IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

BREANNA M HANSEN
Claimant

ALMBRIDGE EMPLOYEE SERVICE CORP
Employer

APPEAL NO: 18A-UI-06029-JC-T

ADMINISTRATIVE LAW JUDGE DECISION

OC: 04/22/18
Claimant: Respondent (2)

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Code § 96.5(1) – Voluntary Quitting
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 May 21, 2018, (reference 04) unemployment insurance decision that allowed benefits. After due notice, a telephone hearing was held on June 15, 2018. The claimant did not respond to the notice of hearing to furnish a phone number with the Appeals Bureau and did not participate in the hearing. The employer participated through Tamara Brandt, human resources. Employer Exhibits 1-16 were admitted into evidence. The administrative law judge took official notice of the administrative records including the fact-finding documents. Based on the evidence, the arguments presented, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUES:

Was the claimant discharged for disqualifying job-related misconduct?
Did the claimant voluntarily quit the employment with good cause attributable to the employer?
Has the claimant been overpaid any unemployment insurance benefits, and if so, can the repayment of those benefits to the agency be waived?
Can any 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: The claimant was employed part-time as a bartender and was separated from employment on December 9, 2017, when she was discharged.

The claimant began work on November 5, 2017. When she was hired, she was trained on the employer's policies and rules (Employer Exhibit 11, 12). These rules included refraining from harassing, threatening and demeaning conduct, including swearing and insubordinate behavior. (Employer Exhibit 16). The claimant worked with her fiancé, Clay, a cook, and her future mother-in-law, Lori, who was also a bartender.

The claimant last performed work on December 9, 2017. At that time, she did not disclose to the employer that her friend's father had passed away on December 5, 2017 and there would be a funeral on December 12, 2017. On December 13, 2017, the claimant called the employer to report she would be absent, stating she had "buried her father" on December 12, 2017 (Employer Exhibit 9). Ms. Brandt reported to management her phone call, and learned through Lori that the claimant's father had not passed away, but rather a friend's father had died.

The claimant and Ms. Brandt spoke a second time and the claimant was asked if she had found a replacement for her 3:00 p.m. shift. It is the employer's usual practice to request employees find their own replacement when possible. The claimant became upset and yelled at Ms. Brandt, using profanity and also threatened to quit. A third call was placed to the claimant with Ms. Brandt and general manager, Ken Haugen. During this call, the claimant became combative again, yelling and threatening to quit. The employer told the claimant she should not come in and could take the shift off because she was in no shape to work, even though she did not qualify for bereavement under the circumstances. Mr. Haugen also told the claimant her language and conduct was unacceptable.

The employer then checked on the claimant when she picked up her paycheck and asked if she was able to return to work. The claimant said no. Thereafter, the claimant began sending text messages to Lori, with profanity and telling her that she better fix things with her (the claimant) if she expected to have any relationship with her son (Clay). Because the claimant and Lori worked together, Lori notified the employer of the messages, which upset her. Upon review of the claimant's conduct on December 13, 2017, coupled with the harassing messages to Lori, the employer initiated separation and discharged the claimant on December 19, 2017.

The claimant did not attend the hearing or submit any documentation in lieu of participation for the hearing.

The administrative record reflects that claimant has received unemployment benefits in the amount of $987.00, since filing a claim with an effective date of April 22, 2018. The administrative record also establishes that the employer did participate in the May 18, 2018 fact-finding interview or make a witness with direct knowledge available for rebuttal. Tamara Brandt participated.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment due to job-related 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.
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> 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).

In an at-will employment environment, an employer may discharge an employee for any number of reasons or no reason at all if it is not contrary to public policy, but if it fails to meet its burden of proof to establish job related misconduct as the reason for the separation, it incurs potential liability for unemployment insurance benefits related to that separation. The employer has the burden of proof in establishing disqualifying job misconduct. *Cosper v. Iowa Department of Job Service*, 321 N.W.2d 6 (Iowa 1982). The issue is not whether the employer made a correct decision in separating claimant, but whether the claimant is entitled to unemployment insurance benefits. *Infante v. IDJS*, 364 N.W.2d 262 (Iowa App. 1984). What constitutes misconduct justifying termination of an employee and what misconduct warrants denial of unemployment insurance benefits are two separate decisions. *Pierce v. IDJS*, 425 N.W.2d 679 (Iowa App. 1988). Misconduct serious enough to warrant discharge is not necessarily serious enough to warrant a denial of job insurance benefits. Such misconduct must be "substantial." *Newman v. Iowa Department of Job Service*, 351 N.W.2d 806 (Iowa App. 1984). The focus is on deliberate, intentional, or culpable acts by the employee. See *Gimbel v. Employment Appeal Board*, 489 N.W.2d 36, 39 (Iowa Ct. App. 1992).

