IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

SETH DIMAS
Claimant

REMBRANDT ENTERPRISES INC
Employer

APPEAL NO: 16A-UI-00377-JE-T

ADMINISTRATIVE LAW JUDGE DECISION

OC: 06/21/15
Claimant: Respondent (2)

Section 96.5-2-a – Discharge/Misconduct
Section 96.3-7 – Recovery of Benefit Overpayment

STATEMENT OF THE CASE:

The employer filed a timely appeal from the January 5, 2016, reference 02, decision that allowed benefits to the claimant. After due notice was issued, a hearing was held by telephone conference call before Administrative Law Judge Julie Elder on February 1, 2016. The claimant did not respond to the hearing notice and did not participate in the hearing or request a postponement of the hearing as required by the hearing notice. Pamela Winkel, Human Resources Administrator/Training Specialist; Jeremiah Gordon, Safety Coordinator; and Jeremiah Love, Operation Manager; participated in the hearing on behalf of the employer.

ISSUE:

The issue is whether the employer discharged the claimant for work-connected misconduct.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed as a full-time package draw off (PDO) operator for Rembrandt Enterprises from March 5, 2015 to November 16, 2015. He was discharged for several incidents, including a final incident of horseplay that jeopardized the employer's pasteurization process.

The employer is an egg facility that pasteurizes eggs for human consumption. The employer uses critical control points (CCP) in the production process that must be followed or will cause serious risk of illness up to and including death to consumers who eat the eggs. The employees in the pasteurization department have been trained and certified in pasteurization.

On November 12, 2015, the claimant was discovered in the pasteurization room acting like he was pushing buttons on the employer's touch screen computers which operators use to pasteurize the eggs. The manager who found the claimant in the pasteurization room, which he had no reason to be in, thought he was touching the panels on the pasteurization machines which is a food safety defense issue and could have caused the employer to have to place its product on hold and caused the product to be unfit for human consumption. The claimant's

actions also could have injured workers as the temperature of the eggs exceeds 150 degrees. The manager instructed the claimant to go to the office where he met with the employer who asked the claimant why he was in the pasteurization area. The claimant responded that he was "just messing around." The decision was made to send him home pending further investigation.

The employer's investigation included food safety/food defense as the employer is a SQFQ level three facility which is the highest level of food safety. The first item the employer teaches new employees is that food safety and defense is every employee's responsibility and failure to follow the proper procedures can actually be punishable by law.

The employer also learned of two other safety violations committed by the claimant the morning of November 12, 2015. The first involved the claimant standing on a railing throwing 50-pound bags and lifting the bags in a very unsafe manner and the second violation occurred when the claimant chose to slide down a bannister in the production area rather than simply walking down the steps.

The claimant received a verbal warning in writing October 15, 2015, for pushing boxes through the automatic taping machine that were not ready and did so with enough force that he shattered a box of product rather than calling a manager when he discovered there was a problem with the machine. On November 6, 2015, the claimant received a written warning for failing to wear his personal protective equipment when working with chemicals and receiving chemical burns after just being trained in that procedure September 2, 2015. On November 11, 2015, the claimant received a written warning for using his lock-out/tag-out lock on his personal locker. One of the first safety procedures taught to new employees by the employer is not to use your lock-out/tag-out lock on anything besides a machine you are locking out. Failure to follow that policy is an OSHA violation and a terminable offense. Instead of discharging the claimant at that time the employer chose to try to work with him and reeducate him. Each time the claimant was talked to about an error or received a disciplinary action he asked the employer if he "was fired now" or "Am I fired now? He was also overheard asking other employees if various violations would get him discharged.

After reviewing the events of November 12, 2015, and the claimant's previous disciplinary record the employer notified the claimant his employment was terminated November 16, 2015.

The claimant has claimed and received unemployment insurance benefits in the amount of $996.85 for the three weeks ending December 26, 2015.

The employer personally participated in the fact-finding interview through the statements of Human Resources Manager Lori Carr, Safety Coordinator Jeremiah Gordon, and Operations Manager Jeremiah Love. The employer also submitted written documentation prior to the fact-finding interview.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment for disqualifying job misconduct.

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.
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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).

The employer has the burden of proving disqualifying misconduct. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). A claimant is not qualified to receive unemployment insurance benefits if an employer has discharged him for reasons constituting work-connected misconduct. Iowa Code section 96.5-2-a. Misconduct that disqualifies an individual from receiving unemployment insurance benefits occurs when there are deliberate acts or omissions that constitute a material breach of the worker's duties and obligations to the employer. See 871 IAC 24.32(1).

The employer's business depends on its employees following established food safety procedures and employees are extensively trained in those areas. Despite that training the claimant entered the pasteurization area November 12, 2015, and pretended to push the control panels on the touch screen computers. He had no valid reason to be in that area but despite that fact he not only was in an area where he did not perform work but was also, in his words, "just messing around." Because of the sensitivity and seriousness of the egg pasteurization process and intense food safety regulations the employer is required to follow, the claimant could not provide any valid reason for his actions.

The claimant had received three formal warnings prior to November 12, 2015, including one November 11, 2015, but notwithstanding those warnings and the employer's efforts to retrain and reeducate the claimant, his behaviors persisted. Additionally, given how eagerly he asked if his infractions would now result in his discharge, it leaves the impression the claimant did not make any effort to improve in the areas addressed by the employer after his initial training and that the claimant hoped for termination. He certainly did not take the process as seriously as required by food safety regulations and laws put in place to protect the health and safety of the public.

Under these circumstances, the administrative law judge concludes the claimant's conduct demonstrated a willful disregard of the standards of behavior the employer has the right to expect of employees and shows an intentional and substantial disregard of the employer's interests and the employee's duties and obligations to the employer. The employer has met its burden of proving disqualifying job misconduct. Cosper v. IDJS, 321 N.W.2d 6 (Iowa 1982). Therefore, benefits are denied.

Iowa Admin. Code r. 871-24.10 provides:

> Employer and employer representative participation in fact-finding interviews.
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> (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.

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 § 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.

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.

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. In this case, the claimant has received benefits but was not eligible for those benefits. While there is no evidence the claimant received benefits due to fraud or willful misrepresentation, the employer participated in the fact-finding interview personally through the statements of Human Resources Manager Lori Carr, Safety Coordinator Jeremiah Gordon, and Operations Manager Jeremiah Love. Consequently, the claimant's overpayment of benefits cannot be waived and he is overpaid benefits in the amount of $996.85.

DECISION:

The January 5, 2016, reference 02, 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 received benefits but was not eligible for those benefits. The employer personally participated in the fact-finding interview within the meaning of the law. Therefore, the claimant is overpaid benefits in the amount of $996.85.

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Julie Elder
Administrative Law Judge

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Decision Dated and Mailed

je/pjs