

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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

CURTISS D BIRD

Claimant

APPEAL NO: 19A-UI-05134-JE-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

LOWE'S HOME CENTERS LLC

Employer

OC: 05/19/19

Claimant: Respondent (2)

Section 96.5-2-a – Discharge/Misconduct

Section 96.3-7 – Recovery of Benefit Overpayment

STATEMENT OF THE CASE:

The employer filed a timely appeal from the June 17, 2019, reference 01, decision that allowed benefits to the claimant. After due notice was issued, a hearing was held by telephone conference call before Administrative Law Judge Julie Elder on July 22, 2019. The claimant participated in the hearing. Nathan Andreeven, District Asset Protection and Safety Manager, participated in the hearing on behalf of the employer. Employer's Exhibits One and Two were admitted into evidence.

ISSUE:

The issue is whether the employer discharged the claimant for work-connected misconduct.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed as a full-time project specialist exterior for Lowe's from September 22, 2018 to May 17, 2019. He was discharged after an investigation by the employer revealed he was padding his commission and committed commission fraud.

The employer received an anonymous tip on its hotline that the claimant was a "liar" and had been stealing for the last year. The tip was referred to an area human resources business partner who contacted District Asset Protection and Safety Manager Nathan Andreeven who began investigating the allegation. Mr. Andreeven found an incident of commission padding May 6, 2019, when the claimant, who goes to customer homes and sells fencing, decking or other services the employer provides, ordered cedar deck boards instead of pickets for a fencing job. Labor costs were also included in the contract. When the claimant realized he ordered deck boards instead of pickets, which were much cheaper, he added the difference to the labor costs of the job and increased his commission from \$136.01 to \$327.71. The customer was not told of the error or refunded the difference in the cost. The claimant testified he was trained that the contract signed in a customer's home cannot be changed. The employer stated that is not its policy in situations such as this one.

The employer then did a reverse investigation and found on April 16, 2019, the store took a margin loss of \$609.64 on another fencing job. The claimant selectively marked down pickets 339 percent causing the employer to take a loss and the claimant to receive a commission of \$36.65.

The employer interviewed the claimant May 17, 2019, and he wrote a statement admitting what he did was wrong and saying, "Yes I did know what I was doing could be dishonest" (Employer's Exhibit One). The claimant testified he thought he would be able to keep his job if he made those statements but also wrote that his statement was true and, "I'm giving this statement under my own free will. Nobody has made any threats or promises for my statement today" (Employer's Exhibit One). Additionally, the claimant testified he previously owned a contracting business that "went south," there was an article in the newspaper about it, and he told the employer about the situation before he was hired. Another article came out in the paper about his business practices May 14 or 15, 2019, and he believes that is why his employment was terminated. The employer was aware of the second article and the matter was referred to superiors but the situation was not pursued by the employer. The employer terminated the claimant's employment May 17, 2019. The termination was based solely on the commission fraud.

The claimant has claimed and received unemployment insurance benefits in the amount of \$4,016.00 for the nine weeks ending July 13, 2019.

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 for disqualifying job misconduct.

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 proving disqualifying misconduct. *Cosper v. Iowa Department of Job Service*, 321 N.W.2d 6 (Iowa 1982). A claimant is not qualified to receive unemployment insurance benefits if an employer has discharged him for reasons constituting work-connected misconduct. Iowa Code section 96.5-2-a. Misconduct that disqualifies an individual from receiving unemployment insurance benefits occurs when there are deliberate acts or omissions that constitute a material breach of the worker's duties and obligations to the employer. See 871 IAC 24.32(1).

While the claimant stated he was trained that once the contract is signed in the customer's home it is final and cannot be changed, that rationale defies logic. When the claimant used incorrect materials in the May 6, 2019, contract resulting in the customer being substantially overcharged, it is not reasonable to conclude the contract could not be redone to accurately reflect the materials being used. Not only did the claimant add the difference in price between the cedar deck boards and the fence pickets to the labor costs, greatly increasing his commission, but he did not even talk to his supervisor about the situation to see how to rectify it. The claimant knew or should have known that his actions were unacceptable and inappropriate. Similarly, he knew or should have known that he could not mark down fence pickets 339 percent causing the employer to take a loss April 16, 2019.

The claimant argues that his termination was the result of the second article about his previous contracting business appearing in the newspaper. The employer hired him knowing about the first article in the paper and although the employer learned of the second article shortly before the claimant's termination and referred it for investigation, it credibly testified the discharge was based solely on the claimant's commission padding.

Under these circumstances, the administrative law judge concludes the claimant's conduct demonstrated a willful disregard of the standards of behavior the employer has the right to expect of employees and shows an intentional and substantial disregard of the employer's interests and the employee's duties and obligations to the employer. The employer has met its burden of proving disqualifying job misconduct. *Cosper v. IDJS*, 321 N.W.2d 6 (Iowa 1982). Therefore, benefits are denied.

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.

The unemployment insurance law requires benefits be recovered from a claimant who receives benefits and is later denied benefits even if the claimant acted in good faith and was not at fault. However, a claimant will not have to repay an overpayment when an initial decision to award benefits on an employment separation issue is reversed on appeal if two conditions are met: (1) the claimant did not receive the benefits due to fraud or willful misrepresentation, and (2) the employer failed to participate in the initial proceeding that awarded benefits. In addition, if a

claimant is not required to repay an overpayment because the employer failed to participate in the initial proceeding, the employer's account will be charged for the overpaid benefits. Iowa Code section 96.3(7)a, b.

The claimant received benefits but has been denied benefits as a result of this decision. The claimant, therefore, was overpaid benefits.

Because the claimant did not receive benefits due to fraud or willful misrepresentation and employer failed to participate in the finding interview, the claimant is not required to repay the overpayment and the employer remains subject to charge for the overpaid benefits.

The employer did not participate in the fact-finding interview. Consequently, the claimant's overpayment of benefits is waived as to the claimant and his benefits, in the amount of \$4,016.00 for the nine weeks ending July 13, 2019, shall be charged to the employer's account.

DECISION:

The June 17, 2019, 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 received benefits but was not eligible for those benefits. The employer did not participate in the fact-finding interview within the meaning of the law. Therefore, the claimant's overpayment is waived as to the claimant and his benefits, in the amount of \$4,016.00 for the nine weeks ending July 13, 2019, shall be charged to the employer's account.

Julie Elder
Administrative Law Judge

Decision Dated and Mailed

je/scn