

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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**DAVID TRESNER**  
Claimant

**APPEAL 17R-UI-09306-JCT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**BLUESTONE ENGINEERING LLC**  
Employer

**OC: 06/11/17  
Claimant: Respondent (2)**

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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 July 11, 2017, (reference 01) unemployment insurance decision that allowed benefits. A first hearing was scheduled for August 3, 2017, and the claimant did not participate. Administrative Law Judge, Dawn Boucher, reversed the initial decision in Appeal 17A-UI-07230-DB-T. The claimant appealed the decision to the Employment Appeal Board (EAB) and the matter was remanded for a new hearing. A hearing was scheduled for October 10, 2017, and the claimant and employer were noticed of the new hearing, but the claimant's attorney was inadvertently omitted. The administrative law judge postponed the hearing to ensure proper notice to both parties and counsel.

The parties and counsel were properly notified about the second hearing. A telephone hearing was held on October 24, 2017. The claimant participated personally and was represented by Christopher C. Stewart, attorney at law. The employer participated through Casey McKinstrey, human resources specialist. Dennis Forinash, director of operations, Tom Foldes, president, Lisa Severino, vice president of accounting, and Mitch McCullough, mechanical department manager, also testified for the employer.

Employer Exhibit 1 was admitted into evidence. The administrative law judge took official notice of the administrative records including fact-finding documents and benefits received to date. 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?  
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 full-time as a mechanical engineer and was separated from employment on June 9, 2017, when he was discharged for having a negative attitude.

The employer has a written policy regarding courtesy, which outlines its expectations that all employees and business contacts are treated with respect, and that employees are to maintain a positive attitude in their interactions with people at the workplace (Employer Exhibit 1). The claimant signed a handbook acknowledgment for receipt of employer policies in 2016 (Employer Exhibit 1). The undisputed evidence is that in light of the employer's courtesy policy, profanity was common and generally tolerated in the workplace, and used by both management and employees.

The claimant had satisfactorily performed his work throughout his employment, which began in 2013. In April 2017, however, the employer noticed a change in both the claimant's demeanor, as well as his lack of meeting deadlines. The claimant was verbally counseled about both his attitude and his work performance on April 28, 2017, in response to an incident where the claimant had missed a deadline for a project, and told the project manager to "fuck off" when questioned. The claimant acknowledged he had "lost his cool" in the remark.

On June 6, 2017, Tom Foldes, president, met with the claimant to discuss the impact the claimant's attitude was having on work morale. The claimant was advised by Mr. Foldes that this was a last chance, and that he needed to make changes to his conduct and attitude immediately. The claimant acknowledged even though he was not given a warning in writing, he knew his job was in jeopardy. A few hours after the meeting, the claimant was observed at work making negative comments about the employer, in the presence of co-workers and heard by a manager. Specifically, the claimant said that Tom (Foldes) was trying to make money off his employees so that he could buy himself a bigger Airstream camper. The comments were reported to the employer, who subsequently discharged the claimant. The claimant admitted to the comments, and stated he thought he was having a private conversation. The claimant also acknowledged that he had become "burnt out" from the work and at the time of discharge, referenced that he planned to probably quit soon.

The administrative record reflects that claimant has received unemployment benefits in the amount of \$3,129.00, since filing a claim with an effective date of June 11, 2017. The administrative record also establishes that the employer did participate in the July 10, 2017 fact-finding interview or make a witness with direct knowledge available for rebuttal. Dennis Forinash participated for the employer.

## **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.

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). Generally, continued refusal to follow reasonable instructions constitutes misconduct. *Gilliam v. Atlantic Bottling Co.*, 453 N.W.2d 230 (Iowa Ct. App. 1990).

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.

The employer in this case has a written policy outlining its expectations of courteous behavior, including having a positive attitude (Employer Exhibit 1). The claimant received a copy of the policy in 2016 (Employer Exhibit 1) and was previously counseled in April 2017, in response to his on-going negative attitude and behavior.

The administrative law judge does not condone the use of profanity or name calling in the work place, in light of employer tolerance, and especially not when directed at members of management. However, the claimant was not discharged for use of profane language. He was discharged for directly disregarding Mr. Foldes' directive on June 6, 2017, after the claimant was counseled about his on-going negative attitude, and that it was affecting employee morale.

In light of Mr. Foldes' warning the claimant that he was on a last chance, hours later, the claimant was observed in the workplace, badmouthing company president, Mr. Foldes to other employees, when he made comments including that Mr. Foldes was trying to milk as much money out of employees to buy himself a bigger camper. The claimant's conduct was disrespectful, and a blatant disregard of Mr. Foldes warning to the claimant that his failure to correct his negative attitude in the workplace could result in his discharge. The claimant's choice to vocalize his unhappiness hours later, while still on the premises, and to personally attack Mr. Foldes was willful and deliberate, and not the result of an isolated moment of frustration or miscommunication. The administrative law judge is persuaded the claimant knew or should have known his conduct was contrary to the best interests of the employer, especially in light a warning for similar conduct, just hours before. The employer has established the claimant was discharged for reasons that constitute misconduct and benefits are denied.

The next issue is whether the claimant must repay benefits he received.

Iowa Code § 96.3(7)a-b 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 § 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 § 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 states pursuant to § 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 un rebutted 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 claimant has been overpaid benefits in the amount of \$3,129.00. 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 it 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. The employer satisfactorily participated in the scheduled fact-finding interview by way of Dennis Forinash. Since the employer did participate in the fact-finding interview, the claimant is obligated to repay the benefits he received and the employer's account shall not be charged.

**DECISION:**

The July 11, 2017, (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 been overpaid benefits in the amount of \$3,129.00 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

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