

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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

SCOTT M LAMBERSON
Claimant

APPEAL NO: 19A-UI-07281-JE-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

BRAD DEERY MOTORS
Employer

OC: 08/04/19
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 September 4, 2019, reference 03, 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 October 7, 2019. The claimant participated in the hearing. Nicholas McCutcheon, Vice-President; Dan O'Mara, Sales Manager; Joel Kilburg, Office Manager; and Robin Moore, Employer Representative; 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 sales consultant for Brad Deery Motors from July 31, 2018 to August 7, 2019. He was discharged for insubordination.

At approximately 12:30 p.m. on August 7, 2019, the claimant went to Vice-President Nicholas McCutcheon's office. He was agitated and was carrying a copy of a communication slip which showed he was being charged \$163.00 for a customer's floor mats because he failed to take care of the situation previously. The customer purchased the vehicle May 24, 2019. She emailed the claimant about the floor mats May 31, 2019, and the claimant responded he was going to check into it June 5, 2019. The claimant emailed the customer June 11, 2019, and asked what floor mats were missing. On July 15, 2019, the claimant was scheduled to conduct a follow-up contact with the customer and wrote "will later. On July 23, 2019, the customer sent the claimant a text checking on the floor mats again and the claimant did not respond. On July 25, 2019, the customer sent a HELP request to the dealership's website and that correspondence was forwarded to Mr. McCutcheon. Sales Manager Dan O'Mara was in Mr. McCutcheon's office when he filled out the order for the customer's floor mats and stated the claimant should have to pay for the mats because it was not the first time the customer contacted him about the issue. The claimant became very upset with Mr. McCutcheon

August 7, 2019, and asked why he had to pay for the floor mats and Mr. McCutcheon said the customer purchased the car May 24, 2019, and the issue was not resolved by July 25, 2019, and consequently the employer had to order new floor mats for the customer. The claimant again asked why and stated the customer was not happy with “anything.” Mr. McCutcheon called Mr. O’Mara to join the conversation and when he arrived asked the claimant to close the door and the claimant said, “What, so you can yell at me” and would not shut the door. Mr. McCutcheon asked Mr. O’Mara if there were other customer issues and he said yes and the claimant raised his voice and said Mr. McCutcheon needed to “learn how to run a dealership because (he) sure as hell didn’t know how to run one.” He continued that he did not know what Mr. McCutcheon “did all day in (his) office.” Mr. McCutcheon asked Mr. O’Mara for examples of the claimant’s customers not being taken care of and the claimant said, “No” loudly. The claimant repeated that he did not know what Mr. McCutcheon did all day but he was not paying for the customer’s floor mats and Mr. McCutcheon said, “Yes you will because its already been charged back” and the claimant said he already talked to a lawyer. Mr. McCutcheon told the claimant to get his belongings and get out and the claimant laughed and said, “You’re going to be sorry” and went down to his office and then to the showroom toward the main office. The employer told the claimant it was going to call the police and did so when the claimant did not leave the dealership.

The claimant has claimed and received unemployment insurance benefits in the amount of \$4,077.00 for the nine weeks ending October 5, 2019.

The employer did not participate in 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 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 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).

While the claimant was upset about being charged for the customer's floor mats, his behavior was unacceptable, inappropriate and unprofessional. Regardless of whether he was angry, he did not have the right to yell at the employer and question whether he knew how to run a dealership. The claimant's actions were insubordinate and damaged the employment relationship beyond repair.

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.

(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 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.

Because the claimant did not receive benefits due to fraud or willful misrepresentation and employer failed to participate in the finding interview, the claimant is not required to repay the overpayment and the employer remains subject to charge for the overpaid benefits.

The employer did not participate in the fact-finding interview. Consequently, the claimant's overpayment of benefits is waived and his overpayment amount of \$4,077.00, for the nine weeks ending October 5, 2019, shall be charged to the employer's account.

DECISION:

The September 4, 2019, reference 03, 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 did not participate in the fact-finding interview within the meaning of the law. Therefore, the claimant's overpayment of benefits, in the amount of \$4,077.00 for the nine weeks ending October 5, 2019, shall be charged to the employer's account.

Julie Elder
Administrative Law Judge

Decision Dated and Mailed

je/scn