IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

JOYCE A WHITE Claimant **KALEIDOSCOPE KIDS CHILDCARE CENTER** Employer	**APPEAL 17A-UI-00157-JCT** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 12/04/16** **Claimant: Respondent (2)**

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Code § 96.3(7) – Recovery of Benefit Overpayment
Iowa Admin. Code r. 871-24.10 – Employer/Representative Participation Fact-finding Interview

STATEMENT OF THE CASE:

The employer filed an appeal from the December 30, 2016, (reference 02) unemployment insurance decision that allowed benefits. The parties were properly notified about the hearing. A telephone hearing was held on January 27, 2017. The claimant participated personally. The employer participated through Mary L. O'Kones, Director. Brianna Reilling, Daycare Instructor, also testified for the employer. Employer Exhibits 1 through 9 were admitted into evidence without objection. The employer submitted additional documents it intended to offer but because the claimant did not receive them, they were excluded from the hearing and decision. The administrative law judge took official notice of the administrative records including the fact-finding documents. Based on the evidence, the arguments presented, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUES:

Was the claimant discharged for disqualifying job-related misconduct?
Has the claimant been overpaid any unemployment insurance benefits, and if so, can the repayment of those benefits to the agency be waived?
Can any charges to the employer's account be waived?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed part-time as an assistant childcare provider and was separated from employment on November 14, 2016, when she was discharged for violating the employer's policy regarding the "safe sleep" policy.

The state of Iowa requires that all licensed daycare providers follow certain guidelines, including placing all children under 12 months on their backs to sleep, unless a medical provider directs otherwise, to help prevent Sudden Infant Death Syndrome (SIDS). As such, the employer also is required to comply with the policy (Employer Exhibits 1 and 2) and has its own internal policy reminding staff how to position a child for sleep (Employer Exhibit 5). The employer's policy

also provides that children old enough to roll from back-to-tummy are permitted to stay in their preferred sleep position, after starting on their back, and that any developmental "tummy time" may not take place in a crib, but rather on the floor, with a child on its tummy and the employee sitting with the child for supervision. In addition, the employer has a policy which states that failure to follow safety policies will result in immediate dismissal (Employer Exhibit 7). The employer trained the claimant upon hire of the safe sleep policy, as well as had her participate in staff meetings about the policy (Employer Exhibit 4), and attend a health and safety review with all employees (Employer Exhibit 6). The claimant also took a training course reiterating the principles of sleep position and tummy time on April 26, 2016 (Employer Exhibit 9).

On November 11, 2016, the employer received a report that the claimant had placed babies under twelve months in a stomach position in the crib. The complaint came from an employee, Whitney, whose child also attended the daycare. The child had not yet been able to roll from his back to his stomach, but was observed in the stomach position by her, while in the crib. Upon this report, the employer conducted an investigation, interviewing other employees in the infant room. The employer did not interview the claimant because it felt she was combative, but interviewed three employees who stated they had observed the claimant had placed children on their stomach and had even advised others to do so. Specifically, Brianna Reilling, asserted that she saw the claimant place a crying child on his stomach in the crib on November 11, 2016 and had observed the claimant do so previously as well.

The evidence was disputed as the claimant denied she had placed any child on its stomach in a crib, acknowledging she knew the policy. However, Ms. Reilling stated she saw the claimant place children on their stomach, and would go to the child and switch it to the back position. It was unclear why Ms. Reilling would not have reported the claimant's conduct previously. In addition, Ms. O'Kones stated the claimant acknowledged when discharged that on November 11, 2016, she had placed a child on its stomach in the crib to make it stop crying, soothe its stomach ache, and comfort it, while she tended to other children.

At the hearing, the claimant denied placing the child on its stomach but stated she had requested help from Ms. Reilling to tend to the crying baby, who she stated was "gagging" and that Ms. Reilling refused to help or call for help from Ms. O'Kones. Ms. Reilling denied any refusal to help with the crying baby or that a request to call for help was made. As a result of the employer investigation, the claimant and another employee were discharged for not following the safe sleep policy.

The administrative record reflects that claimant has received unemployment benefits in the amount of $595.00, since filing a claim with an effective date of December 4, 2016. The administrative record also establishes that the employer did participate in the December 28, 2016 fact-finding interview by way of Mary L. O' Kones and Brianna Reilling.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment for reasons that constitute 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).

