

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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

**JESUS C OJEDA**  
Claimant

**APPEAL NO: 19A-UI-04460-JE-T**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**KMB PROPERTY MANAGEMENT II LLC**  
Employer

**OC: 04/21/19**  
**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 May 21, 2019, 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 June 26, 2019. The claimant did not respond to the hearing notice and did not participate in the hearing. Deana Fountain, Property Manager, participated in the hearing on behalf of the employer.

**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 service technician for KMB Property Management II from February 7, 2017 to April 26, 2019. He was discharged for violations of the employer's policies and substandard work performance.

In mid-2018 the employer verbally warned the claimant to stop taking the company vehicle home on nights and weekends as he was not allowed to do so under the employer's policy. In March 2019 Property Manager Deana Fountain again verbally warned the claimant against taking the company vehicle home.

On January 19, 2019, the claimant signed a maintenance tablet use agreement including a section that stated the GPS must be enabled at all times. The claimant repeatedly disabled his GPS. On March 25, 2019, the claimant clocked in and then left for one to one and one-half hours to take his children to school while still on the clock. When the employer asked him about the situation he admitted to doing so and was not paid for that time. On April 2, April 11 and April 22, 2019, the employer talked to the claimant about disabling his GPS on his tablet.

On April 11, 2019, the claimant received a written warning and was given 14 days to correct the issues of violating company policy for continuous errors on his time sheet; turning off his GPS; and failing to keep complete notes as required.

On April 12, 2019, the claimant was assigned to complete 12 hours of work over the course of one and one-half days and spent two hours and 15 minutes on the task without completing any work before leaving. He was expected to perform routine maintenance such as changing furnace filters, checking smoke detectors, and screens, and other tasks of that nature at three properties. The employer had to send another employee to complete the job. Also on April 12, 2019, the claimant was assigned to walk with a pest control employee at two properties for a total of two hours but the office received two calls from residents who had taken time off from work to let the pest control employee in but said the claimant never showed up with the pest control employee. The employer was required to reschedule the job and the residents were angry about the situation. On April 17, 2019, the claimant was expected to meet a city inspector at 3:30 p.m. but called the office at 2:30 p.m. and said he was going to the property one hour early to make sure everything was ready for the inspector. He called the office at 3:47 p.m. and stated he did not know what unit he was supposed to go to and said he did not have keys to any of the units which told the employer he had not been at the property during that one hour and 47 minutes during which he said he was there. As a result of the claimant's failure to perform his job the employer had to delay a new resident's move-in date. On April 22, 2019, the claimant was given a service ticket for a repair to a washing machine. He told the resident he would order the parts and make the repair but closed the ticket without doing either.

On April 23, 2019, the employer issued the claimant a final written warning for substandard work and gave him three days to correct the issues or termination would occur. On April 23 through April 25, 2019, the claimant repeatedly disabled his tablet GPS and conducted personal business on company time by going to see a bankruptcy attorney while on the clock. On April 24, 2019, the claimant spent 45 minutes at a property on a work order which indicated in the resolution section that the resident was not home. The claimant could not account for his time that day. On April 25, 2019, the employer decided it needed to terminate the claimant's employment because he made no effort to correct his behavior and was not showing needed improvement. On April 26, 2019, the employer notified the claimant his employment was terminated for substandard work performance and policy violations.

The claimant has claimed and received unemployment insurance benefits in the amount of \$4,443.00 for the nine weeks ending June 22, 2019.

The employer personally participated in the fact-finding interview through the statements of Property Manager Deana Fountain and Co-Owner Griffin Carr.

#### **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 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 was capable and qualified to perform the job to the employer's expectations but often deliberately mis-managed his time and failed to complete his work assignments. The reason it can be said his actions were intentional was the fact he repeatedly disabled the GPS program on his tablet despite the employer's repeated instructions not to do so. The employer warned the claimant about his behavior both verbally and in writing and gave him specific time frames to correct his behavior but he failed to change his behavior or show any improvement regardless of the employer's specific warnings.

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 Property Manager Deana Fountain and Co-Owner Griffin Carr. Consequently, the claimant’s overpayment of benefits cannot be waived and he is overpaid benefits in the amount of \$4,443.00 for the nine weeks ending June 22, 2019.

**DECISION:**

The May 21, 2019, 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 \$4,443.00 for the nine weeks ending June 22, 2019.

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Julie Elder  
Administrative Law Judge

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Decision Dated and Mailed

je/scn