

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

ROWDY D VAN CLEAVE
Claimant

MYRIAD ADVISOR SOLUTIONS INC
Employer

APPEAL NO. 17A-UI-11040-B2

**ADMINISTRATIVE LAW JUDGE
DECISION**

**OC: 09/10/17
Claimant: Respondent (2)**

Iowa Code § 96.5-2-a – Discharge for Misconduct
Iowa Code § 96.3-7 – Recovery of Overpayment of Benefits
871 IA Admin. Code 24(10) – Employer Participation in Fact Finding

STATEMENT OF THE CASE:

Employer filed an appeal from a decision of a representative dated October 16, 2017, reference 03, which held claimant eligible for unemployment insurance benefits. After due notice, a hearing was scheduled for and held on November 28, 2017. Claimant participated personally and was represented by attorney Laura Jontz. Employer participated by Danielle White, Leigh White, and Kadee Miller. Employer's Exhibits 1-4 were admitted into evidence.

ISSUES:

Whether claimant was discharged for misconduct?

Whether claimant was overpaid benefits?

If claimant was overpaid benefits, should claimant repay benefits or should employer be charged due to employer's participation or lack thereof in fact finding?

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds: Claimant last worked for employer on September 11, 2017. Employer discharged claimant on September 11, 2017 because employer believed claimant had been insubordinate to managers and co-workers and had not done a task which had been given to him many weeks prior, even though he knew it was of great priority.

Claimant worked on the help desk for employer. Soon after claimant was hired, he had difficulty with some customers and some co-workers. As claimant had been involved in computer work for over twenty years and had numerous trainings and certifications, he knew more about the processes than many of his co-workers. He expressed this to co-workers and the company owner. Additionally, claimant acted in an aggressive manner to co-workers.

A large part of employer's business was backing up its customers' files so that they could be moved or otherwise protected. Claimant started initially working on customer accounts; soon he was asked to oversee the other help desk assistants. This did not last too long as claimant was too abrasive to others. Claimant's hours were switched to working when others weren't working, and near claimant's termination date, he was switched to working nights so that he could do his backups more easily and not have as much communication with co-workers.

On August 23, 2017, claimant was publicly yelling at his co-worker who was asked to organize matters when claimant was relieved of those duties. This was done in front of many co-workers and was very aggressive and threatening. On August 30, 2015, claimant was given a written warning for his outburst and told that such disrespect would not be allowed. At that meeting, or near in time to that meeting, claimant also met with his new manager. (The company owner decided to stop being claimant's manager as the two did not get along.) The new manager told claimant that he would not be going to one of the two scheduled meetings claimant was to have over the Labor Day weekend in Maryland. Claimant was upset.

After claimant's Labor Day trip, he met with his new manager. Claimant was still upset about the way that he'd been treated the previous week. He told his new manager that he would not give her progress reports that the manager demanded of others in positions similar to claimant. Two days later, the company owner came by claimant's computer and discovered that the large backup project claimant was to do for Pinkerton hadn't been done, and couldn't be done as the disk onto which the backups were placed was full and had been for a couple of weeks. As the owner had constantly told claimant and all other workers that backing up was of prime importance, she was very upset that claimant did not have this work done, and progress hadn't been made for weeks.

The next Monday, claimant met with the owner and his new manager and he was terminated. Claimant was not told a specific reason when he was terminated. Employer stated that they did not give a specific reason for termination as there were fears that claimant would become very upset and potentially violent if the termination turned into a discussion over claimant's actions.

Claimant has received unemployment benefits in this matter.

Employer did substantially participate in fact finding in this matter by the participation of Kadee Miller and Leigh White in the fact finding interview.

REASONING AND CONCLUSIONS OF LAW:

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).

Iowa Code § 96.3(7)a-b, as amended in 2008, 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 section 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 section 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 state pursuant to section 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.

A claimant is not qualified to receive unemployment insurance benefits if an employer has discharged the claimant for reasons constituting work connected misconduct. Iowa Code § 96.5-2-a. Before a claimant can be denied unemployment insurance benefits, the employer has the burden to establish the claimant was discharged for work-connected misconduct. *Cosper v. Iowa Department of Job Service*, 321 N.W.2d 6 (Iowa 1982), Iowa Code § 96.5-2-a.

In order to establish misconduct as to disqualify a former employee from benefits an employer must establish the employee was responsible for a deliberate act or omission which was a material breach of the duties and obligations owed by the employee to the employer. Rule 871 IAC 24.32(1)a; *Huntoon v. Iowa Department of Job Service*, 275 N.W.2d 445 (Iowa 1979); *Henry v. Iowa Department of Job Service*, 391 N.W.2d 731, 735 (Iowa Ct. App. 1986). The conduct must show a 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 the employee's duties and obligations to the employer. Rule 871 IAC 24.32(1)a; *Huntoon* supra; *Henry* supra. In contrast, 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 deemed misconduct within the meaning of the statute. Rule 871 IAC 24.32(1)a; *Huntoon* supra; *Newman v. Iowa Department of Job Service*, 351 N.W.2d 806 (Iowa Ct. App. 1984).

The gravity of the incident, number of policy violations and prior warnings are factors considered when analyzing misconduct. The lack of a current warning may detract from a finding of an intentional policy violation.

In this matter, the administrative law judge looks to the two stated reasons for claimant's termination – the lack of production and claimant's dealings with co-workers. Regarding the lack of productions, the evidence fails to establish that claimant was discharged for an act of misconduct when claimant violated employer's policy concerning backing up files. Claimant was not warned concerning this policy. Claimant stated that the files were backed up and claimant had no idea what happened to them.

Regarding claimant's insubordination and disrespectful treatment of managers and co-workers, the evidence to establish that claimant was discharged for an act of misconduct when claimant repeatedly violated employer's policy concerning treatment of co-workers and insubordination directed towards managers. Claimant was warned concerning this policy. The last incident of this type which brought about the discharge constitutes misconduct because claimant was warned days before his termination that his treatment of co-workers had to improve. Days after receiving the warning, claimant was insubordinate to his new manager, refusing to give her updates as to the status of his work. The administrative law judge holds that claimant was discharged for an act of misconduct and, as such, is disqualified for the receipt of unemployment insurance benefits.

The overpayment issue was addressed. Claimant has received benefits in this matter. Said benefits received are overpayments.

The issue of employer participation was addressed. As employer substantially participated in fact finding in this matter, employer's account will not be charged for overpayments received by claimant.

DECISION:

The decision of the representative dated October 16, 2017, reference 03, is reversed. Unemployment insurance benefits shall be withheld until claimant has worked in and been paid wages for insured work equal to ten times claimant's weekly benefit amount, provided claimant is otherwise eligible. Claimant's benefits received in this matter are overpayments. Employer's account shall not be charged for said overpayments.

Blair A. Bennett
Administrative Law Judge

Decision Dated and Mailed

bab/scn