"This is the meaning which has been given the term in other jurisdictions under similar statutes, and we believe it accurately reflects the intent of the legislature." *Huntoon v. Iowa Department of Job Service*, 275 N.W.2d, 445, 448 (Iowa 1979).

In an at-will employment environment, an employer may discharge an employee for any number of reasons or no reason at all if it is not contrary to public policy, but if it fails to meet its burden of proof to establish job related misconduct as the reason for the separation, it incurs potential liability for unemployment insurance benefits related to that separation.

It is the duty of the administrative law judge as the trier of fact in this case, to determine the credibility of witnesses, weigh the evidence and decide the facts in issue. *Arndt v. City of LeClaire*, 728 N.W.2d 389, 394-395 (Iowa 2007). The administrative law judge may believe all, part or none of any witness's testimony. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996). In assessing the credibility of witnesses, the administrative law judge should consider the evidence using his or her own observations, common sense and experience. *Id.*. In determining the facts, and deciding what testimony to believe, the fact finder may consider the following factors: whether the testimony is reasonable and consistent with other believable evidence; whether a witness has made inconsistent statements; the witness's appearance, conduct, age, intelligence, memory and knowledge of the facts; and the witness's interest in the trial, their motive, candor, bias and prejudice. *Id*. Assessing the credibility of the witnesses and reliability of the evidence in conjunction with the applicable burden of proof, as shown in the factual conclusions reached in the above-noted findings of fact, the administrative law judge concludes that the employer has satisfied its burden to establish by a preponderance of the

evidence that the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law.

The employer has the burden of proof in establishing disqualifying job misconduct. *Cosper v. Iowa Department of Job Service*, 321 N.W.2d 6 (Iowa 1982). Such misconduct must be "substantial." *Newman v. Iowa Department of Job Service*, 351 N.W.2d 806 (Iowa App. 1984). In this case, the claimant was discharged for violating the employer and state-mandated policies regarding "safe sleep" for babies under twelve months of age. The "safe sleep" policy is intended to prevent sudden infant death syndrome (SIDS). The claimant was aware of the employer's policy through extensive training, classes and meetings, and that failure to follow employer safety policies could result in immediate discharge (Employer Exhibits 4, 5 ,6, 7 and 9).

The administrative acknowledges that a crying baby or even multiple crying babies simultaneously could create stress for the staff tending to them. However, the policy clearly states that babies should not be placed on their stomach in a crib, and does not carve out exceptions for stomachaches, to soothe, or because an employee is overwhelmed. It cannot be ignored that the purpose of the safe sleep policy is to prevent death, and not simply a preference for the employer or state agency. In light of the conflicting evidence presented at the hearing, the administrative law judge finds the employer's account to be more credible than the claimant. The administrative law judge is persuaded that the claimant did place children on their stomach in the cribs, (as witnessed by Ms. Reilling and admitted to Ms. O'Kones, as well as observed by two other employees) in violation of the employer's policies. The claimant knew or should have known her conduct was contrary to the best interests of the employer and its expectations. Misconduct has been established. Benefits are denied.

Iowa Code § 96.3(7)a-b provides:

> 7. Recovery of overpayment of benefits.
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> 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.
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> 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 § 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.
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> (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 § 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 states pursuant to § 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 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.

Because the claimant’s separation was disqualifying, benefits were paid to which she was not entitled. The claimant was overpaid benefits in the amount of $595.00. 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. The employer will not be charged for benefits if it is determined that it did participate in the fact-finding interview. Iowa Code § 96.3(7), Iowa Admin. Code r. 871-24.10. In this case, the claimant has received benefits but was not eligible for those benefits. The employer satisfactorily demonstrated it participated in the fact-finding interview. Since the employer did participate in the fact-finding interview, the claimant is obligated to repay the benefits she received and the employer’s account shall not be charged.

DECISION:

The December 30, 2016, (reference 02) 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 been overpaid unemployment insurance benefits in the amount of $595.00, and is obligated to repay the agency those benefits. The employer did participate in the fact-finding interview and its account shall not be charged.

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Jennifer L. Beckman
Administrative Law Judge

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Decision Dated and Mailed

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