

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

DYLAN R JOHNSON
Claimant

DEXTER LAUNDRY INC
Employer

APPEAL 18A-UI-05519-H2T

**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 04/22/18
Claimant: Respondent (2)

Iowa Code § 96.5(2)a – Discharge/Misconduct
Iowa Code § 96.3(7) - Recovery of Benefit Overpayment
871 IAC 24.10 – Employer Participation in the fact-finding Interview

STATEMENT OF THE CASE:

The employer filed an appeal from the May 8, 2018, (reference 01) unemployment insurance decision that allowed benefits. The parties were properly notified about the hearing. A telephone hearing was held on June 5, 2018. Claimant participated. Employer participated through (representative) Katie Six, Senior Human Resources Administrator; Todd Reifsteck, Human Resources Director and Eric Jensen, Production Manager. Employer's Exhibits A through C were admitted into the record.

ISSUES:

Was the claimant discharged due to job-connected misconduct?

Has the claimant been overpaid any unemployment insurance benefits, and if so, can the repayment of those benefits to the agency be waived?

Can any 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 production worker beginning on July 14, 2014 through April 20, 2018, when he was discharged. Claimant was discharged for intentionally damaging company property on April 19.

On April 19, the claimant was between one-half hour and one hour late to work because he had a flat tire. He did not call anyone at the employer's place of business to tell them he would be late to work. When he arrived at work he spoke to the desk manager and asked if he could make up the time he was late. He was told that would have to be approved by a supervisor. As the claimant's supervisor was absent that day, the decision would be made by the production

manager. The claimant continued to work as usual until about 1:00 p.m. when he was told by his lead worker Dakota that he would not be allowed to make up the time he had missed and that because he was late he would be given one-half point under the attendance policy. The claimant was not going to lose his job because of the one-half point being added onto his attendance point tally.

After he was notified he would not be allowed to make up his missed time and that he would be assessed one-half point, the claimant's behavior changed. He began slamming the sub-assemblies he was completing onto the floor. At least three subassemblies were damaged by the claimant. Metal parts were bent and had to be replaced or repaired. The claimant's coworkers reported his behavior to the production manager, Mr. Jensen. Mr. Jensen went to the claimant's work station around 2:00 p.m. and examined the sub-assemblies the claimant was working on. He discovered the bent parts as well as missing rivets. When Mr. Jensen spoke to the claimant, the claimant told him that he only working as he had been trained. Three coworkers interviewed by Mr. Jensen all provided identical versions of the events. Each indicated that the claimant was intentionally slamming the sub-assemblies onto the ground as he took them off the jig.

Sometime prior to this event the employer had installed surveillance cameras to protect some equipment in the plant. Mr. Jensen watched the surveillance video of the claimant working on all sixteen sub-assemblies he completed before 1:00 p.m. and the three he completed after 1:00 p.m. The surveillance video confirmed the coworkers version of events that prior to being told that he would be given one-half point for being late to work that day, the claimant was not slamming the sub-assemblies to the ground as he took them off the jig, but instead putting them on the ground so they were not damaged. Additionally, Mr. Jensen's examination of all the sub-assemblies revealed that the claimant had correctly put the rivets in the ones he competed before being told he was going to be assessed one-half point for being late to work. But the sub-assemblies competed after he was told about the attendance point were missing rivets. The employer concluded that the claimant was angry he was not going to be allowed to make up time he was late and that he was going to have one-half point added to his attendance tally, so he was intentionally damaging the sub-assemblies and was intentionally leaving out rivets.

The claimant had been given a copy of the company policies which specifically provide that damaging company property is grounds for immediate discharge.

When the claimant spoke to Mr. Jensen later in the day he was specifically told that only employees who made prior arrangements to use flex-time were allowed to make up time missed. Flex-time was not allowed for employees who were unexpectedly late to work. The employer did not treat the claimant any differently than any other employee and they followed the collective bargaining agreement that was in effect.

The employer intended to participate in the fact-finding interview, but the fact-finder had the wrong telephone number to reach the employer.

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, 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).

It is the duty of the administrative law judge as 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 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. *Id.* 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 believable evidence; whether a witness has made inconsistent statements; the witness's appearance, conduct, age, intelligence, memory and knowledge of the facts; and the witness's interest in the trial, their motive, candor, bias and prejudice. *Id.*

After assessing the credibility of the witnesses who testified during the hearing, considering the applicable factors listed above, and using her own common sense and experience, the administrative law judge finds the testimony provided by Mr. Jensen was more credible than that provided by the claimant. The witnesses interviewed by Mr. Jensen as well as the surveillance video reviewed by him all establish that the claimant changed his behavior after he was told he

would be given one-half point for being late to work. The claimant intentionally left off rivets and intentionally slammed the sub-assemblies to the ground. The claimant intentionally damaged the product he was making because he was upset and angry. Claimant's conduct is not in the employer's best interest and is sufficient job-connected misconduct to disqualifying him from receipt of benefits. Benefits are denied.

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 un rebutted 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.

In this case, the claimant has received benefits but was not eligible for those benefits. Since the employer was not given the opportunity to participate in the fact-finding interview as the fact-finder called the wrong telephone number, the claimant is not obligated to repay the benefits he received to the agency and the employer's account shall not be charged. (See EAB decision in 15B-UI-02454 Krull v Nashua-Plainfield Community School District.) The overpayment shall be charged to the unemployment compensation fund.

DECISION:

The May 8, 2018, (reference 01) decision is reversed. The claimant was discharged from employment due to job-related misconduct. Benefits are withheld until such time as he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible. The claimant has been overpaid unemployment insurance benefits in the amount of \$455.00 and he is not obligated to repay the agency those benefits. The employer did not have the opportunity to participate in the fact-finding interview and their account shall not be charged.

Teresa K. Hillary
Administrative Law Judge

Decision Dated and Mailed

tkh/rvs