IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

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

PARIS D JORDAN
Claimant

WELLS FARGO BANK NA
Employer

APPEAL NO: 18A-UI-08225-JE-T

ADMINISTRATIVE LAW JUDGE DECISION

OC: 07/08/18
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 July 23, 2018, 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 August 23, 2018. The claimant participated in the hearing. Jose Galan, Loan Administration Manager; Kevin Adams, Account Resolution Manager; and Thomas Kuiper, Employer Representative; participated in the hearing on behalf of the employer. Employer's Exhibits One through Six were admitted into evidence.

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 account resolutions specialist II for Wells Fargo Bank from February 10, 2016 to July 9, 2018. He was discharged for manipulation of his time card.

On May 30, 2018, the employer emailed the claimant stating that while reviewing adherence it was noted that the "times documented as worked in timecard don't necessary match our log in-log out reports" (Employer's Exhibit Three). On May 1, 2018, the claimant's time card stated he worked from 7:00 a.m. to 4:00 p.m. but the employer's ACES system showed he arrived at work at 8:54 a.m.; on May 2, 2018, his time card showed 9:00 a.m. to 4:00 p.m. but his SWD time showed he arrived at 9:17 a.m.; on May 3, 2018, the claimant's time card showed 7:00 a.m. to 4:00 p.m. but SWD time showed he arrived at 8:56 a.m.; on May 4, 2018, his time card showed 10:30 a.m. to 2:00 p.m. but his ACES time showed he arrived at 10:56 a.m.; on May 8, 2018, his time card showed 9:00 a.m. to 4:00 p.m. but his ACES time showed he arrived at 9:23 a.m.; on May 9, 2018, his time card showed 8:30 a.m. to 4:00 p.m. but SWD time showed he arrived at 8:38 a.m.; on May 10, 2018, his time card showed 10:00 a.m. to 4:00 p.m. but his SWD time showed he arrived at 10:12 a.m.; on May 11, 2018, his time card showed 12:30 p.m. to 4:00 p.m. but his SWD time showed he arrived at 12:52 p.m.; on May 14, 2018, his time card showed 12:00 p.m. to 4:00 p.m. but his SWD time showed he arrived at

12:09 p.m.; on May 22, 2018, his time card showed 8:50 a.m. to 4:00 p.m. but his ACES time showed he arrived at 9:39 a.m.; on May 23, 2018, his time card showed 8:30 a.m. to 4:00 p.m. but his SWD time showed he arrived at 8:52 a.m.; on May 28, 2018, his time card showed 12:20 p.m. to 1:20 p.m. but his SWD time showed he worked 12:31 p.m. to 1:12 p.m.; and on May 29, 2018, his time card showed 7:00 a.m. to 3:00 p.m. but his ACES time showed he arrived at 7:35 a.m. (Employer's Exhibit Three). The employer used the earliest log in time between the ACES system and the SWD system (Employer's Exhibit Three). The claimant responded in a May 31, 2018, email stating he was "very embarrassed" and surprised and would follow the direction given to him and that he had "an action plan to implement the new direction" (Employer's Exhibit Three). He acknowledged that his time reporting could be viewed as time card manipulation (Employer's Exhibit Three). The claimant's supervisor replied to the claimant's email by stating, "Upon further review of previous coaching provided, it was noticed that your previous supervisor had coached you at least 4 times and provided strict instructions on what to do and why it was important to do it right since it was for not entering time correctly in time tracker and that it could be construed as time card manipulation" (Employer's Exhibit Two).

