

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

JOHN W RAHN
Claimant

WACO COMMUNITY SCHOOL DISTRICT
Employer

APPEAL 19A-UI-05170-S1-T
**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 06/02/19
Claimant: Respondent (2)

Iowa Code § 96.5-2-a – Discharge for Misconduct
Iowa Code § 96.3-7 – Overpayment

STATEMENT OF THE CASE:

WACO Community School District (employer) appealed a representative's June 24, 2019, decision (reference 01) that concluded John Rahn (claimant) was eligible to receive unemployment insurance benefits. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on July 23, 2019. The claimant was represented by Scott Schroeder, Attorney at Law, and participated personally. Jeff Nance, former principal, participated on behalf of the claimant. The employer was represented by Brett Nitzschke, Attorney at Law, and participated by Carrie Coble, Business Manager; Chris Armstrong, Superintendent; and Tim Bartels, Principal. The employer offered and Exhibits 1 and 2 were received into evidence.

ISSUE:

The issue is whether the claimant was separated from employment for any disqualifying reason.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds that: The claimant was hired on June 21, 2016, as a full-time secondary physical education/science teacher. He was governed by the Code of Professional Conduct and Ethics Regulations. The employer has a lost and found for unrecovered items. Students are to keep items of value secured in their lockers.

While students participate in activities in the gymnasium, they put items they did not want to have on their person on a scorer's table. Sometimes they gave the item to the teacher or coach in charge for safekeeping and that person put the item on the scorer's table.

In November 2018, a student gave the claimant a belly ring for safe keeping. He put it in his pants pocket, forgot the item, and went home. He washed his pants and found the item. He put it in a bag and put it in his pants pocket to take back to work on or about November 5, 2018.

On November 1, 2018, a student put hoop earrings on the scorer's table and the claimant told the student he would keep his eye on them. He said he would watch them. He also placed a red rock on the table that he confiscated from a group of students. The students and the claimant forgot the items. On November 5, 2018, the claimant collected the items and placed them in his bag.

On November 4, 2018, a student practiced in the gymnasium and placed a \$300.00 necklace on the scorer's table. She forgot the necklace. On November 5, 2018, she thought she left the necklace at home. After realizing the necklace was on the scorer's table she looked for the necklace on November 6, 2018. The student and a custodian searched the gymnasium but did not find the necklace. The item was reported missing and the employer began an investigation.

Students, teachers, and custodians were questioned and approximately forty-eight hours of video tape was examined. The video showed the student placing the necklace on the table on November 4, 2018. On November 5, 2018, at approximately 8:00 a.m., a coach appeared to pick up the necklace, clasp the ends, and place the item behind the possession sign.

At 8:00 a.m. on November 5, 2018, the claimant appears at the table with a bag of large items. He raises up on his toes to look over the possession sign. He picks up an item with his right hand and transfers the item to his left hand. The claimant looks both ways and puts the item in his left pants pocket. Later, the claimant removes the bag with the belly ring from his pocket and hands it to a student. At 7:00 a.m., on November 6, 2018, the female student appears and searches the area for the necklace.

On November 6, 2018, the employer questioned the claimant about finding missing jewelry in the gymnasium. The claimant answered that he "did not see or find anything". On November 7, 2018, the employer showed the claimant the video. The claimant talked about picking up a red rock and hoop earrings. He removed those from his bag and gave them to the employer. The claimant said he forgot about them and had not had an opportunity to return the items to the students.

The claimant filed for unemployment insurance benefits with an effective date of June 2, 2019. The claimant received \$467.00 in benefits after the separation from employment. The employer participated personally at the fact finding interview on June 21, 2019, by Carrie Coble and Tim Bartels.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow the administrative law judge concludes the claimant was discharged for 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 proof in establishing disqualifying job misconduct. *Cosper v. Iowa Department of Job Service*, 321 N.W.2d 6 (Iowa 1982). The claimant clearly disregarded the standards of behavior which an employer has a right to expect of its employees. The claimant was charged with protecting the minors in his custody. By extension, he must also do his best to protect the minor's assets. A reasonable person would have sent students into the locker room to secure those assets. A reasonable person would have turned forgotten assets into the office for safe keeping. The claimant did neither. He repeatedly kept forgotten items in his own possession. In one case, he took an item home and washed it. The claimant's action of taking the items was volitional.

The final incident involves a forgotten asset. The claimant denies having seen the item but there is no evidence that any other person approached the table but the claimant. The claimant's standard operating practice was to collect items with a goal of returning them to students. Both parties agree that the video shows the claimant taking something from the table and putting it in his pocket. When a claimant intentionally disregards the standards of behavior that the employer has a right to expect of its employees, the claimant's actions are misconduct. The claimant was discharged for misconduct.

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.

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 claimant has received unemployment insurance benefits that the claimant was not entitled to receive. The employer participated personally in the fact finding interview and is not chargeable. The claimant is overpaid unemployment insurance benefits.

DECISION:

The representative’s June 24, 2019, decision (reference 01) is reversed. The claimant is not eligible to receive unemployment insurance benefits because the claimant was discharged from work for misconduct. Benefits are withheld until the claimant has worked in and has been paid wages for insured work equal to ten times the claimant’s weekly benefit amount provided the claimant is otherwise eligible.

The claimant has received unemployment insurance benefits that the claimant was not entitled to receive. The employer participated personally in the fact finding interview and is not chargeable. The claimant is overpaid unemployment insurance benefits.

Beth A. Scheetz
Administrative Law Judge

Decision Dated and Mailed

bas/rvs