

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

TERRY L SPENCER
Claimant

CITY OF COUNCIL BLUFFS
Employer

APPEAL 21A-UI-18932-DB-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 05/09/21
Claimant: Respondent (2R)

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/appellant filed an appeal from the August 19, 2021 (reference 01) unemployment insurance decision that allowed regular State of Iowa funded unemployment insurance benefits following claimant's discharge from work. The parties were properly notified of the hearing. A telephone hearing was held on October 19, 2021. The claimant participated personally and was represented by Attorney Justin Vondrak. The employer participated through witnesses Justin James and Stacie Jensen. The employer was represented by Attorney Graham Jura. The administrative law judge took official notice of the claimant's unemployment insurance benefits records.

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: Claimant was employed full-time as a Fire Captain. He began his employment on January 12, 1998. His last day physically worked on the job was March 18, 2021. He was placed on administrative leave on that day. Claimant was discharged from employment on April 28, 2021. Justin James, Fire Chief for the City of Council Bluffs, was the claimant's supervisor.

On March 16, 2021, claimant was dispatched with Fire Engine 51, along with a medic unit, to an address for a gunshot incident. Training Officer Robert Shoning (Shoning), Acting Engineer Matt Bonnett (Bonnett) and Firefighter James Clark (Clark) were with the claimant on the call. Shoning advised the crew when they were on their way to the address that he knew the 16-year old patient. Upon arrival, Shoning stayed with the grandmother and the other three crew members went to the basement of the residence where the victim was located. Once in the basement the crew recognized that the victim had received a single gunshot wound to the head with major trauma and that the injuries were beyond sustainable for life. The crew then went

back upstairs. At some point the claimant went back into the basement and took three photographs of the juvenile victim on his personal cell phone. The claimant, Bonnett and Clark all returned to the station and Shoning remained on scene with the family. When Bonnett was in the television room at the station, claimant told him that he had gone back downstairs and took photos of the kid.

On March 18, 2021, Assistant Chief Sorenson became aware that the claimant had taken photos of the juvenile victim. He consulted with Fire Chief James, who instructed him to speak with the claimant about whether he took pictures of the juvenile victim. Assistant Chief Sorenson asked claimant whether he photographed the juvenile suicide victim on the call from the 16th and the claimant responded that he "did not have the pictures". The claimant was put on administrative leave at that time and requested to surrender his cell phone so the pictures could be captured from the phone in order to ensure that they were not transmitted to anyone. Claimant refused to surrender his personal cell phone to Assistant Chief Sorenson.

On March 20, 2021, claimant was given an order to turn over any or all electronic files in his possession due to him taking these images in commission of his employment. On March 22, 2021, claimant turned in a thumb drive with no pictures from the date of March 16, 2021. The phone was never turned over by the claimant at any point. The claimant had destroyed the phone.

On March 24, 2021, the claimant was given notice of a formal investigation and that notice outlined the complaint against him and the standards of procedures that the employer believed he had violated. On March 31, 2021, Fire Chief James met with the claimant to interview him about the March 16, 2021 incident. During that interview, the claimant admitted that he had taken three photographs of the juvenile suicide victim and that he took the images to be used for training. Claimant informed Fire Chief James that he believed the pictures could be used for training due to the unique wound inflicted to the victim. Claimant had not informed the training officer that he had taken the photographs at the scene. Claimant had also not documented that he took the pictures at the scene, which was required of him to do pursuant to the employer's policy.

The employer has written standards of procedures that the claimant had access to and was required to review as part of his job duties. Claimant most recently reviewed these policies on October 7, 2020. SOP 112-D provides that the taking of or disseminating of any photos, videos or recordings of incidents, scenes, department personnel or civilians involved in an incident are strictly prohibited. There is an exception if the Fire Chief grants permission.

Rule 808 requires employees to protect the privacy of citizens and take steps to protect the confidentiality of others. It also provides that employees are not allowed to use photographs, including incident scenes, unless expressly authorized. Fire Chief James was the proper person to request permission to take pictures of the incident scene. Claimant did not request permission from Fire Chief James to do so.

Policy 800-9 provides that employees shall treat the members of the public and fellow employees in a courteous and professional manner. Policy 800-15 provides that employees shall make themselves available to participate fully and honestly in all administrative investigations and be completely honest in said investigation. Policy 800-29 provides that employees shall not engage in theft, vandalism or misuse of City property.

Claimant had been verbally counseled on February 7, 2020 regarding his general decision making and leadership abilities. No formal written discipline was issued to him at that time.

