job-related 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 began employment with this employer in 2009 and in January 2015, was promoted to full-time quality assurance manager. The claimant was separated from employment on December 6, 2016, when he was discharged for unsatisfactory performance (Employer Exhibits 2 and 3).

The employer's business operations include the processing and production of food product, which is distributed in the United States and abroad. Consequently, the employer is required to conduct rigorous screenings, samplings and complete records related to food safety issues. The claimant supervised four technicians, who were also responsible for performing various tests and samplings to ensure safe product left the premises. In July 2016, one of the claimant's four technicians went on an extended medical leave and did not return until the end of the claimant's employment. The claimant acknowledged the loss of one person was felt amongst his team.

Prior to September 2016, the claimant did not have warnings related to his job performance in the capacity of QA supervisor. On August 24, 2016, the claimant, his co-manager, and his manager, Sara Fassler, had a meeting to discuss improvements needed and status of tasks (Employer Exhibit 6). No discipline was issued to the claimant in response. On September 9, 2016, a note to file was addressed between the claimant and Sara Fassler, QA Manager, alerting the claimant that the "integrity of the department" was in question by the Director (Employer Exhibit 5, page 11). Then on October 19, 2016, the claimant was put on a performance improvement plan ("PIP") related to "constant mistakes" in his department. The PIP outlined a list of deficiencies related to the claimant and the supervision of his technicians (Employer Exhibit 5), including responsiveness to communications, missed tests, delays and organization (Employer Exhibit 5.) The undisputed evidence is the claimant was made aware that his job was in jeopardy, and that subsequent reviews with management would occur over the next 90 days to evaluate his job performance.

Over the next seven weeks, the claimant met with Sara Fassler to discuss the status of his PIP and to address ongoing issues (Employer Exhibit 7). The claimant stated he discussed staffing concerns with Ms. Fassler, and accordingly to Ms. Fassler, the claimant's performance did not show significant improvement. On October 26, 2016, the claimant was issued another corrective action in response to missed Gastonia Sampling of cage free egg product that was required for products shipped to the European Union (Employer Exhibit 4). The claimant, when confronted with the PIP, corrective actions or meetings, did not have an explanation for missed tests but would commit to trying to do better.

The final incident occurred between November 29 and December 2, 2016 when Ms. Fassler conducted an investigation of missing samples (Employer Exhibit 3). According to the employer, the claimant was determined to have hid product samples used for particle size analysis testing in a cabinet contained within the supervisor's office, the claimant's technicians had failed to complete egg whites sampling, GEL strength sampling had not been timely completed, water samples had not been shipped to Midwest Labs, reports were incomplete, and the claimant was determined to have been dishonest/falsified documents in the substandard performance of his job (Employer Exhibit 3). He was subsequently discharged. The claimant acknowledged he had incomplete reports, and had forgotten to complete the Gel strength samples testing. The claimant relied upon a daily task list which changed based on the products being tested, and asserted in light of being down one technician, that he was doing the best he could at his job. The claimant further denied hiding any samples and acknowledged the importance of timely testing for the success and protection of the employer.

The administrative record reflects that claimant has received unemployment benefits in the amount of \$4,423.00, since filing a claim with an effective date of December 4, 2016. The administrative record also establishes that the employer did participate in the December 22, 2016 fact-finding interview by way of Pamela Winkel, Sara Fassler and Lori Karr.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was not 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).

"This is the meaning which has been given the term in other jurisdictions under similar statutes, and we believe it accurately reflects the intent of the legislature." *Huntoon v. Iowa Department of Job Service*, 275 N.W.2d, 445, 448 (Iowa 1979).

In an at-will employment environment, an employer may discharge an employee for any number of reasons or no reason at all if it is not contrary to public policy, but if it fails to meet its burden of proof to establish job related misconduct as the reason for the separation, it incurs potential liability for unemployment insurance benefits related to that separation. The employer has the burden of proof in establishing disqualifying job misconduct. *Cosper v. Iowa Department of Job Service*, 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. IDJS*, 364 N.W.2d 262 (Iowa App. 1984). What constitutes misconduct justifying termination of an employee and what misconduct warrants denial of unemployment

insurance benefits are two separate decisions. *Pierce v. IDJS*, 425 N.W.2d 679 (Iowa App. 1988).

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.* Assessing the credibility of the witnesses and reliability of the evidence in conjunction with the applicable burden of proof, as shown in the factual conclusions reached in the above-noted findings of fact, the administrative law judge concludes that the employer has not satisfied its burden to establish by a preponderance of the evidence that the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law.

Workers in the human food production and processing industry reasonably have a higher standard of care required in the performance of their job duties to ensure public safety and health. The administrative law judge recognizes the role that the claimant in quality assurance, and specifically in management, had to ensure product testing was completed and recorded. It cannot be ignored however, the volume of tests required, the changing of tests to be performed based on daily task sheets or the fact the claimant was down one technician or 25% of his workforce, for executing many of the tasks for which he supervised.

Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of unemployment benefits. See *Lee v. Employment Appeal Board*, 616 N.W.2d 661 (Iowa 2000). The focus is on deliberate, intentional, or culpable acts by the employee. See *Gimbel v. Employment Appeal Board*, 489 N.W.2d 36, 39 (Iowa Ct. App. 1992). Based on the credible evidence presented, the claimant had demonstrated an ability to perform his job duties prior to August 2016, but began experiencing difficulty. In light of meetings (Employer Exhibits 5 and 6) and formal warnings and a performance improvement plan, (Employer Exhibits 4, 5 and 7), the claimant continued to miss testing sampling, (including between November 26 and December 2, 2016) to the detriment of the employer. However, the credible evidence presented does not support that the claimant's actions were willful or intentional, or that he hid samples on purpose. Rather, he did attempt to perform the job to the best of his ability but was unable to meet its expectations. Failure in job performance due to inability or incapacity is not considered misconduct because the actions were not volitional. *Huntoon v. Iowa Dep't of Job Serv.*, 275 N.W.2d 445, 448 (Iowa 1979). Based on the evidence presented, the administrative law judge is not persuaded that the evidence establishes that the claimant acted deliberately or with recurrent negligence in violation of company policy, procedure, or prior warning. While the employer may have been justified in discharging the claimant under the conditions of his performance improvement plan, work-connected misconduct as defined by the unemployment insurance law has not been established.

Nothing in this decision should be interpreted as a condemnation of the employer's right to terminate the claimant for violating its policies and procedures. The employer had a right to follow its policies and procedures. The analysis of unemployment insurance eligibility, however,

does not end there. This ruling simply holds that the employer did not meet its burden of proof to establish the claimant's conduct leading separation was misconduct under Iowa law.

Because the claimant is eligible for benefits, the issues of overpayment and relief of charges for the employer are moot.

DECISION:

The December 23, 2016 (reference 01) decision is affirmed. The claimant was discharged for no disqualifying reason. Benefits are allowed provided he is otherwise eligible. There is no overpayment of benefits. The employer is not relieved of charges associated with the claim.

Jennifer L. Beckman
Administrative Law Judge

Decision Dated and Mailed

jlb/rvs