

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

68-0157 (9-06) - 3091078 - EI

HUMBERTO J DUENAS
Claimant

APPEAL NO: 20A-UI-02711-JE-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

WELLS ENTERPRISES INC
Employer

OC: 09/22/19
Claimant: Respondent (2-R)

Section 96.5-2-a – Discharge/Misconduct
Section 96.3-7 – Recovery of Benefit Overpayment

STATEMENT OF THE CASE:

The employer filed a timely appeal from the March 20, 2020, reference 03, decision that allowed benefits to the claimant. After due notice was issued, a hearing was held by telephone conference call before Administrative Law Judge Julie Elder on May 1, 2020. The claimant did not respond to the hearing notice and did not participate in the hearing. Jody Wilson, Human Resources Generalist and Peggy Leight, Employer's Representative, participated in the hearing on behalf of the employer.

ISSUE:

The issues are whether the employer discharged the claimant for work-connected misconduct.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed as a full-time assistant machine operator for Wells Enterprises from October 1, 2018 to February 26, 2020. He was discharged for failure in the performance of his duties.

On February 19, 2020, the claimant failed to scan the code on a product for an ingredient through the employer's LSR system. The claimant scanned the wrong product in and one that did not go to the run the employer was working on at that time. He scanned it as "Run 2" and the product was accepted but the employer was working on "Run 1" which was a different form of the product. Had he scanned it as "Run 1" it would have been declined and the situation could have been avoided. Usually the hallway employee brings product to the line. The claimant paged the hallway employee but only waited one to two minutes for him to arrive and then went to get the product himself. An employee coming into work looked at the work orders and noticed it came from line two. Although the claimant's error was discovered fairly early in the shift, it cost the employer \$3,000.00 in wrong product run and took the employer five and one-half hours to reset the line. When the employer talked to the claimant about the issue he denied scanning at all and blamed his supervisor and the lab technician. The supervisor and lab technician do not do the scanning. The employer verified the claimant went to the hallway

and grabbed the product to bring to the line without verifying that it was the correct product. The situation could have been avoided had the claimant waited for the hallway employee or scanned correctly.

The claimant received a written warning in February 2019 for throwing product on the floor; a written warning in May 2019 for mis-tagging bar codes on the freezer pallets; and a written warning December 29, 2019, for misuse of the time clock.

Due to the severity of the situation on February 19, 2020, the employer treated it like a lock-out/tag-out violation and escalated the disciplinary process. Usually an employee would receive a five-day suspension for an incident where he failed to correctly scan product. In this case, however, because the claimant had three prior written warnings in the previous 12 months, the employer moved past the suspension stage and terminated the claimant's employment as is allowed under the employer's disciplinary process.

The employer did not participate in the fact-finding interview.

The claimant has received regular unemployment benefits in the amount of \$5,291.00 for the 11 weeks ending May 9, 2020. He has also received \$3,600.00 in Federal Pandemic Unemployment Compensation.

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).

The employer has the burden of proving disqualifying misconduct. *Cosper v. Iowa Department of Job Service*, 321 N.W.2d 6 (Iowa 1982). A claimant is not qualified to receive unemployment insurance benefits if an employer has discharged him for reasons constituting work-connected misconduct. Iowa Code section 96.5-2-a. Misconduct that disqualifies an individual from receiving unemployment insurance benefits occurs when there are deliberate acts or omissions that constitute a material breach of the worker's duties and obligations to the employer. See 871 IAC 24.32(1).

The claimant paged the hallway employee to bring him more product but only allowed him one to two minutes to get there before he went and grabbed the product himself. He picked up the wrong product and scanned it to a different run than the employer was working on and his error cost the employer \$3,000.00 in lost product and five and one-half hours in lost production while it reset the line.

The claimant received three previous written warnings in the last 12 months and under the employer's policy an infraction of this nature escalates the disciplinary process. Consequently, the claimant's employment was terminated.

Under these circumstances, the administrative law judge concludes the claimant's conduct demonstrated a willful disregard of the standards of behavior the employer has the right to expect of employees and shows an intentional and substantial disregard of the employer's interests and the employee's duties and obligations to the employer. The employer has met its burden of proving disqualifying job misconduct. *Cosper v. IDJS*, 321 N.W.2d 6 (Iowa 1982). Therefore, benefits are denied.

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.

The unemployment insurance law requires benefits be recovered from a claimant who receives benefits and is later denied benefits even if the claimant acted in good faith and was not at fault. However, a claimant will not have to repay an overpayment when an initial decision to award benefits on an employment separation issue is reversed on appeal if two conditions are met: (1) the claimant did not receive the benefits due to fraud or willful misrepresentation, and (2) the employer failed to participate in the initial proceeding that awarded benefits. In addition, if a claimant is not required to repay an overpayment because the employer failed to participate in the initial proceeding, the employer's account will be charged for the overpaid benefits. Iowa Code section 96.3(7)a, b.

The claimant received benefits but has been denied benefits as a result of this decision. The claimant, therefore, was overpaid benefits.

Because the claimant did not receive benefits due to fraud or willful misrepresentation and the employer failed to participate in the fact finding interview, the claimant is not required to repay the overpayment and the employer remains subject to charge for the overpaid benefits.

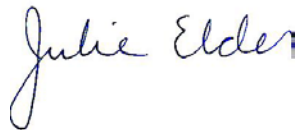
Consequently, the claimant's overpayment of benefits in the amount of \$5,291.00 for the 11 weeks ending May 9, 2020, is waived as to the claimant and his overpayment shall be charged to the employer's account.

The issue of whether the claimant has been overpaid federal pandemic unemployment compensation is remanded to the Benefits Bureau of Iowa Workforce Development for an initial investigation and decision.

DECISION:

The March 20, 2020, reference 03, decision is reversed. The claimant was discharged for disqualifying job 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 received benefits but was not eligible for those benefits. The employer did not participate in the fact-finding interview within the meaning of the law. Therefore, the claimant's overpayment of benefits in the amount of \$5,291.00 for the 11 weeks ending May 9, 2020, shall be charged to the employer's account.

The issue of whether the claimant has been overpaid federal pandemic unemployment compensation is remanded to the Benefits Bureau of Iowa Workforce Development for an initial investigation and decision.



Julie Elder
Administrative Law Judge

May 26, 2020
Decision Dated and Mailed

je/scn