

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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

BEVERLY J FANELLI
Claimant

APPEAL NO: 20A-UI-00266-JE-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

COUNCIL BLUFFS COMM SCHOOL DIST
Employer

OC: 12/08/19
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 December 30, 2019, reference 01, 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 January 29, 2020. The claimant participated in the hearing. Gary Milborn, Chief of Human Resources; Casey Moran, Principal; Kelly Fischer, Benefits Specialist; and David Peterson, Employer Representative, participated in the hearing on behalf of the employer. Director of Compliance Emily Warren observed the hearing. Claimant's Exhibits A and B and Employer's Exhibits One through 34 were admitted into evidence.

ISSUE:

Whether the employer discharged the claimant for work-connected misconduct as defined by Iowa law and whether she is overpaid benefits.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant worked as a full-time para-educator for Council Bluffs Community School District from August 28, 2015 to December 10, 2019. She was discharged for boundary and performance issues.

On December 7, 2015, the employer conducted the claimant's probationary evaluation and expressed concerns about her kissing a student on the cheek and allowing him to sit on her lap, leaving before 4:00 p.m., and disrespecting students by calling them idiots.

In June 2016, the claimant's evaluation cited four "needs improvement" under the essential job functions. The employer talked to the claimant about reading books during work and using harsh language toward students.

On May 15, 2017, the claimant's performance evaluation listed two "needs improvement" regarding her tone toward students and the need for positive interactions with students. The claimant received coaching from a consultant and showed improvement for a while but the employer's concerns persisted.

On September 26, 2017, the claimant received a letter of reprimand and was suspended part of the day September 25 and the full day September 26, 2017, for a documented use of an improper hold in pulling a student upstairs. School employees are only allowed to put their hands on a child if the child is out of control. The claimant received training on how to transport a student who is out of control but she did not follow the employer's procedure.

On November 20, 2017, a letter of concern was placed in the claimant's file due to job performance concerns. The letter outlined the issues including the claimant speaking to students harshly. The employer emphasized the seriousness of the matter and told the claimant any further incidents could result in termination.

On April 27, 2018, the claimant's performance evaluation again stated there were four essential job functions she "needs improvement." The claimant scolded two students for not writing their names correctly, shook her finger in a student's face, and took a sharp tone with parents and colleagues.

On May 7, 2018, the claimant was placed on a last chance agreement which stated she must assist students in completing the assignments given by teachers and not change the assignments, abide by the student education plans, properly communicate with students and parents, and not communicate with parents about students.

During 2019 Principal Casey Moran exchanged emails and had conversations about not lowering expectations for students, ensuring the students did their work themselves, only teachers could modify or shorten assignments, and her time in the classroom needed to be spent with the students and not on the computer or reading articles.

On December 8, 2019, two teachers told Mr. Moran they had concerns about the claimant violating boundaries by kissing students on the cheek and head and giving them candy and disrupting student groups in the special education classroom. Mr. Moran talked to several teachers and they all cited the same concerns about disrupting the classes including telling students a fourth grade writing assignment was too hard and coloring with a second grader instead of doing an assignment. The third grade teacher said the claimant was not meeting the directive of completing assignments and the second grade teacher stated the claimant was disruptive and pulled students away from their work. The employer required boundary training of all employees for the first time in the fall of 2019 and the claimant attended the training.

On December 9, 2019, the employer met with the claimant and discussed the issues presented by the teachers. He then spoke to Chief of Human Resources Gary Milborn and they went through the claimant's personnel file and the last chance agreement. On December 10, 2019, the employer terminated the claimant's employment.

The claimant has claimed and received unemployment insurance benefits in the amount of \$1,254.00 for the six weeks ending January 25, 2020.

The employer participated personally in the fact-finding interview through the statements of Benefits Specialist Kelly Fischer.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment for no disqualifying reason.

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).

The claimant admitted kissing students on the top of their heads and giving them hugs despite the fact she attended boundary invasion training in the fall of 2019 and knew or should have known that school personnel are not to touch students unless they are out of control. The claimant was previously warned about kissing students but despite those warnings, including a last chance agreement, her behavior continued. At least four teachers complained about the claimant's actions in hugging and kissing students as well as giving them candy, being disruptive in class and not supporting the teachers who were her supervisors by following their directives.

The administrative law judge believes the claimant's intentions were good for the most part but her actions violated the employer's policies and procedures and she either failed to understand that or knew and chose to ignore the rules. Either way, the employer's expectations were not unreasonable and the claimant had an obligation to follow policy.

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 employer participated in the fact-finding interview, the claimant is required to repay the overpayment and the employer’s account will not be charged for benefits paid.

DECISION:

The December 30, 2019, reference 01, decision is reversed. The claimant was discharged from employment due to job-related misconduct. Benefits are withheld until such time as she has worked in and been paid wages for insured work equal to ten times her weekly benefit amount, provided she 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 \$1,254.00 for the six weeks ending January 25, 2020.

Julie Elder
Administrative Law Judge

Decision Dated and Mailed

je/scn