

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

DANIEL JONES
Claimant

SENECA COMPANIES INC
Employer

APPEAL 17A-UI-06029-JP-T
**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 05/07/17
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 May 31, 2017, (reference 01) unemployment insurance decision that allowed benefits. A hearing was initially set for June 28, 2017; however, after the parties were contacted for the hearing, claimant requested to postpone the hearing. Over the employer's objection, claimant's postponement request was granted. A new hearing was set for July 11, 2017 at 1:00 p.m. The parties were properly notified about the hearing. A telephone hearing was held on July 11, 2017. On July 11, 2017, claimant did not answer when contacted at the number provided and he did not participate in the hearing. Employer participated through Matt Puffer and Jeff Campbell. Tessa Kirsch, Samantha Smith, and Amy Merschbrock observed the hearing on the employer's behalf, but did not testify. Employer Exhibits 1, 2, 3, and 4 were admitted into the record with no objection. Official notice was taken of the administrative record, including claimant's benefit payment history and the fact-finding documents, with no objection.

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 distribution lead from September 13, 2011, and was separated from employment on January 31, 2017, when he was discharged.

Prior to December 21, 2016, claimant had communicated to the employer that he had some mental health issues and the employer accommodated him with scheduling changes. On

December 21, 2016, Mr. Puffer and Mr. Campbell met with claimant regarding his absenteeism and his job duties. Employer Exhibit 4. Claimant informed the employer he felt overwhelmed and the employer agreed to transfer/reduce some of his job duties. Employer Exhibit 4. Claimant appreciated the reduction in his job duties. Employer Exhibit 4. When claimant went to lunch on December 21, 2016, he requested additional time to get some medication filled. Employer Exhibit 4. The employer granted claimant's request. Employer Exhibit 4. When claimant returned from lunch, he was hallucinating (claimant would make phone calls and think it was a recording on the other end when someone would answer) and he was not making sense. Employer Exhibit 4. Claimant also was yelling and throwing things. The employer felt concerned for the safety of its employees given claimant's behavior. Due to claimant's behavior, some of his friends were contacted to try to calm him down. Employer Exhibit 4. After approximately three hours, claimant was convinced to go see his counselor. Employer Exhibit 4. During the three hours, Mr. Puffer told claimant and his wife that they would put him on short term disability and he was not allowed back on the employer property until he had "a release stating he is not a harm to himself or anyone he works with." Employer Exhibit 4. The employer also told claimant that if he wanted to continue his employment, he had to go the company EAP (Employee Assistance Program). Employer Exhibit 4. Claimant's wife, Darcy, is also an employee for the employer.

On December 23, 2016, Mr. Puffer e-mailed claimant information about the EAP, including an "Authorization for Disclosure of Protected Health Information". Employer Exhibits 1 and 4. Claimant was reminded that as a condition of continued employment he needs to be evaluated by the EAP and confirm that he is "not a danger to [himself] or anyone else including co-workers." Employer Exhibits 1 and 4.

On December 27, 2016, Mr. Puffer sent claimant another e-mail regarding the December 23, 2016 e-mail. Employer Exhibits 1 and 4. Mr. Puffer reiterated that "a condition of [claimant's] employment with Seneca is that [he] contact the EAP provider and get help from them." Employer Exhibits 1 and 4. Mr. Puffer instructed claimant that he needed to conduct the intake call within twenty-four hours. Employer Exhibits 1 and 4.

On December 28, 2016, claimant completed the intake call with the EAP and provided the employer with the "Authorization for Disclosure of Protected Health Information". Employer Exhibit 1. Mr. Puffer testified that the EAP recommended treatment for claimant.

On December 29, 2016, Mr. Puffer e-mailed claimant and instructed him not to call his wife on the dispatch line. Employer Exhibit 1. Mr. Puffer instructed claimant to contact his wife on her cell phone and she would reply on her breaks. Employer Exhibit 1. On December 30, 2016, Mr. Puffer reiterated to claimant that his constant phone calls to his wife on the dispatch line are disruptive to the work environment. Employer Exhibits 1 and 4.

On January 7, 2017, Mr. Puffer testified claimant was arrested for Domestic Abuse Assault against his wife. Employer Exhibits 2 and 4. Mr. Puffer testified he believes the charges were later dismissed.

On January 11, 2017, claimant had a meeting with the EAP about forms that needed to be signed and another appointment was setup for January 19, 2017. On January 13, 2017, Mr. Puffer contacted the EAP about the number of calls claimant was making to the employer. Mr. Puffer testified that the EAP felt claimant's behavior was concerning, especially given his recent arrest for domestic assault. The employer continued to have concerns for its employees' safety due to claimant's behavior.

On January 27, 2017, the EAP informed Mr. Puffer that claimant was a no-call/no-show for his January 26, 2017 appointment and he did not call to reschedule. Employer Exhibit 1. Previously, claimant had rescheduled this appointment a couple of times before missing the January 26, 2017 appointment.

