

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

STEPHAN J BAXTER
Claimant

VALERO SERVICES INC
Employer

APPEAL 17A-UI-01770-H2T
**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 01/15/17
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 February 6, 2017, (reference 01) unemployment insurance decision that allowed benefits. The parties were properly notified about the hearing. A telephone hearing was held on March 9, 2017. Claimant participated and was represented by Nick Brown, Attorney at Law. Employer participated through Bob Abbott, Director of Human Resources. Employer's Exhibits 1 through 5 were 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 shift supervisor beginning on July 24, 2006 through January 12, 2017, when he was discharged.

When employees are in working in the plant they are required to wear fire protection gear. The rule applies to all employees including managers. Managers, like the claimant are expected to enforce and abide by all safety rules. There are at least two categories of safety rules: regular safety rules and lifesaving rules. The company policy, a copy of which was given to all employees put employees on notice that even one violation of a lifesaving rule would lead to discharge.

The claimant had been given a final written warning on November 16 for improper conduct when he falsified his time card and an impact report and when he encouraged two of his crew

members who knew he had falsified the impact report to stay silent about his conduct. The warning also was for mismanaging his crew during a complicated lock-out tag-out procedure. In response to the written warning the claimant indicated to the employer that in the future he would not compromise his integrity and that honesty in his dealings was of paramount importance.

Around December 23, the claimant saw his boss, production manager Kelly Davey in the plant without the required fire protection pants. Mr. Davey's conduct was a safety rule violation, but was not considered a lifesaving rule violation based on his location in the plant. The claimant did not confront Mr. Davey about the violation, nor did he report the violation to the human resources department, the plant manager or the 1-800 anonymous complaint line. What he did do was a few days later he angrily complained to his crew that Mr. Davey had committed a lifesaving rule violation. Claimant was angry because he had been written up by Mr. Davey in November 2016. The claimant misrepresented to the crew that Mr. Davey had committed a lifesaving violation. He also told the crew he did not like or trust the upper management team in the plant. The claimant was a part of the management team.

One of the crew members reported what the claimant had said and the employer investigated. The claimant admitted to upper management that he had made the comments to his crew and that he had told them he did not trust the management team in the plant. During the investigation the claimant also told the employer that he did not trust the management team and had no confidence in them. The claimant as a supervisor misrepresented the severity of Mr. Davey's rule violation. His action, in light of his final written warning just two months prior led the employer to the decision to discharge the claimant as they could not trust him to work in concert with management going forward.

The claimant has received unemployment benefits after the separation on a claim with an effective date of January 15, 2017.

The employer did not participate in the fact-finding interview because their chosen representative Equifax did not give Iowa Workforce Development the name and telephone number of the employee at Valero Services who was going to participate.

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.

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 Iowa Court of Appeals found substantial evidence of misconduct in testimony that the claimant worked slower than he was capable of working and would temporarily and briefly improve following oral reprimands. *Sellers v. EAB*, 531 N.W.2d 645 (Iowa App. 1995). Generally, continued refusal to follow reasonable instructions constitutes misconduct. *Gilliam v. Atlantic Bottling Company*, 453 N.W.2d 230 (Iowa App. 1990).

The claimant was given a final warning in November 2016. He knew that any further incidents could lead to discharge. After the final warning, the claimant wrote a statement indicating that he would be honest and deal with the employer with integrity going forward. There was no business reason for the claimant to badmouth the production manager to his crew or to even tell them about the situation. The appropriate action was for the claimant to report the violation to upper management or the human resources department. Badmouthing the management team he was part of to the employees he supervised is not dealing with the employer with integrity. The claimant provided false information to the crew, as Mr. Davey's violation was not a lifesaving rule violation. The claimant's argument that upper management did not suffer any consequences for failure to follow the rules is not credible in light of the fact that Mr. Davey was disciplined for his rule violation when the employer learned of it. The claimant admitted he knew it was important to report rule violation and he had away to anonymously report the violation but chose not to do so. The employer's evidence does establish substantial repeated job connected misconduct on the part of the claimant sufficient to disqualify him from receipt of unemployment insurance benefits. Benefits are denied.

Iowa Code § 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.

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. The employer relied on Equifax, their paid representative, to provide the agency with information about who to call on the employer's behalf to participate in the fact-finding interview. Equifax stands in the place of the employer. Equifax did not provide the needed information to Iowa Workforce Development so the employer did not participate in the fact-finding interview. Since the employer did not participate in the fact-finding interview the claimant is not obligated to repay the benefits he received to the agency and the employer's account shall be charged.

DECISION:

The February 6, 2017, (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 \$2,682.00 and he is not obligated to repay the agency those benefits. The employer did not participate in the fact-finding interview and their account shall be charged.

Teresa K. Hillary
Administrative Law Judge

Decision Dated and Mailed

tkh/rvs