

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

PATRICIA D ANDERSON
Claimant

COLLIS INC
Employer

APPEAL 18A-UI-03967-JP-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

**OC: 12/24/17
Claimant: Respondent (2)**

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Code § 96.3(7) – Recovery of Benefit Overpayment
Iowa Admin. Code r. 871-24.10 – Employer/Representative Participation Fact-finding Interview

STATEMENT OF THE CASE:

The employer filed an appeal from the March 20, 2018, (reference 05) unemployment insurance decision that allowed benefits. The parties were properly notified about the hearing. A telephone hearing was held on April 23, 2018. Claimant did not register for the hearing and did not participate. Employer participated through human resource manager Deb Bianchi. Official notice was taken of the administrative record with no objection.

ISSUES:

Was the claimant discharged for disqualifying job-related misconduct?

Has the claimant been overpaid unemployment insurance benefits, and if so, can the repayment of those benefits to the agency be waived?

Can 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 resistance welder operator from September 25, 2017, and was separated from employment on February 7, 2018, when she was discharged.

Claimant received a copy of employer's drug and alcohol use policy. The employer's policy provides automatic drug testing for any accidents requiring medical treatment. On February 5, 2018, claimant suffered an injury to her thumb at work that required medical treatment. Claimant reported the injury to her supervisor (Roy Jordan). Mr. Jordan took claimant to the first aid room, but it was determined that she needed offsite medical attention for the injury. Mr. Jordan then transported claimant to the Urgent Care Clinic in Clinton, Iowa. On the way to the Urgent Care Clinic, Mr. Jordan told claimant she would need to take a drug test at the Urgent Care Clinic. At the Urgent Care Clinic, it was determined that claimant needed to be taken to Mercy Hospital in Clinton, Iowa for further treatment. Mr. Jordan then transported claimant to

the Mercy Hospital. On the way to the Mercy Hospital, Mr. Jordan told claimant she would have to perform the drug test at Mercy Hospital. Claimant told Mr. Jordan that she would not pass the drug test. After checking claimant into Mercy Hospital, Mr. Jordan left the hospital. Later the employer discovered that claimant had left Mercy Hospital before Mercy Hospital could administer the drug test.

On February 6, 2018, the employer made numerous attempts to call claimant, but she did not answer. The employer left multiple voicemail messages for claimant but she did not respond. Claimant called the employer's attendance line on February 6, 2018, and informed the employer she would be absent.

On February 7, 2018, the employer's safety manager went to claimant's house and made contact with claimant. The safety manager informed claimant the employer needed her to take a drug test due to her accident at work. The safety manager transported claimant to the Medical Associates Clinic in Clinton, Iowa for a drug test. Claimant submitted to the drug test on February 7, 2018. Claimant submitted a urine sample that was split into two components. Claimant's sample was sent to a certified laboratory. The initial result of the drug screen on February 7, 2018, was positive for marijuana metabolites/THC. On February 7, 2018, the employer notified claimant about the initial results of the drug screen. The employer informed claimant she would get a certified letter about the confirmed results, she would have the opportunity to have the second sample tested, and she could provide any information to the medical review officer (MRO) that she believed may have affected the results.

The employer was notified that the results were confirmed positive for marijuana metabolites/THC via a letter from the medical review officer (MRO) dated February 20, 2018. The results were provided to claimant by certified mail with return receipt. Claimant did not respond to the employer's certified letter. The MRO made multiple attempts to contact claimant by telephone, but she did not answer the calls. Claimant also did not return the MRO's messages. In the employer's certified letter, claimant was offered but did not pursue a split sample test.

The administrative record reflects that claimant has received unemployment benefits in the amount of \$480.00, since filing a claim with an effective date of December 24, 2017, for the five weeks-ending April 21, 2018. The administrative record also establishes that the employer did not participate in the fact-finding interview through no fault of its own. Ms. Bianchi testified that the employer was waiting for the fact-finder's phone call, but it did not receive one. Ms. Bianchi testified the fact-finder called a number listed as being in Tennessee.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes claimant was discharged from employment due to job-related misconduct. Benefits are denied.

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 job misconduct. *Cosper v. Iowa Department of Job Service*, 321 N.W.2d 6 (Iowa 1982). Whether an employee violated an employer's policies is a different issue from whether the employee is disqualified for misconduct for purposes of unemployment insurance benefits. See *Lee v. Emp't Appeal Bd.*, 616 N.W.2d 661, 665 (Iowa 2000) ("Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of benefits." (Quoting *Reigelsberger*, 500 N.W.2d at 66.)).

Testing under Iowa Code section 730.5(4) allows employers to test employees for drugs and/or alcohol but requires the employer "adhere to the requirements . . . concerning the conduct of such testing and the use and disposition of the results." Iowa Code section 730.5(9) requires that a written drug screen policy be provided to every employee subject to testing. Iowa Code section 730.5(1)*i* allows drug testing if an employee is injured at work. Testing shall include confirmation of initial positive test results. Iowa Code section 730.5(7)(i)(1) mandates that if a medical review officer (MRO) reports a positive test result to the employer, upon a confirmed positive drug or alcohol test by a certified laboratory, the employer shall notify the employee of the test results by certified mail return receipt requested, and the right to obtain a confirmatory or split-sample test.

The employer has met the requirements of Iowa Code section 730.5. Claimant did receive a copy of employer's drug and alcohol use policy. Claimant's sample was tested at a certified testing facility post-accident and the drug screen was positive for marijuana metabolites/THC. The employer notified claimant by certified mail and offered her a split screen sample. Claimant did not request a second test of the split sample. Employees are required to be drug free in the workplace. The violation of the known work rule constitutes misconduct as it presents a safety

hazard to the employee and the general public and potential liability for the employer. Benefits are denied.

The administrative law judge further concludes that the claimant has been overpaid unemployment insurance benefits.

Iowa Code section 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 she 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), Iowa Admin. Code r. 871-24.10. In this case, the claimant has received benefits but was not eligible for those benefits. The benefits were not received due to any fraud or willful misrepresentation by the claimant. Additionally, employer did not participate in the fact-finding interview. Thus, the claimant is not obligated to repay to the agency the benefits he received.

The law also states that an employer is to be charged if “the employer failed to respond timely or adequately to the department’s request for information relating to the payment of benefits. . .” Iowa Code § 96.3(7)(b)(1)(a). Here, the employer did not participate in the fact finding interview because it did not receive a phone call. Benefits were not paid because the employer failed to respond timely or adequately to IWD’s request for information relating to the payment of benefits. Instead, benefits were paid because the employer did not receive a call from the agency. The employer thus cannot be charged. Since neither party is to be charged then the overpayment is absorbed by the fund.

DECISION:

The March 20, 2018, (reference 05) unemployment insurance decision is reversed. Claimant was discharged from employment due to job-related misconduct. Benefits are withheld until such time as claimant has worked in and been paid wages for insured work equal to ten times her weekly benefit amount, provided she is otherwise eligible.

Claimant has been overpaid unemployment insurance benefits in the amount of \$480.00 and is not obligated to repay the agency those benefits. The employer did not participate in the fact-finding interview through no fault of its own and its account shall not be charged.

Jeremy Peterson
Administrative Law Judge

Decision Dated and Mailed

jp/rvs