

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

ANTHONY WILMOT
Claimant

APPEAL NO: 15A-UI-09570-JE-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

DEERY BROTHERS INC
Employer

OC: 08/02/15
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 14, 2015, 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 11, 2015. The claimant participated in the hearing. Terry Mertens, General Manager; Craig Beck, Salesperson; Tim Heiniger, Used Car Manager; Suzy Meza, Technical Coordinator for Employer's Unity; and Jackie Nolan, Employer Representative 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 salesperson for Deery Brothers from February 10, 2014 to July 31, 2015. He was discharged after a final, loud, profanity-laced argument with his co-worker wife and another employee.

On July 31, 2015, Salesperson Craig Beck was at his desk around 8:15 a.m. His desk was located between the claimant's desk and the claimant's wife, Cassandra Wilmot's, desk. The claimant and his wife began arguing about a cell phone the claimant was buying from another employee for their daughter. Ms. Wilmot told the claimant their daughter was not going to like the phone the claimant purchased and the claimant screamed, "I don't give a fuck what your daughter says. Your daughter is going to take this phone." Ms. Wilmot said, "I'm just telling you she's not going to like it" and the claimant repeatedly said, "I don't give a fuck. She's going to take this fucking phone. When a parent gives a child a gift they take it." Ms. Wilmot stated, "I'm just telling you she's not going to like it" and the claimant screamed, "Don't ever fucking disrespect me again in front of anybody." At that point Mr. Beck intervened and reminded the claimant they were on the showroom floor and stated he needed to calm down. The claimant then turned his attention to Mr. Beck and yelled, "Shut the fuck up Beck and mind your own

business.” The claimant then took a few steps toward Mr. Beck who stood up which caused the claimant to stop advancing toward him. The claimant continued yelling at Mr. Beck, however, yelling at him to “shut up” and to “shut your fucking mouth and mind your own business.” At that time Mr. Beck walked away to find someone in management and met Used Car Manager Tim Heiniger coming down the steps and asked him if he knew what was going on. Mr. Heiniger stated he was aware of the situation because the receptionist had already called upstairs. By the time Mr. Heiniger arrived downstairs the incident appeared to have resolved itself so he returned upstairs and was in the morning sales meeting when he learned the situation had flared up again. He went to the showroom floor immediately after the conclusion of the meeting and observed the claimant was in the smoking area. Mr. Heiniger contacted General Manager Terry Mertens and said he thought it was time they “part ways” with the claimant and Mr. Mertens said he would be in. When Mr. Mertens arrived he met with the claimant and Mr. Heiniger and they discussed the situation and the claimant’s prior verbal and written warnings about the same type of behavior and notified the claimant, who was quite agitated, that his employment was terminated.

On December 20, 2014, the claimant was belligerent and insubordinate in the morning sales meeting toward Mr. Mertens because he did not agree with a new policy. He was loud and used profanity until Mr. Mertens told him to leave the morning meeting and then sent him home on suspension because that was the second time a similar situation had occurred in the morning meeting. The warning indicated that if another incident occurred again the claimant could face termination.

On June 12, 2015, the claimant received a warning for making threatening comments and being belligerent toward another employee. Two employees who heard the claimant threaten physical harm to the other employee reported the incident to the employer who issued the warning to the claimant. The warning also addressed the claimant’s tardiness and smoking outside the designated area.

The claimant has claimed and received unemployment insurance benefits in the amount of \$2,928.00 for the six weeks ending September 12, 2015.

The employer did not participate personally in the fact-finding interview but did provide written statements for the fact-finder. The employer’s representative, Suzy Meza, waited for the fact-finder’s call, scheduled August 13, 2015, at 10:20 a.m., for 40 minutes but the call never came.

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:

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 yelled and screamed and used profanity directed at his co-worker wife and Mr. Beck on the showroom floor over a non-work-related issue. His language and behavior were completely inappropriate and unprofessional for the work place. Additionally, his behavior toward Mr. Beck in walking toward him after yelling at him to "shut (his) fucking mouth and mind his own business" was aggressive and threatening. It is unacceptable to speak to, threaten or attempt to intimidate co-workers in that manner, regardless of whether one was his wife, and his behavior demonstrated a willful disregard of the behavior an employer has the right to expect of an employee. Additionally, this was not the claimant's first outburst of this nature and he had been warned about this type of behavior and had been suspended in the past for the same type of conduct.

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.

871 IAC 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 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. In this case, the claimant has received benefits but was not eligible for those benefits. While there is no evidence the claimant received benefits due to fraud or willful misrepresentation, the employer participated in the fact-finding interview through written statements. The employer's representative waited 40 minutes for the fact-finder's call but it never came. Because the employer provided written information and was available for the fact-finder's call but did not receive the call, the administrative law judge concludes the employer has met the requirements of participation. Consequently, the claimant's overpayment of benefits cannot be waived and he is overpaid benefits in the amount of \$2,928.00.

DECISION:

The August 14, 2015, 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 met the definition of participation in the fact-finding interview within the meaning of the law. Therefore, the claimant is overpaid benefits in the amount of \$2,928.00.

Julie Elder
Administrative Law Judge

Decision Dated and Mailed

je/css