

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

DONALD LESTER
Claimant

APPEAL NO: 16A-UI-07600-JE-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

DOHRN TRANSFER COMPANY LLC
Employer

OC: 06/12/16
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 July 1, 2016, reference 01, 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 July 29, 2016. The claimant participated in the hearing. Sally Jackson, Human Resources Director and Janine Cummings, Human Resources Supervisor, participated in the hearing on behalf of the employer. Employer's Exhibits One through Four were admitted into evidence.

ISSUE:

The issue is 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 local truck driver for Dohrn Transfer Company from April 26, 2007 to June 14, 2016. He was discharged for placing his hands on another employee and stating he was going "to take me out back and break my neck" (Employer's Exhibit Four).

On June 8, 2016, the employer received an incident report from Alex Griffith about a situation that occurred with the claimant earlier that day. Mr. Griffith wrote a statement and the employer began its investigation June 9, 2016. The employer interviewed the claimant and asked if he knew Mr. Griffith and whether he talked to him June 8, 2016, and the claimant stated, "Yes, he's usually there when I come to work and I ask him how he's doing. We joke together. He's a good kid" (Employer's Exhibit Two). The employer asked the claimant if he recalled a conversation with him and the claimant answered, "Yes. I can't remember what comment he made but I said back to him, laughing, 'What do you want me to do, break your neck?' or 'what, do you want your neck broken?' It was something like that, but we were joking and laughing, we always joke. I don't remember what he said to start the conversation. What's he trying to do?" (Employer's Exhibit Three). The employer asked the claimant if he put his hands on Mr. Griffith or touched him at all during their conversation and the claimant said, "I just patted him on the back. This wouldn't be an incident to me, if I don't even remember what was said.

Where is this coming from?” (Employer’s Exhibit Three). The employer suspended the claimant pending investigation. During his testimony the claimant stated he got along well with Mr. Griffith and they always joked around but emphasized Mr. Griffith was a sarcastic individual.

On June 10, 2016, the employer interviewed Mr. Griffith, who stated he “was sitting in the breakroom at the MSC terminal doing (his) paperwork and (the claimant) came in and asked (me) if his truck was loaded. I told him it wasn’t yet because we had to put some diversified freight on it still. He said not to put that freight on him. So I said, ‘That’s too bad.’ Then he placed his hands on my head and my neck. He said he was going to take off my head and he was going to do that by breaking my neck. He said that comment right into my ear” (Employer’s Exhibit Three). The employer asked Mr. Griffith how the claimant placed his hands on his head and neck and Mr. Griffith replied, “He put one hand on the top of my head and the other hand on the back of my neck” (Employer’s Exhibit Three). The employer asked Mr. Griffith if he said anything to the claimant at that time and Mr. Griffith explained he “tried not to say anything else to him” (Employer’s Exhibit Three). The employer asked if there were any witnesses to the incident and Mr. Griffith stated there were not (Employer’s Exhibit Three). Mr. Griffith also stated he did not see the claimant again the remainder of the night but he did talk to his supervisor about the situation and the supervisor advised him to file a report. The employer asked if there had ever been any other incidents of a similar nature involving the claimant in the past and the Mr. Griffith stated on June 3, 2016, the claimant came in and said something and Mr. Griffith replied, “HR is just a short call away,” and the claimant said he “would give (Mr. Griffith) a reason to call HR” (Employer’s Exhibit Three). The supervisor as well as another employee witnessed that exchange (Employer’s Exhibit Three). The employer asked Mr. Griffith if there was any possibility the claimant was joking and Mr. Griffith said, “No. This was not joking. I’ve never really gotten along with him that great” (Employer’s Exhibit Three).

Both men agreed physical contact did occur when the claimant touched Mr. Griffith’s neck and head, both said there were no witnesses, and both concurred the claimant made a comment about breaking Mr. Griffith’s neck. The only item they did not agree on was whether the claimant was acting in a joking manner. Because the claimant made physical contact with Mr. Griffith and made a statement about breaking Mr. Griffith’s neck, the employer determined the claimant violated its policy against workplace harassment and made a threat of violence against Mr. Griffith. Under the employer’s policy those actions are grounds for automatic termination and the employer sent the claimant a certified letter June 14, 2016, notifying him of his discharge.

The claimant has claimed and received unemployment insurance benefits in the amount of \$2,155.00 for the six weeks ending July 23, 2016.

The employer did not personally participate in the fact-finding interview. It provided a form letter stating the claimant violated the employer’s Workplace Harassment Policy June 6, 2016.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment for disqualifying job 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.

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 admitted touching Mr. Griffith's head and neck while indicating he was going to break his neck. While the claimant maintains he was joking with Mr. Griffith, Mr. Griffith did not believe the claimant was joking and reported the incident to the employer. The claimant's actions were a violation of the employer's workplace harassment policy and were inappropriate and unprofessional.

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.

DECISION:

The July 1, 2016, 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 received benefits but was not eligible for those benefits. The employer provided a written form to the fact-finder but did not personally participate in the fact-finding interview. The issue of the amount of the claimant’s overpayment and whether the employer participated in the fact-finding interview within the meaning of the law, is remanded to the Claims Section for an initial determination and adjudication.

Julie Elder
Administrative Law Judge

Decision Dated and Mailed

je/pjs