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*. Assessing the credibility of the witnesses and reliability of the evidence in conjunction with the applicable burden of proof, as shown in the factual conclusions reached in the above-noted findings of fact, the administrative law judge

concludes that the employer has satisfied its burden to establish by a preponderance of the evidence that the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law.

In this case, on December 13, 2017, the claimant called the employer to report her absence for her 3:00 p.m. shift, indicating she had "buried her father" the previous day. The employer learned from another employee, Lori, who was also the claimant's future mother-in-law that it was the claimant's friend's father who had passed away the prior week. The claimant was not truthful to the employer when she misrepresented her father died.

The employer asked the claimant if she had found a replacement for her shift, which was customary when calling off, and the claimant became belligerent, yelling and cursing at Ms. Brandt. In a follow up call that day, the claimant again was confrontational and aggressive with Ms. Brandt and general manager, Kevin Haugen. The claimant was ultimately permitted to take time off when the employer felt she could not perform work that day. She was also verbally counseled regarding her conduct and interactions with Ms. Brandt. The employer did not fire the claimant for her conduct that day, because it was trying to be compassionate given the claimant's stress and grief with the death of someone she cared.

It is true that "[t]he use of profanity or offensive language in a confrontational, disrespectful, or name-calling context may be recognized as misconduct, even in the case of isolated incidents or situations in which the target of abusive name-calling is not present when the vulgar statements are initially made." *Myers v. Emp't Appeal Bd.*, 462 N.W.2d 734 (Iowa Ct. App. 1990). However, the claimant's use of one instance of profanity, when not used in front of customers, accompanied by threats or in a confrontational manner does not rise to the level of misconduct. See *Nolan v. Emp't Appeal Bd.*, 797 N.W.2d 623 (Iowa Ct. App. 2011), distinguishing *Myers* (Mansfiled, J., dissenting) (finding the matter to be an issue of fact "entrusted to the agency.").

The claimant was then asked if she was ready to return to work by her manager, and she said no. At that point, the employer did not intend to discharge her. However, the claimant then began sending messages to her co-worker, Lori, using profanity and about their relationship with the claimant's fiancé, who was also Lori's son and a co-worker. Working with family members or significant others can pose unique challenges in the workplace, where the lines of professional and personal relationships understandably can become blurred. Such is the case here, where the claimant worked with her fiancé and future mother-in-law. However, the claimant's text messages were meant to be intimidating and in response to Lori revealing that the claimant's father had not passed away to the employer. Because Lori was also an employee, and the messages were directly related to work matters, the profanity laced and threatening messages are work related.

Based on the credible evidence, the administrative law judge concludes the claimant was discharged after she was dishonest to the employer about "burying her father" and then was repeatedly combative and used profane language to management and another employee, Lori. The claimant did not attend the hearing and did not refute the employer's credible testimony. The administrative law judge is persuaded the claimant knew or should have known her conduct was contrary to the best interests of the employer. Therefore, based on the evidence presented, the claimant was discharged for misconduct, even without prior warning. Benefits are denied.

The next issue to address is whether the claimant must repay the benefits she has received.

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 in the amount of $987.00.

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.
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> (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 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.

DECISION:

The May 21, 2018, (reference 04) decision is reversed. The claimant was discharged from employment due to job-related misconduct. Benefits are withheld until such time as she has worked in and been paid wages for insured work equal to ten times her weekly benefit amount, provided she is otherwise eligible. The claimant has been overpaid benefits in the amount of $987.00 and is obligated to repay the benefits. The employer's account is relieved of charges associated with the claim.

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Jennifer L. Beckman
Administrative Law Judge

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Decision Dated and Mailed

jlb/scn