

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

**YASSER A GABER**  
Claimant

**THE UNIVERSITY OF IOWA**  
Employer

**APPEAL 17A-UI-10470-LJ**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**OC: 09/17/17**  
**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 October 11, 2017 (reference 01) unemployment insurance decision that allowed benefits based upon a determination that claimant was discharged and the employer failed to establish willful or deliberate misconduct. The parties were properly notified of the hearing. An in-person hearing was held in Cedar Rapids, Iowa, on December 5, 2017. The claimant, Yasser A. Gaber, participated and claimant's son, Seif Gabber, acted as claimant's representative. The employer, The University of Iowa, participated through Mary Eggenburg, Benefits Specialist; and Douglas Robertson, Director of Food and Nutrition Services. Claimant's Exhibits A through F were received and admitted into the record without objection. Employer's Exhibit 1 was received and admitted into the record without 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, most recently as a food service supervisor, from March 16, 2004, until September 18, 2017, when he was discharged. On August 23, an employee came to Robertson to report that claimant had been playing chess instead of working during the weekend prior. This employee reported that claimant played chess for approximately two hours with another person who was off the clock at the time. This employee also reported that claimant had called him over from a different work area to help out, and then claimant proceeded to play chess while this employee covered for him. After receiving this report, the employer commenced an investigation.

During the investigation, Robertson spoke to six additional employees. These employees reported that claimant was frequently absent from his work area and could not be located. Several of claimant's peers, who were both supervisors, described claimant as a bully and stated that he humiliated and intimidated staff-members. One of these supervisors described claimant's method of supervision as exerting control over other people. The employee with whom claimant played chess reported that claimant brought the chess board from home and he (the employee) felt compelled to play as claimant was his supervisor. Other employees that claimant supervised reported that claimant was out of the work area occasionally and was not there as often as they needed him to be. One employee, a subordinate from a different work area, described adverse interactions that she had with claimant. This employee reported that claimant yelled at her and behaved in a threatening and intimidating manner by repeating himself, stating that the head supervisor was gone and so he was in charge, and telling her what to do.

Robertson interviewed claimant on September 11, 2017. Claimant admitted that he brought the chess board into work, but he denied sitting and playing for hours. He reported that he would make a move and then go and do work, then come back and make another move and then return to work again. Claimant denied behaving in a bullying or hostile manner toward anyone, and he denied disappearing from his work area. Claimant carries a pager, and he believes that no one should have had difficulty reaching him during the work day. According to Robertson, claimant had no reason to ever be outside his work area during the work day. After claimant's interview, Robertson placed him on administrative leave pending additional investigation. Claimant was discharged one week later.

Claimant had been warned for similar conduct in the past. In February 2008, claimant received a written reprimand for neglecting his job duties and responsibilities. In May 2008, claimant received a one-day suspension for threatening and intimidating behavior. Claimant was put on notice that his job would be in jeopardy for further similar incidents. Additionally, claimant was aware that he came across in an aggressive manner. Approximately one year before he was discharged, another employee was chosen over claimant to move to an open day-shift position. Claimant spoke to someone about this, and he was told that he scared people and he refused to do what he was asked to do, which led the employer to select the other employee instead of him.

The administrative record reflects that claimant has received unemployment benefits in the amount of \$4,128.00, since filing a claim with an effective date of September 17, 2017, for the eight weeks ending December 2, 2017. The administrative record also establishes that the employer did participate in the fact-finding interview. Employer faxed a letter dated October 6, 2016, stating Eggenburg was not available to participate in the fact-finding interview. She included a brief statement about claimant's discharge and attached Exhibit 1 for the fact-finder's review.

#### **REASONING AND CONCLUSIONS OF LAW:**

For the reasons that follow, the administrative law judge concludes claimant was discharged from employment due to disqualifying misconduct. Benefits are withheld.

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).

It is the duty of the administrative law judge as the trier of fact in this case, to determine the credibility of witnesses, weigh the evidence and decide the facts in issue. *Arndt v. City of LeClaire*, 728 N.W.2d 389, 394-395 (Iowa 2007). The administrative law judge may believe all, part or none of any witness's testimony. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996). In assessing the credibility of witnesses, the administrative law judge should consider the evidence using his or her own observations, common sense and experience. *Id.* In determining the facts, and deciding what testimony to believe, the fact finder may consider the following factors: whether the testimony is reasonable and consistent with other believable evidence; whether a witness has made inconsistent statements; the witness's appearance, conduct, age, intelligence, memory and knowledge of the facts; and the witness's interest in the trial, their motive, candor, bias and prejudice. *Id.* After assessing the credibility of the witnesses who testified during the hearing, considering the applicable factors listed above, and using her own common sense and experience, the administrative law judge finds the employer's testimony more credible than claimant's testimony.

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. Emp't Appeal Bd.*, 531 N.W.2d 645 (Iowa Ct. App. 1995). Generally, continued refusal to follow reasonable instructions constitutes misconduct. *Gilliam v. Atlantic Bottling Co.*, 453 N.W.2d 230 (Iowa Ct. App. 1990). Misconduct must be "substantial" to warrant a denial of job insurance benefits. *Newman v. Iowa Dep't of Job Serv.*, 351 N.W.2d 806 (Iowa Ct. App. 1984). When based on carelessness, the carelessness must actually indicate a "wrongful intent" to be disqualifying in nature. *Id.* Negligence does not constitute misconduct unless recurrent in nature; a single act is not disqualifying unless indicative of a deliberate disregard of the employer's interests. *Henry v. Iowa Dep't of Job Serv.*, 391 N.W.2d 731 (Iowa Ct. App. 1986). Poor work performance is not misconduct in the absence of evidence of intent. *Miller v. Emp't Appeal Bd.*, 423 N.W.2d 211 (Iowa Ct. App. 1988).

The employer is entitled to establish reasonable work rules and expect employees to abide by them. Here, claimant had been warned about both neglecting his job responsibilities and his treatment of others in the workplace. Claimant's repeated failure to perform his job duties and treat others with respect after having been warned is evidence of negligence or carelessness to such a degree of recurrence as to rise to the level of disqualifying job-related misconduct. Benefits are withheld.

The next issues to be determined are whether claimant has been overpaid benefits, whether the claimant must repay those benefits, and whether the employer's account will be charged. 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 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.

Because the claimant's separation was disqualifying, benefits were paid to which he 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. However, the employer did not meet the threshold of participation. The employer did not provide the name and contact information for a rebuttal witness, and it did not submit the policies it alleged claimant violated. Since the employer did not participate in the fact-finding interview the claimant is not obligated to repay to the agency the benefits he received and the employer's account shall be charged.

**DECISION:**

The October 11, 2017 (reference 01) unemployment insurance decision is reversed. 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 \$4,128.00 and is not obligated to repay the agency those benefits. The employer did not participate in the fact-finding interview and its account shall be charged.

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Elizabeth A. Johnson  
Administrative Law Judge

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Decision Dated and Mailed

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