On August 21, 2020, Fire Chief James met with the claimant regarding claimant's failure to ensure that his crew was wearing proper personal protection equipment during a multiple

vehicle accident. Claimant chose to self-demote instead of having Fire Chief James demote him.

Claimant's administrative records establish that he has received regular unemployment insurance benefits of \$11,776.00 for the weeks between May 9, 2021 and October 16, 2021. A fact-finding interview was conducted by telephone. The claimant participated personally during the interview. The employer participated through witness Stacie Jensen during the interview. Ms. Jensen provided the interviewer with information about the final incident leading to the claimant's discharge and copies of the applicable work rules and policies.

The claimant's administrative records establish that he was paid Federal Pandemic Unemployment Compensation (FPUC) benefits during his May 9, 2021 claim year. The issue of whether the claimant is overpaid FPUC benefits will be remanded to the Benefits Bureau for an initial investigation and determination.

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.

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).

Iowa Admin. Code r. 871-24.32(4) provides:

(4) Report required. The claimant's statement and employer's statement must give detailed facts as to the specific reason for the claimant's discharge. Allegations of misconduct or dishonesty without additional evidence shall not be sufficient to result in disqualification. If the employer is unwilling to furnish available evidence to corroborate the allegation, misconduct cannot be established. In cases where a suspension or disciplinary layoff exists, the claimant is considered as discharged, and the issue of misconduct shall be resolved.

Iowa Admin. Code r.871-24.32(8) provides:

(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.

The employer has the burden of proof in establishing disqualifying job-related 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). What constitutes misconduct justifying termination of an employee and what misconduct warrants denial of unemployment insurance benefits are two separate decisions. *Pierce v. Iowa Dep't of Job Serv.*, 425 N.W.2d 679 (Iowa Ct. App. 1988). Misconduct serious enough to warrant discharge is not necessarily serious enough to warrant a denial of job insurance benefits. Such misconduct must be "substantial." *Newman v. Iowa Dep't of Job Serv.*, 351 N.W.2d 806 (Iowa Ct. App. 1984). When based on carelessness, the carelessness must actually indicate a "wrongful intent" to be disqualifying in nature. *Id.* 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).

In this case, claimant knew that it was against the employer's policies to take pictures of the juvenile suicide victim without prior authorization, but he did so anyway. This was a deliberate act that constituted a substantial and material breach of the claimant's duties that arose out of his contract of hire. Substantial job-related misconduct has been established. Regular unemployment insurance benefits are denied, as the separation from employment is disqualifying. Because benefits are denied, the issues of overpayment and chargeability must be addressed.

Iowa Code § 96.3(7)a-b 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.

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 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.

Because the claimant's separation was disqualifying, benefits were paid after his separation from employment which he was not entitled to. The unemployment insurance law provides that benefits must be recovered from a claimant who receives benefits and is later determined to be ineligible for those 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).

The administrative law judge finds that the employer sufficiently participated in the fact-finding interview by telephone through witness Stacie Jensen as Ms. Jensen provided information to the interviewer about the final incident leading to claimant's discharge and included copies of the policies that the claimant violated. As such, the claimant must repay the regular unemployment insurance benefits that he received, \$11,776.00 from May 9, 2021 through October 16, 2021, and the employer's account may not be charged for benefits paid.

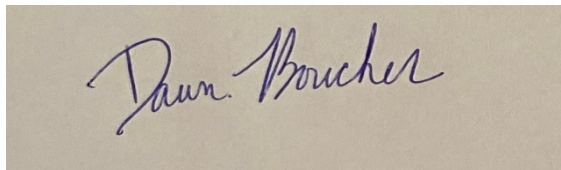
DECISION:

The August 19, 2021 (reference 01) unemployment insurance decision is reversed. The claimant's separation was disqualifying. Unemployment insurance benefits funded by the State of Iowa are denied until the claimant has worked in and been paid wages for insured work equal to ten times his weekly benefit amount after his April 28, 2021 separation date, and provided he is otherwise eligible.

The claimant has been overpaid regular unemployment insurance benefits funded by the State of Iowa in the amount of \$11,776.00 for the weeks of May 9, 2021 through October 16, 2021 and must repay the agency those benefits received. The employer's account may not be charged for those benefits paid as it sufficiently participated in the fact-finding interview.

REMAND:

The issue of whether the claimant is overpaid FPUC benefits is remanded to the Benefits Bureau for an initial investigation and determination.



Dawn Boucher
Administrative Law Judge

October 29, 2021
Decision Dated and Mailed

db/scn