IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

MICHAEL J TOMPOS Claimant **CROTHALL HEALTHCARE INC** Employer	**APPEAL 17A-UI-13163-JP-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 11/19/17** **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 December 11, 2017, (reference 01) unemployment insurance decision that allowed benefits. The parties were properly notified about the hearing. A telephone hearing was held on January 17, 2018. Claimant participated. Employer participated through director of environmental services and patient transport Angela Scherer. 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 patient transporter from January 1, 2015, and was separated from employment on November 22, 2017, when he was discharged.

The employer has a written employee handbook that prohibits theft and dishonesty by its employees. Claimant was aware of the policy.

On November 21, 2017, during claimant's scheduled shift, Ms. Scherer watched claimant walk into the patient kitchenette area. The patient kitchenette area is an area that has pop and food for patients only. Staff can access the patient refrigerator to get pop or food for patients. There is a posted sign on the refrigerator that says it is for patients only. The client (Genesis) pays to stock the items in the refrigerator for patients. If a patient utilizes an item from the patient refrigerator, the patient is charged for the item. Employees have a separate refrigerator to store items they want. Ms. Scherer watched claimant open the patient refrigerator and retrieve a can

of pop. Claimant then got a cup of ice and poured the pop into the cup of ice. Claimant threw the can of pop into the recycle container. Claimant then put a lid on the cup and walked out. Claimant then walked down the hall drinking the pop. Ms. Scherer observed claimant drink the pop from the cup. Ms. Scherer was unable to approach claimant at that time because she had to handle another issue. Later, Ms. Scherer attempted to talk to claimant, but he was out transporting a patient. Ms. Scherer then typed up a violation report regarding the incident and sent it to the corporate office. The corporate office decided to discharge claimant because it is a serious violation.

On November 22, 2017, Ms. Scherer and the patient transport coordinator met with claimant. Ms. Scherer discussed with claimant that she had observed him drink a pop from the patient refrigerator on November 21, 2017. Claimant argued with Ms. Scherer and stated that the nurses had given him permission. Ms. Scherer told claimant that nurses could not give him permission. Ms. Scherer confirmed with the patient transport coordinator that the patient transport coordinator had given claimant a verbal warning in April 2017 for taking pop out of a patient's refrigerator. Claimant called the patient transport coordinator a liar. Ms. Scherer asked claimant if he wanted to write any comments on the discharge paperwork. Ms. Scherer testified that claimant responded he was not going to sign anything. Ms. Scherer testified that she asked if claimant wanted to go get his things and he told her he was not leaving. Ms. Scherer then had to get security to escort claimant out.

On October 14, 2016, the employer gave claimant a written warning for inattention to patient transport procedures. On April 7, 2017, the employer gave claimant verbal warning for taking a pop out of the patient's refrigerator. The employer warned claimant that it is considered theft and he should not be taking pop out of the patient's refrigerator. Ms. Scherer had witnessed claimant taking the pop out of the patient's refrigerator and then walking down the hall drinking it. Ms. Scherer was not the director and did not have any disciplinary authority at that time. On June 1, 2017, the employer gave claimant a final written warning for violation of the company's fair treatment and respect policy and unprofessional behavior. Claimant was warned his job was in jeopardy.

The administrative record reflects that claimant has received unemployment benefits in the amount of $2,052.00, since filing a claim with an effective date of November 19, 2017, for the six weeks-ending January 13, 2018. The administrative record also 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.

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 finds the employer's version of events to be more credible than claimant's recollection of those events.

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). "Theft from an employer is generally disqualifying misconduct." *Quintin H Wyatt v. The University Of Iowa*, 15B-UI-08148-EAB, (dated September 17, 2015); *Ringland Johnson Inc. v. Employment Appeal Board*, 585 N.W.2d 269 (Iowa 1998). "Value is . . . not the issue" in determining misconduct and "a single attempted theft [may] be misconduct as a matter of law." *Quintin H Wyatt v. The University Of Iowa*, 15B-UI-08148-EAB, (dated September 17, 2015); *Ringland Johnson Inc. v. Employment Appeal Board*, 585 N.W.2d 269 (Iowa 1998).

The employer is entitled to establish reasonable work rules and expect employees to abide by them. The employer's rule prohibiting theft and dishonesty is reasonable.

Claimant's argument that he had permission to remove a can of pop from the patient refrigerator by the nursing staff and the pop was for a patient is not persuasive. The employer has presented substantial and credible evidence that on November 21, 2017, claimant removed a can of pop from the patient refrigerator, poured it into a cup of ice, and then drank it. The pop in the patient refrigerator is for patients only. Ms. Scherer credibly testified that the refrigerator claimant removed the pop from had a sign that said patients only. Ms. Scherer further credibly testified she watched claimant take a drink from the cup claimant poured the pop into. The employer has a right to protect its property from being taken, even if the value of the property is minimal. "Theft from an employer is generally disqualifying misconduct." *Quintin H Wyatt v. The University Of Iowa*, 15B-UI-08148-EAB, (dated September 17, 2015); *Ringland Johnson Inc. v. Employment Appeal Board*, 585 N.W.2d 269 (Iowa 1998). "Value is . . . not the issue" in determining misconduct and "a single attempted theft [may] be misconduct as a matter of law." *Quintin H Wyatt v. The University Of Iowa*, 15B-UI-08148-EAB, (dated September 17, 2015); *Ringland Johnson Inc. v. Employment Appeal Board*, 585 N.W.2d 269 (Iowa 1998). The employer had previously warned claimant on April 7, 2017 for taking a pop from the patient refrigerator and drinking it.

The employer presented substantial and credible evidence that claimant's conduct of removing and consuming a pop from the patient refrigerator 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 the 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.
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> *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.
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> (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 December 11, 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 $2,052.00 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.

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Jeremy Peterson
Administrative Law Judge

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Decision Dated and Mailed

jp/rvs