The situation prompted the claimant's supervisor, Loan Administration Manager Jose Galan, to contact Account Resolution Manager Kevin Adams, and they decided to consult human resources. After human resources were contacted it suggested verifying the claimant's actual arrival times by his badge in logs. The employer reviewed the claimant's arrival times from January 2 through May 3, 2018 and found a total of 27.33 in time paid that the claimant did not work and was not in the building. The employer completed that review and Mr. Adams met with the claimant June 8, 2018. The claimant expressed "shock" and "embarrassment" about the situation and Mr. Adams asked how he could be shocked when he was coached about the same thing by his previous supervisor several times. The claimant did not respond. Mr. Adams provided the claimant a copy of Employer's Exhibit Four and stated he found the situation to be "egregious error." Mr. Adams began going through the document with the claimant but the claimant stopped him and stated it looked like time card manipulation. He stated he forgot to put his time on his time card daily and forgot when he arrived late or left early. Mr. Adams responded that was exactly what the claimant was coached on previously. At the end of the conversation, Mr. Adams stated he was contacting human resources and investigations and the claimant asked if he was going to be discharged. Mr. Adams said the disciplinary action would be up to and including termination depending on the findings of the investigation.

After the May 30, 2018, exchange of emails the claimant continued his time card inaccuracies but in a "different format" for his lunch and departure times. He indicated he left at 4:00 p.m. when he stayed after 4:00 p.m. which was also a violation of the employer's policy. An example of this situation occurred June 20, 2018, when the claimant stated he went to lunch from 11:00 a.m. to 12:00 p.m. but actually went from 11:15 a.m. to 12:13 p.m. His time card also said he arrived at 7:27 a.m. and left at 4:00 p.m. when he really logged out at 4:13 p.m.

The claimant was also on intermittent FMLA and the employer had to go through and eliminate any times he was absent due to FMLA in order to make sure the claimant was not penalized for those times. Mr. Adams received termination approval but before he could discharge the claimant, he opened a human resources case about his FMLA and then another human resources case about his interaction with Mr. Galan regarding his late arrivals. The claimant missed his initial appointment for his human resources case which further prolonged that process. His human resources cases were completed by July 9, 2018, at which time the employer notified the claimant his employment was terminated.

The claimant has claimed and received unemployment insurance benefits in the amount of $2,801.00 for the six weeks ending August 18, 2018.

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).

The claimant manipulated his time card and his testimony that his actions were unintentional is not persuasive. Between January 2 and May 3, 2018, he claimed 27.33 hours that he did not

actually work and was not in the building. The claimant's previous supervisor warned him several times about accurately recording his time and the claimant's professed shock about the situation is unconvincing. Following the May 30, 2018, email where Mr. Galan expressed his concern about the claimant's time card, the claimant did not arrive late or leave early without accurately recording his time but he did fail to correctly report his lunch breaks. The employer reasonably expects employees to record their time each day rather than waiting until the end of the pay period and the claimant failed to do so. Even though it does not appear he was stealing time from the employer after May 30, 2018, he was manipulating his time card by failing to truthfully report his lunch break times. The claimant was warned about his time card and knew or should have known how important it was to maintain accurate reporting times.

The remaining question is whether the claimant's actions were a current act of misconduct. The administrative law judge concludes it was. Because the claimant was on intermittent FMLA, the employer had to comb through those records to ensure none of the times the claimant reported late or left early were covered by FMLA, which was a time consuming process for the employer as it covered a five month period. In addition to that, when the employer received permission to terminate the claimant's employment, the claimant filed two human resources claims which prevented the termination from occurring. He also missed the initial human resources meeting which further delayed his termination. The employer discharged him after reviewing his time reporting records, intermittent FMLA claims, and human resources cases. The delay in the termination was due to the intermittent FMLA and the claimant's actions and the claimant should not profit from causing the termination to take longer than it would have otherwise.

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 as to the claimant and his overpayment of benefits in the

amount of $2,801.00 for the six weeks ending August 18, 2018, shall be charged to the employer's account.

DECISION:

The July 23, 2018, 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 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 $2,801.00 for the six weeks ending August 18, 2018, is waived as to the claimant and that amount shall be charged to the employer's account.

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Julie Elder
Administrative Law Judge

_____
Decision Dated and Mailed

je/scn