

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

DUANE L HOGANS
Claimant

MARKETSOURCE INC
Employer

APPEAL 18A-UI-10318-DB-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 02/04/18
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/appellant filed an appeal from the October 4, 2018 (reference 08) unemployment insurance decision that allowed benefits based upon claimant's discharge from employment. The parties were properly notified of the hearing. A telephone hearing was held on October 30, 2018. The claimant, Duane L. Hogans, participated personally. The employer, Marketsource Inc., participated through witness Joseph Rubal. Employer's Exhibits 1 through 4 were admitted. The administrative law judge took official notice of the claimant's unemployment insurance benefits records, including the fact-finding documents.

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 recall specialist. Claimant was employed from July 5, 2018 until September 18, 2018, when he was discharged. Joseph Rubal was claimant's immediate supervisor.

This employer has an automobile manufacturer as a client. Claimant's job duties consisted of visiting customers who owned specific automobiles that needed to have their vehicle repaired due to product recalls. Claimant received an itinerary of addresses to visit. His job duties required him to visit the addresses and attempt to make contact with the customers. If he did not make contact, he was required to leave information for the customer at their address of record. He was then required to document his activity at the address in the employer's electronic database.

At some point, the client suspected that the claimant was not performing visits to the customers. On September 11, 2018, the zone manager observed claimant on his route for the day in order to investigate whether the claimant was performing his job duties. The zone manager waited for claimant from 11:45 a.m. to 2:15 p.m. at an address located on SW 23rd Street in Des Moines, Iowa. See Exhibit 1. There were two entrances to the apartment complex and the zone manager was able to observe both entrances. See Exhibit 1. The zone manager did not observe claimant arrive at the address between 11:45 a.m. and 2:15 p.m. See Exhibit 1. Case notes were uploaded by the claimant into the electronic database reporting that the claimant visited the apartment complex at 12:30 p.m. and taped a recall packet and contact information to front door. See Exhibit 1.

The zone manager travelled to the third address that claimant was going to visit that day, which was located on Fleur Drive. The zone manager received an uploaded note in the electronic database that claimant visited the apartment and left a taped recall packet and contact information to front door. See Exhibit 1. However, the uploaded note was in the system prior to claimant arriving at the apartment complex. The zone manager observed the claimant arrive at 2:30 p.m.; however, the note was uploaded and claimant reported that he visited the apartment at 2:05 p.m. The zone manager concluded that the claimant was falsifying his activity in the field. See Exhibit 1.

The employer has a written policy regarding falsification of company records. See Exhibit 3. Claimant had access to the written policy. The written policy provides that falsification of company records may result in disciplinary action, up to and including immediate termination of employment. See Exhibit 3.

Mr. Rubal conducted a telephone interview with the claimant regarding the allegations of him falsifying company records. See Exhibit 2. After reviewing the zone manager's allegations and claimant's responses, the claimant was discharged from employment.

Claimant has not received any unemployment insurance benefits between his additional claim date of September 16, 2018 and the date of this hearing due to another disqualifying decision issued by Iowa Workforce Development. The employer did participate in the fact-finding interview through submitting written documentation regarding the discharge of the claimant.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged for job-related misconduct. Benefits are denied.

As a preliminary matter, I find that the Claimant did not quit. Claimant was discharged from employment.

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.

Further, the employer has the burden of proof in establishing disqualifying job 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). The focus of the administrative code definition of misconduct is on deliberate, intentional or culpable acts by the employee. *Id.* When based on carelessness, the carelessness must actually indicate a "wrongful intent" to be disqualifying in nature. *Id.*

The decision in this case rests, at least in part, upon the credibility of the parties. 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.*

I have carefully weighed the credibility of the witnesses and the reliability of the evidence considering the applicable factors listed above. While the zone manager did not testify at the hearing, the notes relating to observations on September 11, 2018 were admitted as Exhibit 1. The zone manager's observations were put in writing within one day following the events, were detailed and specific regarding claimant's actions and the zone manager's actions, and included pictures as well as screenshots from the client's electronic database to corroborate the zone manager's observations that day. Further, the claimant presented no motive that the zone manager had to fabricate statements against the claimant.

Even though claimant provided first-hand testimony, his testimony regarding why his note would be uploaded to the electronic database prior to him actually visiting the apartment on Fleur Drive was not reasonable. Even if there was an error in the electronic system uploading, it would cause the note to be delayed, not exist prior to claimant even arriving at the property. Further, this was not a situation where there were only a few minutes between when claimant noted he arrived and when the zone manager noted he arrived, it was a 25-minute difference.

As such, the employer has presented substantial and credible evidence that claimant deliberately falsified company records, in violation of the employer's known written policy. This behavior established willful and wanton disregard of the employer's interest as is found in a deliberate violation or disregard of standards of behavior, which the employer has the right to expect of employees. It is disqualifying misconduct, even without a prior warning. Benefits are denied. Because benefits are denied, the issues of overpayment and chargeability must be addressed.

Iowa Code § 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.

The claimant's separation was disqualifying, however, there have been no benefits paid to the claimant since he filed his additional claim effective September 16, 2018. As such, the claimant has not been overpaid benefits since filing his additional claim effective September 16, 2018. The employer did participate in the fact-finding interview but the issue of chargeability is moot.

DECISION:

The October 4, 2018 (reference 08) unemployment insurance decision is reversed. Claimant was discharged from employment for job-related misconduct. Unemployment insurance benefits are denied until claimant has worked in and earned wages for insured work equal to ten times his weekly benefit amount after his September 18, 2018 separation date, and provided he is otherwise eligible. The overpayment and chargeability issues are moot.

Dawn Boucher
Administrative Law Judge

Decision Dated and Mailed

db/rvs