

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

MARK M VINSAND
Claimant

IOWA BATH SOLUTIONS LLC
Employer

APPEAL 17A-UI-11452-JP-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

**OC: 10/15/17
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 November 2, 2017, (reference 01) unemployment insurance decision that allowed benefits. The parties were properly notified about the hearing. A telephone hearing was held on November 29, 2017. Claimant did not register for the hearing and did not participate. Employer participated through regional vice-president Mark Pappas. Employer Exhibit 1 was admitted into evidence 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 an outside sales representative from March 1, 2017, and was separated from employment on October 16, 2017, when he was discharged.

The final incident that led to discharge occurred on October 13, 2017, when a customer called the employer and was extremely upset about how claimant treated the customer during an appointment. The customer told the employer that claimant was verbally abusive towards the customer's wife. The customer told the employer that claimant refused to leave the customer's house after the customer told him no. The customer told the employer that eventually the customer had to essentially throw claimant out of the customer's house. Around October 14 or 15, 2017, Mr. Pappas contacted the customer and apologized for what happened during the

appointment. The customer explained to Mr. Pappas what happened. The customer told Mr. Pappas that claimant was extremely rude. The customer told Mr. Pappas that the customer would not do business with the employer anymore because the employer employs people like claimant. Mr. Pappas then called human resources to verify claimant's prior warnings. On October 16, 2017, the employer met with claimant and informed him he was discharged.

Claimant had multiple prior warnings regarding his behavior during appointments with the employer's customers. During the first week of April 2017, the employer received a complaint about claimant's conduct during an appointment. The customer told Mr. Pappas that claimant was rude during the appointment. Mr. Pappas gave claimant a verbal warning for his conduct during this appointment. Mr. Pappas told claimant he had to follow the employer's rebuttal script if a customer told him no instead of badgering the customer.

In June 2017, claimant sold a customer a bathroom. The next day, the customer called the employer and complained that claimant had used profanity under his breath, but loud enough for the customer to hear, when claimant made an error on the paperwork. The customer also told the employer that claimant left a lot of unanswered questions. Mr. Pappas sent another sales representative to the customer to answer the questions. The customer told the other sales representative that claimant was rude to the customer and instructed the employer that claimant was not allowed to return to the customer. Mr. Pappas spoke with claimant about the customer's complaint. Claimant stated that the customer was crazy. Mr. Pappas gave claimant a verbal warning for his conduct with this customer. Mr. Pappas also warned claimant that the next incident would result in a written warning.

On September 13, 2017, the employer received a complaint from customer regarding claimant's conduct during an appointment. The customer was shaken by claimant's conduct during the appointment. The customer told the employer that claimant was hard closing her on the employer's coupon. Claimant did not follow the employer's rebuttal protocol as he had been instructed to. Mr. Pappas decided to give claimant a written warning for the incident, but before he could give claimant the written warning another customer called the employer on September 21, 2017 and complained about claimant's behavior during an appointment. This customer complained that claimant was hard selling the customer on the employer's coupon. Mr. Pappas spoke to the customer and the customer told him that they were extremely confused as to what claimant was selling them. The customer told Mr. Pappas that they did not want to see claimant again. The customer told Mr. Pappas that they did not want the employer to call the customer again because of claimant's conduct. On September 28, 2017, the employer gave claimant a final written warning because of his conduct during his appointments with these customers. Employer Exhibit 1. Claimant was warned that his job was in jeopardy. Employer Exhibit 1.

The administrative record reflects that claimant has received unemployment benefits in the amount of \$1,028.00, since filing a claim with an effective date of October 15, 2017, for the three weeks-ending November 4, 2017. The employer did not receive notice of the fact-finding interview until after the fact-finding interview had occurred. Mr. Pappas testified he did receive a phone call for the fact-finding interview, but he was out of the country at the time and he was not able to answer the phone call. The administrative record establishes that the employer did participate in the fact-finding interview by providing written documentation that, without rebuttal, would have resulted in disqualification.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes 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, 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).

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). A warning weighs heavily toward a finding of intentional conduct. Willful misconduct can be established where an employee manifests an intent to disobey a future reasonable instruction of his employer. *Myers v. Iowa Dep't of Job Serv.*, 373 N.W.2d 507 (Iowa Ct. App. 1985). Generally, continued refusal to follow reasonable instructions constitutes misconduct. *Gilliam v. Atlantic Bottling Co.*, 453 N.W.2d 230 (Iowa Ct. App. 1990).

It is reasonable for the employer to expect its employees to treat its customers with courtesy and respect. The employer has presented substantial and credible evidence that around October 13, 2017, claimant was rude to a customer after having been warned about his behavior with customers. Mr. Pappas credibly testified this customer refused to do business with the employer because of claimant's behavior and the customer had to essentially throw claimant out of the customer's house because he refused to leave. The employer presented substantial and credible evidence that claimant's conduct was a "deliberate violation or disregard of standards of behavior which the employer has the right to expect of employees[.]"Iowa Admin. Code r. 871-24.32(1)a. This is disqualifying misconduct. Benefits are denied.

The administrative law judge further concludes that claimant has been overpaid unemployment insurance benefits.

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 November 2, 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 \$1,028.00 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