

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

MINDY L CORDRAY
Claimant

SWIFT PORK COMPANY
Employer

APPEAL 18R-UI-00237-JP-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

**OC: 10/08/17
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 November 6, 2017, (reference 01) unemployment insurance decision that allowed benefits. The parties were properly notified about the hearing set for February 1, 2018 at 1:00 p.m. On January 29, 2017, the employer faxed a postponement request because “[t]he employers witness Rogelio Bahena is not available after 2:00 p.m.” In its request, the employer indicated the reason for the request was because its witness is not available after 2:00 p.m.; however, the telephone hearing is currently scheduled for 1:00 p.m. Therefore the employer has not shown a good cause reason to postpone the hearing and the employer’s postponement request was denied. A telephone hearing was held on February 1, 2018. Claimant participated. Brian Ulin participated on claimant’s behalf. Employer participated through human resources supervisor Rogelio Bahena.

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 production worker from January 3, 2011, and was separated from employment on October 12, 2017, when she was discharged.

As a production worker, claimant worked with raw meat. The employer has a policy that requires employees to wear a protective frock when they are working on the production floor. Employees wear the protective frock over their street clothes to make sure the meat does not get contaminated. The policy provides that when an employee goes on break they are required to hang it on special hooks in a designated area. Claimant was aware of the employer’s policy.

On October 9, 2017, during claimant's scheduled shift, she was working on the production floor. While claimant was on the production floor, she was properly wearing her protective frock. During her shift, claimant went on a bathroom break. When claimant left her area to go on her bathroom break, she did not hang her protective frock on the special hooks in the designated area; instead she laid her protective frock over the safety handrail in her work area. The employer has quality control technicians that perform rounds in the area. Quality control technician Amy Gardner noticed claimant's protective frock on the handrail while claimant was on her bathroom break. Ms. Gardner picked up claimant's protective frock and started to walk towards the special hooks in the designated area to hang up claimant's protective frock when claimant was returning from her bathroom break. Claimant told Ms. Gardner that she was right there, to leave her stuff alone, and she was getting ready to put it on. Ms. Gardner followed claimant back to claimant's work area and informed her that the protective frock had to be properly hung up in the designated area. Ms. Gardner then called her supervisor to the area. Claimant's supervisor was also called to the area. The supervisors then called the superintendent over and claimant was requested to go to the back office. In the back office, the employer instructed claimant she needed to hang up her protective frock on the special hooks in the designated area. The employer tried to make claimant understand that it was a food safety issue and she needed to use the special hooks. Claimant then went back to work, but she left early due to an illness/injury.

Claimant was absent on October 10, 2017. On October 11, 2017, claimant met with Mr. Bahena about the incident on October 9, 2017. Mr. Bahena testified that if a USDA inspector would have seen claimant's protective frock on the handrail, the employer would have received a non-compliance warning, fine, or shutdown. The employer informed claimant it was going continue investigating the incident. Claimant was allowed to work during the investigation. On October 12, 2017, Mr. Bahena told claimant she was discharged for hanging her frock on the handrail instead of the hooks.

On May 5, 2017, the employer gave claimant a three day suspension for creating hostile work environment. Claimant had yelled and used profanity at her supervisor. Claimant was warned her job was in jeopardy. Claimant admitted she had a prior verbal warning approximately two months prior to her discharge for hanging her protective frock over the handrail. Claimant was instructed she was to use the special hooks to hang up her protective frock.

The administrative record reflects that claimant has received unemployment benefits in the amount of \$3,529.00, since filing a claim with an effective date of October 8, 2017, for the sixteen weeks-ending January 27, 2018. The administrative record also establishes that the employer did participate in the fact-finding interview.

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.

It is the duty of an administrative law judge and 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, as the finder of fact, 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. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996). 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 evidence you believe; whether a witness has made inconsistent statements; the witness's conduct, age, intelligence, memory

and knowledge of the facts; and the witness's interest in the trial, their motive, candor, bias and prejudice. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996).

This administrative law judge assessed the credibility of the witnesses who testified during the hearing, considering the applicable factors listed above, and used my own common sense and experience. This administrative law judge finds the employer's version of events to be more credible than claimant's recollection of those events.

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).

Iowa Admin. Code r. 871-24.32(8) provides:

(8) *Past acts of misconduct.* While past acts and warnings can be used to determine the magnitude of a current act of misconduct, a discharge for misconduct cannot be based on such past act or acts. The termination of employment must be based on a current act.

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). A warning weighs heavily toward a finding of intentional conduct. Willful misconduct can be established where an employee manifests an intent to disobey a future reasonable instruction of his employer. *Myers v. Iowa Dep't of Job Serv.*, 373 N.W.2d 507 (Iowa Ct. App. 1985). 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).

The employer is entitled to establish reasonable work rules and expect employees to abide by them. The employer's policy requiring production workers to hang their protective frocks on special hooks in a designated area is reasonable. Mr. Bahena credibly testified that if a USDA inspector sees an employee's protective frock on the handrail, the employer would receive a non-compliance warning, fine, or shutdown.

The employer has presented substantial and credible evidence that on October 9, 2017, claimant willfully laid her protective frock over the handrail after having been warned. Workers in the human food production and processing industry reasonably have a higher standard of care required in the performance of their job duties to ensure public safety and health. Claimant's conduct on October 9, 2017 violated those standards of care and the employer's policy after having being previously warned. The employer presented substantial and credible evidence that claimant's conduct was a "deliberate violation or disregard of standards of behavior which the employer has the right to expect of employees[.]" Iowa Admin. Code r. 871-24.32(1)a. This is disqualifying misconduct. 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 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 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. Since the employer did participate in the fact-finding interview the claimant is obligated to repay to the agency the benefits she received and the employer's account shall not be charged.

DECISION:

The November 6, 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 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 \$3,529.00 and is obligated to repay the agency those benefits. The employer did participate in the fact-finding interview and its account shall not be charged.

Jeremy Peterson
Administrative Law Judge

Decision Dated and Mailed

jp/rvs