

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

CARLOS M CORELLA
Claimant

THE UNIVERSITY OF IOWA
Employer

APPEAL NO. 14A-UI-10701-B2T

**ADMINISTRATIVE LAW JUDGE
AMENDED DECISION**

**OC: 09/21/14
Claimant: Respondent (2R)**

Iowa Code § 96.5-2-a – Discharge for Misconduct
Iowa Code § 96.3-7 – Recovery of Overpayment of Benefits
Iowa Admin. Code r. 871-24.10 – Employer Participation in Fact Finding

STATEMENT OF THE CASE:

Employer filed an appeal from a decision of a representative dated October 9, 2014, reference 02, which held claimant eligible for unemployment insurance benefits. After due notice, a hearing was scheduled for and held on November 4, 2014. Claimant participated personally. Employer participated by David Burgeon, Heidi Nobiling, Natalie Chambers, and Mary Eggenburg. Claimant's Exhibits A-B were admitted into evidence.

A previous ruling was issued in this matter that contained numerous scrivener's errors. This amended ruling addresses those errors.

ISSUES:

Whether claimant was discharged for misconduct?

Was claimant overpaid benefits?

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

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds: Claimant last worked for employer on August 14, 2014. Employer discharged claimant on September 9, 2014 because claimant was seen to have intentionally provided false information, had abused property of employer, and used property of employer in an unauthorized manner.

Claimant worked as a phlebotomy technician for employer in a lab with three to four coworkers. On August 14, 2014 claimant was working in the lab with coworkers. At or around 2:25 pm, claimant's supervisor, Natalie Chambers went to the restroom outside of the lab. Upon her return from the restroom approximately five minutes later she found her business phone

missing. When she returned from the restroom, claimant was using the lab restroom. Ms. Chambers called her phone in an attempt to locate it. She heard the distinctive ring of the phone in the bathroom. She told claimant she heard the phone ringing in the bathroom.

The phone was answered and immediately hung up. Ms. Chambers called it again and it rang again such that she could hear it. When she attempted to call a third time there was no ring. A short time later claimant exited the bathroom, and when Ms. Chambers confronted him about the phone, he lifted his shirt and offered to disrobe to show that he didn't have the phone. Ms. Chambers looked at his back pocket and didn't see the phone. Ms. Chambers then went into the bathroom and looked for the phone.

A short time after Ms. Chambers went into the bathroom to look for the phone, claimant found the phone. The battery had been removed when the phone was found. On the phone was evidence that it had been called, and a text had been sent. Claimant showed that his phone had received a message from the phone that had been lost that stated, "I tired of you shit you latinos are pussies."

As there were questions as to misappropriation of a business phone, improper use of a business phone, and derogatory statements, an investigation was launched. All people within the lab at the time of the incident were interviewed multiple times. The information of the interviews is summarized above.

Claimant's recitation of the facts included that Ms. Chambers had asked him out repeatedly, and was upset that he rebuffed her. Ms. Chambers was close friends with another member of the lab, and used her supervisory position over others to cause them to tell untruths as to what happened.

REASONING AND CONCLUSIONS OF LAW:

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).

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.

Iowa Admin. Code r. 871-24.32(4) provides:

(4) Report required. The claimant's statement and the employer's statement must give detailed facts as to the specific reason for the claimant's discharge. Allegations of misconduct or dishonesty without additional evidence shall not be sufficient to result in disqualification. If the employer is unwilling to furnish available evidence to corroborate the allegation, misconduct cannot be established. In cases where a suspension or disciplinary layoff exists, the claimant is considered as discharged, and the issue of misconduct shall be resolved.

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.

A claimant is not qualified to receive unemployment insurance benefits if an employer has discharged the claimant for reasons constituting work connected misconduct. Iowa Code § 96.5-2-a. Before a claimant can be denied unemployment insurance benefits, the employer has the burden to establish the claimant was discharged for work-connected misconduct. *Cosper v. Iowa Department of Job Service*, 321 N.W.2d 6 (Iowa 1982), Iowa Code § 96.5-2-a.

In order to establish misconduct as to disqualify a former employee from benefits an employer must establish the employee was responsible for a deliberate act or omission which was a material breach of the duties and obligations owed by the employee to the employer. Rule 871 IAC 24.32(1)a; *Huntoon v. Iowa Department of Job Service*, 275 N.W.2d 445 (Iowa 1979); *Henry v. Iowa Department of Job Service*, 391 N.W.2d 731, 735 (Iowa Ct. App. 1986). The conduct must show a 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 the employee's duties and obligations to the employer. Rule 871 IAC 24.32(1)a; *Huntoon* supra; *Henry* supra. In contrast, 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 deemed misconduct within the meaning of the statute. Rule 871 IAC 24.32(1)a; *Huntoon* supra; *Newman v. Iowa Department of Job Service*, 351 N.W.2d 806 (Iowa Ct. App. 1984).

In this matter, the evidence established that claimant was discharged for an act of misconduct when claimant violated employer's policies concerning improper use of university property and dishonesty.

The last incident, which brought about the discharge, constitutes misconduct because claimant's actions constitute a willful and ongoing dishonest and inappropriate action. Multiple coworkers gave similar stories to the investigators, all of whom implicated claimant in the improper actions. The administrative law judge holds that claimant was discharged for an act of misconduct and, as such, is disqualified for the receipt of unemployment insurance benefits.

As the ruling of the fact finder is being reversed, claimant is deemed to have been overpaid benefits in this matter. As employer offered satisfactory involvement in the fact finding of this case, employer's account will not be charged. This case is remanded to the fact finder for determination as to the amount of overpaid benefits.

DECISION:

The decision of the representative dated October 9, 2014, reference 02, is reversed. Unemployment insurance benefits shall be withheld until claimant has worked in and been paid wages for insured work equal to ten times claimant's weekly benefit amount, provided claimant is otherwise eligible.

This matter is remanded to the fact finder for the determination of the amount of overpayment of benefits.

Blair A. Bennett
Administrative Law Judge

Decision Dated and Mailed

bab/pjs/pjs