On January 31, 2017, the employer made the decision to discharge claimant for not completing the treatment requirements from the EAP referral. Claimant was also discharged because his "behavior presents a significant risk of substantial harm to other employees[.]" Employer Exhibit 1.

The administrative record reflects that claimant has received unemployment benefits in the amount of \$1605.00, from May 7, 2017 through June 24, 2017, since filing a claim with an effective date of May 7, 2017. Mr. Puffer testified that the employer did not receive notification about a fact-finding interview for claimant's separation. Mr. Puffer testified that the employer also did not receive a phone call to participate in the fact-finding interview. The administrative record establishes that the employer did participate in the fact-finding interview by providing written documentation with its protest that, without rebuttal, would have resulted in disqualification.

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 section 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).

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). 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). Poor work performance is not misconduct in the absence of evidence of intent. *Miller v. Emp't Appeal Bd.*, 423 N.W.2d 211 (Iowa Ct. App. 1988). Generally, continued refusal to follow reasonable instructions constitutes misconduct. *Gilliam v. Atlantic Bottling Co.*, 453 N.W.2d 230 (Iowa Ct. App. 1990).

The employer is entitled to establish reasonable work rules and expect employees to abide by them. The employer's requirement that claimant complete treatment through its EAP due to his recent behavior was reasonable. This case is similar to *Reigelsberger v. Employment Appeal Bd.*, 500 N.W.2d 64, 64–65 (Iowa 1993) (*distinguished by Eaton v. Iowa Employment Appeal Bd.*, 602 N.W.2d 553 (Iowa 1999); *Harrison v. Employment Appeal Bd.*, 659 N.W.2d 581 (Iowa 2003); and *Baker v. City of Wellman*, 870 N.W.2d 273). Like in *Reigelsberger*, this case does not involve any violation of statutory due process protections and the discharge was not based on a positive drug test result, but on a failure to comply with treatment. See *Reigelsberger*, 500 N.W.2d (Iowa 1993).

In *Reigelsberger*, he was "intoxicated and unruly at a social event the company sponsored after working hours." *Reigelsberger*, 500 N.W.2d at 65 (Iowa 1993). "Murphy Farms promptly suspended Reigelsberger's employment, pending further evaluation for substance abuse." *Id.* Similar to *Reigelsberger*, claimant was hallucinating and acting unruly (throwing things and yelling). The employer also placed claimant on short term disability and required him to go to the employer's EAP for treatment before he could return to work. See *Reigelsberger*, 500 N.W.2d (Iowa 1993). It is noted that although the incident in *Reigelsberger* occurred after hours, claimant's incident occurred while he was at work.

Similar to *Reigelsberger*, claimant was evaluated by the employer's EAP and it was determined he needed treatment. See *Id.* at 65 ("Reigelsberger was then evaluated at a professional facility that determined he had a drinking problem."). Like in *Reigelsberger*, claimant refused to comply with the recommended treatment and was a no-call/no-show for his January 26, 2017 appointment. Employer Exhibit 1; See *Reigelsberger*, 500 N.W.2d at 65 (Iowa 1993) ("Reigelsberger disagreed with the severity of the treatment recommendations and refused to comply with them."). After claimant failed to comply with the terms of continued employment by complying with treatment and due to the employer's fear for its employees safety based on claimant's recent behavior, the employer discharged claimant. See *Id.* ("Murphy Farms then terminated Reigelsberger's employment on the basis of "lack of response and compliance [with the treatment] recommendations...." The fear is that Reigelsberger has the potential to drive one of its vehicles while under the influence of alcohol. Murphy Farms thus alleges that Reigelsberger's failure to follow the treatment recommendations jeopardized public safety and exposed the company to liability.").

The employer has presented substantial and credible evidence that claimant's refusal to comply with treatment based of the EAP's recommendations and his recent behavior is disqualifying

misconduct even without prior warning. See *Id.* at 67 (The Court found Reigelsberger's "refusal to face up to his problems were utterly unreasonable [and h]e was guilty of misconduct."). The employer has a duty to protect the safety of its employees. Claimant's conduct was contrary to the best interests of the employer and the safety of its employees. Benefits are denied.

Iowa Code section 96.3(7)a, b, as amended in 2008, 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 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 participate in the fact-finding interview by providing written documentation that, without rebuttal, would have resulted in disqualification, the claimant is obligated to repay to the agency the benefits he received and the employer's account shall not be charged.

DECISION:

The May 31, 2017, (reference 01) unemployment insurance decision is reversed. Claimant was discharged from employment due to job-related misconduct. Benefits are withheld until such time as claimant 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 \$1605.00 and is obligated to repay the agency those benefits. The employer did participate in the fact-finding interview by providing written documentation that, without rebuttal, would have resulted in disqualification, and its account shall not be charged.

Jeremy Peterson
Administrative Law Judge

Decision Dated and Mailed

jp/rvs