**IOWA WORKFORCE DEVELOPMENT**
**UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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| **RYAN M HOWELL**<br>Claimant<br><br>**BRIDGESTONE RETAIL OPERATIONS LLC**<br>Employer | **APPEAL 15A-UI-13756-H2T**<br><br>**ADMINISTRATIVE LAW JUDGE DECISION**<br><br>**OC: 11/15/15**<br>**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 December 4, 2015 (reference 01) unemployment insurance decision that allowed benefits. The parties were properly notified about the hearing. A telephone hearing was held on January 6, 2015. Claimant participated. Employer participated through Eric Bradley, Mechanic; (representative) Ben Moliterno, Area Manager; Jason Newton, Store Manager; and Eric Lemke, General Services Technician. Employer's Exhibits One and Two were entered and received into the record. Claimant's Exhibit A was entered and received 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 manager in training beginning on June 28, 2015 through October 22, 2015; when he was discharged. The claimant had worked in the employer's tire building operation for a number of years but had been a manager in training only four months before he was discharged for violating the employer's workplace violence policy.

On October 18, the claimant was talking with another employee when Eric Bradley attempted to get his attention for assistance by calling his name loudly at least two times. The shop is a loud work environment and it is possible for employees not to be able to hear over the noise. Believing that the claimant could not hear him, Mr. Bradley touched his arm in an attempt to get his attention. Mr. Bradley did not twist the claimant's arm or wrist. Mr. Bradley had no intent to hurt the claimant, he was merely trying to get his attention. At hearing the claimant admitted that he had heard Mr. Bradley call his name twice but he was intentionally ignoring Mr. Bradley because he was working on another issue with another employee.

As Mr. Bradley touched the claimant on the arm, the claimant spun around and shoved Mr. Bradley in the chest so hard that he fell down on his butt and back and slid across the work floor almost hitting his head on a piece of equipment. There was no need for the claimant to push Mr. Bradley. The event was witnessed by Eric Lemke who reported a version of events similar to that reported by Mr. Bradley. The employer's rule does not prohibit employees from touching each other at all and in a work place it is a normal occurrence for employees to touch each other in non-offensive off-handed ways. The claimant did not grab or hold the claimant's arm. Mr. Bradley did nothing that would warrant discipline as touching an employee who you believe cannot hear you in an attempt to get their attention is not a violation of the employer's workplace violence policy. The claimant was upset that Mr. Bradley was bothering him when he had chosen to ignore him and reacted by pushing a subordinate to the ground. The claimant was not defending himself as the evidence does not support a finding that Mr. Bradley was attacking the claimant.

The claimant's medical records have no objective findings of injury to the claimant. His doctor noted an unspecified injury of right elbow. The medical records only contain subjective complaints of pain but no objective finding of injury. The claimant had no permanent injury as a result of Mr. Bradley touching his arm in an attempt to get his attention. The claimant has received unemployment benefits after the separation on a claim with an effective date of November 15, 2015. .

The employer did participate personally in the fact-finding interview through Mr. Moliterno who provided the same essential information to the fact-finder as was provided at the appeal hearing.

**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 § 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.
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> 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).

The claimant knew that workplace violence policy would prohibit shoving a coworker so hard he would fall to the floor. The claimant knew that to engage in such conduct was conduct that would lead to his discharge.

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 Ct. 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*, 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. *State v. Holtz*, Id.

The administrative law judge does not find the claimant's version of events credible. Mr. Bradley had no issues with the claimant at all prior to this incident and there would have been no reason for him to attack the claimant. The claimant admits that he knew Mr. Bradley was trying to get his attention but he ignored him. Both Mr. Bradley and Mr. Lemke credibly testified that Mr. Bradley did not attack or grab the claimant in such a way as to impede him from moving or walking. The claimant simply over reacted to Mr. Bradley simply touching in an attempt to get his attention and he shoved Mr. Bradley down to the floor. Mr. Bradley did not violate the employee's workplace violence policy but the claimant did by shoving a coworker to the floor. The claimant had no injury but is merely alleging that in an attempt to justify his shoving Mr. Bradley to the floor. Under these circumstances the claimant's actions are substantial misconduct and a violation of the conduct an employer has a right to expect from its employees. Benefits are denied.

Iowa Code § 96.3-7, 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) 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. 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. The employer shall not be charged with the benefits.

(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 the claimant 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). In this case, the claimant has received benefits but was not eligible for those benefits. Since the employer participated in the fact-finding interview the claimant is obligated to repay the benefits he received to the Agency and the employer's account shall not be charged.

**DECISION:**

The December 4, 2015 (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 $3703 and he is obligated to repay the Agency those benefits. The employer did participate in the fact-finding interview and their account shall not be charged.

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Teresa K. Hillary
Administrative Law Judge

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Decision Dated and Mailed

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