

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

BRADLEY J SHAFFER
Claimant

APPEAL NO: 17A-UI-09230-JE-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

QDM LLC
Employer

OC: 08/06/17
Claimant: Respondent (2)

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 August 29, 2017, 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 September 27, 2017. The claimant did not respond to the hearing notice and did not participate in the hearing or request a postponement of the hearing as required by the hearing notice. Brian Rorris, General Manager, participated in the hearing on behalf of the employer. Employer's Exhibits One through Five 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 hired as a part-time cook for Quintin's Bar and Deli from December 26, 2015 to August 7, 2017. He was discharged for insubordination, disregard of job duties, and violation of company policy.

The claimant received a written warning January 27, 2016, for leaving "a bag of buns and a whole container of croissants open, letting them spoil, and causing them to be thrown away. Also the oven was not turned off, along with a couple of soup wells" which were fire hazards (Employer's Exhibit One). The employer's closing procedures are contained on the closing sheets which are always available in the kitchen (Employer's Exhibit One). The warning stated, "Any further infraction may cause or lead up to suspension or termination" (Employer's Exhibit One).

On February 19, 2016, the claimant received a written warning for failing to complete his weekly and bi-monthly cleaning duties" (Employer's Exhibit Two). The warning stated that the kitchen staff had been told if they did not complete their job duties within a given timeframe the

employer could issue them a written warning and a second written warning “may lead up to or include suspension and/or termination” (Employer’s Exhibit Two).

On March 17, 2016, the claimant received a written warning for failing to “close properly by leaving three boxes of chicken strips out, letting them spoil, and causing them to be thrown away” (Employer’s Exhibit Three). Additionally, the line was not cleaned correctly or filled for the next shifts (Employer’s Exhibit Three).

On August 3, 2017, the claimant received a written warning for using his phone 22 times during his four hour shift in violation of the employer’s policy (Employer’s Exhibit Four). The claimant was aware of the employer’s cell phone policy and was told that “future occurrences may result in suspension or termination” (Employer’s Exhibit Four).

On February 28, 2017, the claimant received a final written warning after a customer came in and ordered food at 11:58 p.m. The kitchen closes at 12:00 a.m. and the staff is expected to take orders and serve customers until that time. The claimant “saw the order but continued to close without making the food on the ticket. This resulted in the bartender having to discount the drinks for the table in question as well as lost tips for the server involved” (Employer’s Exhibit Five).

On August 7, 2017, the kitchen was open until 10:00 p.m. and an order was placed at 9:55 p.m. The claimant refused to prepare the order and argued with the kitchen manager for 15 minutes before making the food. The customers had to wait longer than necessary and were unhappy with the situation. The food preparation should have taken 10 minutes but because of the claimant’s refusal to make the food it took him nearly 30 minutes to get the food out after the order was placed.

Following the incident earlier that evening, the employer terminated the claimant’s employment August 7, 2017, for insubordination, refusing to do his job, and violation of company policy.

The claimant has claimed and received unemployment insurance benefits in the amount of \$696.00 for the four weeks ending September 2, 2017.

The employer participated personally in the fact-finding interview through the statements of General Manager Brian Rorris.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment for no disqualifying reason.

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). The propriety of a discharge is not at issue in an unemployment insurance case. An employer may be justified in discharging an employee, but the employee's conduct may not amount to misconduct precluding the payment of unemployment compensation. The law limits disqualifying misconduct to substantial and willful wrongdoing or repeated carelessness or negligence that equals willful misconduct in culpability. *Lee v. Employment Appeal Board*, 616 N.W.2d 661, 665 (Iowa 2000).

The claimant received four written warnings before the employer issued him a final written warning for refusing to prepare an order that came in a few minutes before the kitchen closed February 25, 2017. As the claimant was aware, the employer accepts orders up to the time the kitchen closes at either 10:00 p.m. or 12:00 a.m. The warning stated that any further incidents could result in termination of employment.

On August 7, 2017, the claimant was again insubordinate and refused to perform his job duties as instructed by his manager when an order was placed shortly before the kitchen closed. After being told to prepare the order, the claimant argued with the kitchen manager for 15 minutes causing the order to take an inordinate amount of time to get to the customer. The claimant knew or should have known the employer's policy about taking orders up to the time the kitchen closed but despite that knowledge he not only failed to follow the policy but was argumentative and insubordinate as well.

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 employer participated in the fact-finding interview, the claimant is required to repay the overpayment and the employer will not be charged for benefits paid.

The employer participated in the fact-finding interview personally through the statements of General Manager Brian Rorris. Consequently, the claimant's overpayment of benefits cannot be waived and he is overpaid benefits in the amount of \$696.00 for the four weeks ending September 2, 2017.

DECISION:

The August 29, 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 received benefits but was not eligible for those benefits. The employer personally participated in the fact-finding interview within the meaning of the law. Therefore, the claimant is overpaid benefits in the amount of \$696.00 for the four weeks ending September 2, 2017.

Julie Elder
Administrative Law Judge

Decision Dated and Mailed

je/scn