

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

INGRID N EMBRING

Claimant

APPEAL 22A-UI-02602-DH-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

SUMMIT FOOD SERVICE LLC

Employer

OC: 08/15/21

Claimant: Respondent (2)

Iowa Code § 96.5(1) - Voluntary Quit

Iowa Code § 96.5(2)a - Discharge for Misconduct

Iowa Admin. Code r. 871-24.10 - Employer/Representative Participation Fact-finding Interview

Iowa Code § 96.3(7) - Recovery of Benefit Overpayment

Iowa Admin. Code r. 871-24.32(1)a - Discharge for Misconduct

Iowa Admin. Code r. 871-24.1(113)c - Discharge for Violation of Rules

STATEMENT OF THE CASE:

The employer/appellant, Summit Food Service, LLC, appealed from the December 29, 2021, (reference 06) unemployment insurance decision that allowed benefits based upon finding the record for the December 7, 2021, dismissal from work did not show willful or deliberate misconduct. Notices of hearing were mailed to the parties' last known addresses of record for a telephone hearing scheduled for February 22, 2022. The claimant, Ingrid Embring, failed to call and did not participate. The employer participated through John Soete, witness and party representative, and Sheryl Duckworth, food service director. Judicial notice was taken of the administrative file. Employers Exhibit was admitted.

ISSUES:

Was the separation a layoff, discharge for misconduct or a voluntary quit without good cause?

Was the claimant overpaid benefits?

Should claimant repay benefits and/or charge employer due to employer participation in fact finding?

FINDINGS OF FACT:

Having heard the testimony and reviewed the evidence in the record, the undersigned finds:

Claimant was employed with employer with her first day of work being October 29, 2021, and her last day worked being December 7, 2021. She was a part-time food service worker with a set schedule with some extra work for coverage. Employer runs a kitchen, provides meals at a state correctional facility where there are prison inmates. Employer has an employee handbook. Claimant was provided with one on October 27, 2021, just prior to her start date. See EMPL. EXHIBIT page 1. One of the policies was regarding contraband, and in particular, cell phones.

See EMPL. EXHIBIT page 3. The policy explicitly bans bringing cellphones into the facility, with employees being given explicit education and training on the contraband policy. The kitchen is part of the facility. Cell phones are to be left in employee's personal vehicles and can be used on their break times in the parking lot.

Claimant was given verbal warnings regarding violating this policy by having her cell phone with her in the kitchen, taking videos on November 8 and 21, 2021. One December 7, 2021, claimant had her cellphone with her in the kitchen where she was making and posting videos to TikTok. The state prison became aware of the video postings on the same date and told the employer. The employer reviewed that matter, taking a screen shot of one of the postings (see EMPL. EXHIBIT page 2) and in light of the two recent verbal warnings, terminated claimant on December 7, 2021. The screenshot is of claimant. The video is from the kitchen.

The harm attempted to be prevented is not having inmates have access to cell phones, respecting the inmates' privacy by not have pictures/videos of them posted and protecting the confidentiality of the facility by not publishing its layout. When claimant was told she was being discharged for misconduct regarding her cell phone use, she indicated that she understood.

Records show claimant has received \$0.00 in benefits on this claim, with her weekly benefit amount being \$131.00. Employer submitted some response/documents for fact finding. When the representative called for the fact-finding hearing, employer did not answer, and the representative was unable to leave a voice mail message. A 4-day letter was sent with no response. Per the definitions, employer did not participate in fact finding. See Iowa Admin. Code r. 871-24.10(1).

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.

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.

871 IAC 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 Department of Job Service*, 275 N.W.2d 445, 448 (Iowa 1979).

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). The Iowa Court of Appeals found substantial evidence of misconduct in testimony that the claimant worked slower than he was capable of working and would temporarily and briefly improve following oral reprimands. *Sellers v. Emp't Appeal Bd.*, 531 N.W.2d 645 (Iowa Ct. App. 1995). 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). 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).

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.* 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).

Further, 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). The law limits disqualifying misconduct to substantial and willful wrongdoing or repeated carelessness or negligence that equals willful misconduct in culpability. *Lee v. Employment Appeal Bd.*, 616 N.W.2d 661 (Iowa 2000).

Iowa Admin. Code r. 871-24.1 provides:

Definitions.

Unless the context otherwise requires, the terms used in these rules shall have the following meaning. All terms which are defined in Iowa Code chapter 96 shall be construed as they are defined in Iowa Code chapter 96.

24.1(113) Separations. All terminations of employment, generally classifiable as layoffs, quits, discharges, or other separations.

c. *Discharge.* A discharge is a termination of employment initiated by the employer for such reasons as incompetence, violation of rules, dishonesty, laziness, absenteeism, insubordination, failure to pass probationary period.

Claimant was aware of the policy, having received the handbook, had training, and two prior disciplinary actions about the policy. Claimant violated the policy again on December 7, 2021, and was discharged on that date for the misconduct.

The next issue is whether claimant has been overpaid benefits. 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.

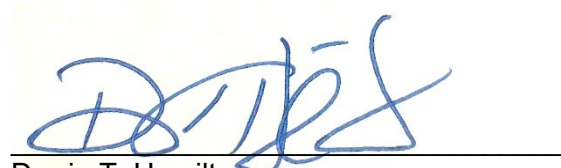
This rule is intended to implement Iowa Code section 96.3(7)"b" as amended by 2008 Iowa Acts, Senate File 2160.

Because the claimant's separation was disqualifying, any benefits paid on the claim would be benefits to which she 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. Claimant did not receive any benefits on this claim. The employer did not participate in the fact-finding interview, but this issue is moot.

The law also states that an employer is to be charged if "the employer failed to respond timely or adequately to the department's request for information relating to the payment of benefits. . ." Iowa Code § 96.3(7)(b)(1)(a). Here, the employer did not respond adequately, but the issue is moot with no benefits having been paid.

DECISION:

The December 29, 2021, (reference 06) unemployment insurance decision is **REVERSED**. Claimant was discharged for misconduct on December 7, 2021. Benefits are withheld until such time as she has worked in and been paid wages for insured work equal to ten times her weekly benefit amount, provided she is otherwise eligible. Claimant has been overpaid unemployment insurance benefits, as no benefits were paid on this claim, and therefore there are no benefits to be repaid. The employer's failure to adequately participate in fact finding is a moot issue.



Darrin T. Hamilton
Administrative Law Judge

March 10, 2022
Decision Dated and Mailed

dh/scn