

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

DEBORAH J WATTS

Claimant

APPEAL 19A-UI-06172-AW-T

**AMENDED ADMINISTRATIVE LAW JUDGE
DECISION**

IOWA HEARING AID CENTERS LLC

Employer

OC: 07/07/19

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:

Employer/appellant filed an appeal from the July 25, 2019 (reference 01) unemployment insurance decision that allowed benefits. The parties were properly notified of the hearing. A telephone hearing was held on August 26, 2019, at 2:00 p.m. Claimant participated. Employer participated through Sheila Williams, Operations Manager. Employer's Exhibits 1 – 4 were admitted. Official Notice was taken of the administrative record.

ISSUES:

Whether claimant's separation was a discharge for disqualifying, job-related misconduct.

Whether claimant was overpaid benefits.

Whether claimant should repay those benefits and/or whether employer should be charged based upon its participation in the fact-finding interview.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed full-time as a clinic administrator from August 20, 2018 until her employment with Iowa Hearing Aid Centers LLC ended on June 25, 2019. (Williams Testimony)

Employer has a policy that provides: "unauthorized use or observation of another employee in possession of, or being under the influence of intoxicants narcotics, or other drugs during work hours" will result in discharge. (Exhibit 4) The policy is outlined in the employee handbook. (Williams Testimony) Claimant received a copy of the employee handbook and was aware of the policy. (Exhibit 1 & 2; Claimant Testimony) Because employees work remotely, employer must rely upon employees to report suspected drug use to employer. (Williams Testimony) Drug use by employees is a safety concern for employees and customers and could be detrimental to the employer's reputation and, thus, its business. (Williams Testimony)

On at least one occasion during claimant's employment, claimant smelled the odor of methamphetamine coming from the back room in the office. (Claimant Testimony) At the time

claimant noticed the smell, the back room was occupied by claimant's coworker. (Claimant Testimony) Claimant is familiar with the smell of methamphetamine. (Claimant Testimony) Claimant confronted her coworker regarding smoking methamphetamine (Claimant Testimony); the coworker responded that she did not smoke methamphetamine often. (Williams Testimony) Claimant did not report the incident to the employer. (Claimant Testimony) The coworker's employment was subsequently terminated. (Claimant Testimony)

On June 11, 2019, claimant told a new coworker that claimant observed a former coworker doing drugs in the back room at work. (Williams Testimony) On June 19, 2019, the new coworker reported what claimant had told her to Sheila Williams, Operations Manager. (Williams Testimony) Williams arranged a site visit to claimant's office. (Williams Testimony) On June 25, 2019, Williams met with claimant regarding the allegation that claimant observed a coworker using drugs at work and failed to report it to employer. (Williams Testimony) Claimant admitted smelling methamphetamine when the coworker was in the back room and confronting the coworker about it. (Williams Testimony) When asked for an explanation, claimant said she did not want to get anyone in trouble. (Williams Testimony) Employer terminated claimant's employment on June 25, 2019 for violation of the employee handbook. (Williams Testimony)

The administrative record reflects that claimant filed for and has received unemployment insurance benefits in the gross amount of \$1,644.00 for benefit weeks ending August 3, 2019 through August 24, 2019. Employer participated in the fact-finding interview through Sheila Williams, Operations Manager.

REASONING AND CONCLUSIONS OF LAW:

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

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 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:

- 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 of misconduct has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. *Reigelsberger v. Emp't Appeal Bd.*, 500 N.W.2d 64, 66 (Iowa 1993); accord *Lee v. Emp't Appeal Bd.*, 616 N.W.2d 661, 665 (Iowa 2000). 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 "must be substantial" to justify the denial of unemployment benefits. *Lee*, 616 N.W.2d at 665 (citation omitted). Disqualification for a single misconduct incident must be a deliberate violation or disregard of standards of behavior which employer has a right to expect. *Diggs v. Emp't Appeal Bd.*, 478 N.W.2d 432 (Iowa Ct. App. 1991).

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.

Conduct asserted to be disqualifying misconduct must be current. *West v. Emp't Appeal Bd.*, 489 N.W.2d 731 (Iowa 1992); *Greene v. Emp't Appeal Bd.*, 426 N.W.2d 659 (Iowa Ct. App. 1988). Whether the act is current is measured by the time elapsing between the employer's awareness of the misconduct and the employer's contact with the employee concerning the misconduct. *Greene*, 426 N.W.2d at 662. It is not measured by the time elapsing between the misconduct and the employees' discharge.

Claimant was aware that a coworker was smoking methamphetamine at the workplace and that she had a responsibility to report her coworker's drug use to employer. Claimant decided not to report her coworker's drug use to employer, because claimant did not want to get her coworker in trouble. Claimant breached the duty she owed to her employer and disregarded the standards of behavior that employer had a right to expect of her. Claimant's failure to report her coworker's drug use constitutes job-related misconduct. Employer became aware of claimant's misconduct on June 19, 2019 and addressed the misconduct with claimant on June 25, 2019. Less than a week elapsed between employer's awareness and notice to claimant. Claimant was discharged for a current act of disqualifying, job-related misconduct. Benefits are denied.

The next issues to be determined are whether claimant has been overpaid benefits, whether the claimant must repay those benefits, and whether the employer's account will be charged. For the reasons that follow, the administrative law judge concludes the claimant was overpaid, claimant must repay those benefits and employer's account will not be charged.

Iowa Code § 96.3(7)(a)-(b) 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.

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.

Because the claimant's separation was disqualifying, benefits were paid to which she was not entitled. Claimant has been overpaid unemployment insurance benefits in the amount of \$1,644.00 for benefit weeks ending August 3, 2019 through August 24, 2019. Because the employer participated in the fact-finding interview, the claimant is obligated to repay to the agency the benefits she received and the employer's account shall not be charged.

DECISION:

The July 25, 2019 (reference 01) unemployment insurance decision is reversed. Benefits are denied. The claimant has been overpaid unemployment insurance benefits in the amount of \$1,644.00 for benefit weeks ending August 3, 2019 through August 24, 2019 and is obligated to repay those benefits to the agency. The employer participated in the fact-finding interview and its account shall not be charged.

Adrienne C. Williamson
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Decision Dated and Mailed

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