

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

DENNIS M NELSON
Claimant

SMITHFIELD FARMLAND CORP
Employer

APPEAL 15A-UI-11339-JP-T
**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 09/13/15
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 October 1, 2015 (reference 01) unemployment insurance decision that allowed benefits. The parties were properly notified about the hearing. A telephone hearing was held on October 26, 2015. Claimant participated. Employer participated through human resource manager Becky Jacobsen. Employer's Exhibit One was admitted into evidence 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 production worker from September 8, 1997 and was separated from employment on September 15, 2015; when he was discharged.

On May 26, 2015, claimant went on a medical leave of absence from the employer. Claimant had exhausted his Family and Medical Leave Act (FMLA) leave prior to May 26, 2015. The employer had medical documentation that claimant was to be off work because of his ears. Claimant had middle ear infection, which was from a childhood injury. Claimant spoke with Ms. Jacobson in July 15, 2015 because she had reports he was working on a roof. Claimant had been working on his cousin's roof and in return, his cousin helped claimant with his roof. Ms. Jacobson also requested current medical documentation for claimant's leave of absence. During this meeting, Ms. Jacobson asked claimant why he was not working for the employer. Claimant told Ms. Jacobson he cannot work because his medication makes him dizzy.

Ms. Jacobson requested that the claimant provide updated medical information, including any work restrictions, to the employer. Claimant did not provide this. Ms. Jacobson told claimant she was evaluating his employment status. Claimant never provided any work restrictions to Ms. Jacobson until September 8, 2015. Claimant testified he was eligible to return work on August 31, 2015 with no work restrictions. Claimant returned to work for the employer on August 31, 2015 but the employer suspended him on this date. On September 8, 2015, the employer received work restrictions for claimant; which stated that due to claimant's pain medication he was to not operate heavy machinery until further notice. There was not a start or end date for the restriction. The note was signed on September 8, 2015. Ms. Jacobson testified that if claimant had provided any work restrictions, the employer would have looked for any open opportunities to accommodate him.

The employer has a policy that prohibits employees from working outside the employer when they are on a leave of absence (Employer's Exhibit One). Claimant was aware of this policy (Employer's Exhibit One).

The administrative record reflects that claimant has received unemployment benefits in the amount of \$1570 since filing a claim with an effective date of September 13, 2015; for the six weeks ending October 24, 2015. The administrative record also establishes that the employer did 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 due to job-related misconduct. Benefits are denied.

It is the duty of an administrative law judge and 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, as the finder of fact, 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. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996). 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 evidence you believe; whether a witness has made inconsistent statements; the witness's conduct, age, intelligence, memory and knowledge of the facts; and the witness's interest in the trial, their motive, candor, bias and prejudice. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996).

This administrative law judge assessed the credibility of the witnesses who testified during the hearing, considering the applicable factors listed above, and used my own common sense and experience. This administrative law judge reviewed the exhibit submitted. This administrative law judge finds the employer's version of events to be more credible than claimant's recollection of those events.

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).

Generally, continued refusal to follow reasonable instructions constitutes misconduct. *Gilliam v. Atlantic Bottling Co.*, 453 N.W.2d 230 (Iowa Ct. App. 1990). 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).

Claimant went on a medical leave of absence on May 26, 2015; after having exhausted his Family and Medical Leave Act (FMLA) leave. The employer has a policy that prohibits employees from working while on a medical leave of absence (Employer's Exhibit One). Claimant was aware of this condition when he was placed on his medical leave of absence (Employer's Exhibit One). The policy does allow for employees to request permission from the employer to work while on leave; however, claimant did not make any such request to the employer (Employer's Exhibit One). It is undisputed that claimant was working on his cousin's roof while he was on an approved medical leave of absence. Claimant's argument that it does not fall under the employer's policy because he was not employed by his cousin is not persuasive. One of the stated reasons behind the employer's policy is to allow employees to recuperate while they are on medical leave (Employer's Exhibit One). On July 15, 2015, when asked by Ms. Jacobson, after learning claimant was working on a roof, why he was not working for the employer, he responded that his medication makes him dizzy. Claimant also received a benefit from working on his cousin's roof as his cousin agreed to work on claimant's roof in return. Furthermore, claimant failed to comply with the employer's requests to be updated on his medical condition, including any work restrictions. Claimant failed to maintain consistent

contact with the employer and keep it updated with his medical condition, specifically any work restrictions. Ms. Jacobson testified the employer would have reviewed options to accommodate claimant had any work restrictions been provided. It is also noted that claimant testified he was released to work with no work restrictions on August 31, 2015 but on September 8, 2015, his doctor said he had a work restriction of not operating heavy machines until further notice. No reason was given by claimant as to why he would be restricted on September 8, 2015 but not August 31, 2015.

The employer has presented substantial and credible evidence that claimant worked for someone other than the employer after he was granted a medical leave of absence in clear violation of a known employer's policy. Claimant also failed to update the employer on his medical status when the employer requested an update. This is misconduct without prior warning. Benefits are denied.

Iowa Code § 96.3-7, 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) 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. 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. The employer shall not be charged with the benefits.

(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, the claimant is obligated to repay to the Agency the benefits he received and the employer's account shall not be charged.

DECISION:

The October 1, 2015 (reference 01) unemployment insurance 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 been overpaid unemployment insurance benefits in the amount of \$1570 and is obligated to repay the Agency those benefits. The employer did participate in the fact-finding interview and its account shall not be charged.

Jeremy Peterson
Administrative Law Judge

Decision Dated and Mailed

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