

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

EDUARDO FERNANDEZ
Claimant

SWIFT PORK COMPANY
Employer

APPEAL 16A-UI-13419-JCT

**ADMINISTRATIVE LAW JUDGE
DECISION**

**OC: 11/20/16
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 8, 2016, (reference 01) unemployment insurance decision that allowed benefits. The parties were properly notified about the hearing. A telephone hearing was held on January 10, 2017. The claimant participated personally and through a CTS Language Link Spanish interpreter. The claimant's registered witness, Brian Ulin, was unavailable when called for the hearing. The employer participated through Rogelio Bahena, Human Resources Supervisor. 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 full-time in production (cutting neck bones) and was separated from employment on November 19, 2016, when he was discharged for dishonesty, insubordination and falsification.

The claimant was made aware of the employer's policies at the time of hiring which prohibit falsification of company records or other acts of dishonesty. The employer policies are written in English but the training was conducted in Spanish. The claimant had no prior warnings for similar conduct before discharge, and his discharge was based solely on the incidents that occurred on November 16, 2016, at the end of his shift.

While the claimant was still clocked in, he was observed near the production line but not performing work. He was asked by manager, Aaron Hernandez, to help with the “rework” on the production line. The claimant responded that he was clocked out and could not help. The time was approximately 12:07 a.m. The claimant left the work area, and Mr. Hernandez checked the employer’s electronic timekeeping system, Kronos, which reflected the claimant was still clocked in and could have performed the requested work. The claimant admitted he lied to Mr. Hernandez but refused to do the work because he felt like Mr. Hernandez did not treat him fairly. The claimant had not previously reported any concerns of unfair treatment to his supervisor or human resources.

Upon seeing that the claimant was still clocked in, Mr. Hernandez sent co-worker, Armando Romo, to find the claimant and direct him to return to the production floor. When Mr. Romo found the claimant, he responded by saying something to the effect of, “tell him you didn’t see me; I’m not here.” The employer reported this discussion occurred within just a few minutes of the conversation with Mr. Hernandez at 12:07 a.m. The claimant asserted he was clocked out by the time Mr. Romo confronted him. The employer records reflected that the claimant clocked out at 12:19 a.m. The employer initiated an investigation and interviewed the claimant with a Spanish interpreter, and the claimant admitted to lying to Mr. Hernandez. The employer concluded his conduct was insubordinate to Mr. Hernandez and as well as dishonest, and he was subsequently discharged. Mr. Hernandez nor Mr. Romo attended the hearing or provided written statements for the hearing.

The administrative record reflects that claimant has received unemployment benefits in the amount of \$3360.00, since filing a claim with an effective date of November 20, 2016. The administrative record also establishes that the employer participated in the fact-finding interview on December 7, 2016, by way of its vendor representative, Alice Noble, and accompanying written statement.

REASONINGS AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment due to job-related 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.

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 proof in this matter. See Iowa Code section 96.6(2). Misconduct must be substantial in order to justify a denial of unemployment benefits. Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of unemployment benefits. See *Lee v. Employment Appeal Board*, 616 N.W.2d 661 (Iowa 2000). The focus is on deliberate, intentional, or culpable acts by the employee. See *Gimbel v. Employment Appeal Board*, 489 N.W.2d 36, 39 (Iowa Ct. App. 1992).

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 met 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.

In this case, the employer has a policy which prohibits acts of dishonesty. The claimant was made aware of the employer's expectations and policies upon hire. The claimant was discharged following an investigation of his actions that occurred on November 16, 2016, towards the end of his shift when he refused to perform "rework" on the production line when requested by manager, Aaron Hernandez. Further, the claimant lied to Mr. Hernandez and told him that he was off the clock, around 12:07 a.m., when he was in fact, on the clock until 12:19 a.m.

The question of whether the refusal to perform a specific task constitutes misconduct must be determined by evaluating both the reasonableness of the employer's request in light of all circumstances and the employee's reason for noncompliance. *Endicott v. Iowa Dep't of Job Serv.*, 367 N.W.2d 300 (Iowa Ct. App. 1985). There was no evidence presented that the request for the claimant to perform "rework" on the production line was outside of the claimant's

job duties, or in any way harmful or something he was not trained to do. Rather, the claimant's shift was ending and he did not want to perform the work. The claimant stated he told Mr. Hernandez that he could not do the work because he was clocked out, knowing that he was still clocked in, because he felt Mr. Hernandez treated him unfairly. There was no credible evidence presented that the claimant had ever raised concerns of unfair treatment before this incident or that Mr. Hernandez unfairly targeted in the request for rework. Further, the claimant was asked a second time through co-worker, Armando Romo, to return to the production line and he again refused, telling Mr. Romo to tell Mr. Hernandez that he was not there, even though he was still clocked in.

Based on the circumstances and evidence presented, the administrative law judge concludes the employer's request by way of Mr. Hernandez was reasonable, and the claimant failed to provide any persuasive evidence to justify his non-compliance. Although the employer did not present a first-hand witness to the final incident, the administrative law judge finds its account of events to be credible. Further, the claimant admitted to the employer during the investigation that he was dishonest about being clocked out when he refused to perform "rework" on the production line.

Honesty is a reasonable, commonly accepted duty owed to the employer. Based on the evidence presented, the administrative law judge concludes that the claimant intentionally lied to Mr. Hernandez when he refused to perform work and stated he was clocked out, and further, failed to provide persuasive evidence to justify his non-compliance. The administrative law judge is persuaded the claimant knew or should have known his conduct was contrary to the best interests of the employer. Therefore, the claimant was discharged for reasons that would constitute misconduct, even without prior warning for similar conduct. Benefits are denied.

The next issue is whether the claimant must repay benefits received, and whether the employer can be relieved of charges associated with the claim.

Iowa Code § 96.3(7)a-b 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 § 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

§ 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 he was not entitled. The claimant has been overpaid benefits in the amount of \$3360.00. 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 participated in the fact-finding interview by way of representative, Alice Noble, and written statement. Since the employer did participate in the fact-finding interview the claimant is obligated to repay the benefits he received and the employer's account shall not be charged.

DECISION:

The December 8, 2016, (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 been overpaid unemployment insurance benefits in the amount of \$3360.00, 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.

Jennifer L. Beckman
Administrative Law Judge

Decision Dated and Mailed

jlb/rvs