IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

MICHAEL J MARTSCHING Claimant **THE AMERICAN BOTTLING COMPANY** Employer	**APPEAL 19A-UI-06840-JC-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 07/28/19** **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/appellant, The American Bottling Company, filed an appeal from the August 15, 2019 (reference 01) Iowa Workforce Development ("IWD") unemployment insurance decision which allowed benefits. The parties were properly notified about the hearing. A telephone hearing was held on September 23, 2019. The claimant participated personally and was represented by Greg Griner, attorney at law. The employer, The American Bottling Company, participated through Stephanie Dixon, human resources manager. Dan Krumrey testified and Dane Descombaz was listed as a potential witness but did not testify.

The administrative law judge took official notice of the administrative records including the fact-finding documents. Employer Exhibits 1-8 were admitted. 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 as a shipping and receiving clerk and was separated from employment on July 29, 2019, when he was discharged (Employer Exhibit 3).

Prior to the final incident, the claimant had been trained on the employer rules and code of conduct. He had received a final written warning on March 7, 2018 in response to his conduct with a customer regarding an order (Employer Exhibit 4). He was also coached on March 28, 2019 by way of his 2018 performance evaluation that he needed to improve his customer relations skills and contact a manager when an issue arises so it did not escalate (Employer Exhibit 5, pages 2-3).

The final incident occurred on July 9-10, 2019 and the employer was made aware of the incident in a letter dated July 14, 2019 by a customer. According to the customer, the claimant and his co-worker's handling of his load resulted in him having two scale tickets being issued and significant delay in transporting the load. If a driver is delayed in transporting his load, it can affect his DOT regulated driving hours, which can further delay product delivery. If a driver incurs tickets from DOT for weight violations, it can impact his commercial driver's license privileges.

The undisputed evidence is the load in question was unconventional inasmuch as the driver would be transporting both the employer's product and other product not owned by the employer. Upon loading the truck, the driver announced it was too heavy per DOT regulations. The claimant directed him to go to the nearest facility to obtain a scale ticket to show the exact weight. The driver did so and returned.

The driver and claimant then disagreed about how to reduce the weight so the vehicle was at a legal weight for operation. The claimant did not call his manager but called the load planner. The claimant made adjustments without calculating the weight of the product and the driver left a second time, only to return with a second scale ticket, reflecting it was still too heavy. The claimant stated that he told the driver he could refuse the load or take it at the weight and distribution as the claimant had loaded it (there was also some discussion in how the product was distributed/loaded). The claimant did not contact his manager at any time during the transaction. The claimant said he didn't contact his manager because he took it upon himself to handle it.

Upon receiving the customer complaint letter, the claimant and his co-worker were interviewed by the employer. The claimant was discharged based upon the employer's investigation of the incident and claimant's co-worker was disciplined but not discharged because he had no prior discipline for similar conduct, unlike the claimant.

The administrative record reflects that claimant has received unemployment benefits in the amount of $1,787.00, since filing a claim with an effective date of July 28, 2019. The administrative record also establishes that the employer did participate in the fact-finding interview or make a witness with direct knowledge available for rebuttal. Stephanie Dixon, Dan Krumrey and Dane Descombaz participated.

REASONING 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 law disqualifies individuals who are discharged from employment for misconduct from receiving unemployment insurance benefits. Iowa Code § 96.5(2)a. They remain disqualified until such time as they requalify for benefits by working and earning insured wages ten times their weekly benefit amount. *Id.*

Iowa Administrative Code rule 871-24.32(1)a provides:

> "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 establishing disqualifying job misconduct. *Cosper v. Iowa Department of Job Service*, 321 N.W.2d 6 (Iowa 1982). The issue is not whether the employer made a correct decision in separating claimant, but whether the claimant is entitled to unemployment insurance benefits. *Infante v. IDJS*, 364 N.W.2d 262 (Iowa App. 1984). What constitutes misconduct justifying termination of an employee and what misconduct warrants denial of unemployment insurance benefits are two separate decisions. *Pierce v. IDJS*, 425 N.W.2d 679 (Iowa App. 1988). Misconduct serious enough to warrant discharge is not necessarily serious enough to warrant a denial of job insurance benefits. Such misconduct must be "substantial." *Newman v. Iowa Department of Job Service*, 351 N.W.2d 806 (Iowa App. 1984). Generally, continued refusal to follow reasonable instructions constitutes misconduct. *Gilliam v. Atlantic Bottling Co.*, 453 N.W.2d 230 (Iowa Ct. App. 1990).

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.

In this case, the credible evidence establishes the claimant had been previously issued a final written warning in March 2018 about negative interaction and mishandling a customer transaction. He was then reminded in his 2018 performance review, which he signed in March 2019, that he needed to contact management with issues so they do not escalate and that he needed to continue to improve his customer service interactions. The claimant knew or should have known that he could be discharged for future infractions involving customers.

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).

The undisputed evidence is the claimant's handling of a customer load on July 9-10, 2019 resulted in a driver incurring two scale tickets and a significant delay in delivery. The tickets and delay could have been avoided had the claimant engaged management upon the driver and claimant disputing how to handle the truck being overweight. The undisputed evidence presented was that this was a unique load and not common to have non-employer product also loaded. Logically, that would be further reason to escalate the issue to management for

handling. If the claimant engaged with his manager and had taken the time to calculate the load, the scale tickets and delays may have been avoided. Instead, the claimant "took it upon himself" to handle, rather than cause the driver delays and then telling him that his choice was to take the overweight load or refuse it. The claimant's actions harmed the driver directly and customer relations on behalf of the employer. The administrative law judge is persuaded the claimant had been given clear directives to contact management for customer issues and the claimant failed to present persuasive evidence to justify his noncompliance with the employer's reasonable expectation. The administrative law judge is persuaded the claimant knew or should have known his conduct was contrary to the best interests of the employer. The employer has established the claimant was discharged for job-related misconduct. Benefits are denied.

The next issues to address are whether the claimant must repay benefits received and whether the employer's account is relieved of charges.

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.
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> (1) 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 $1,787.00. 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 scheduled fact-finding interview by way of Stephanie Dixon, Dan Krumrey and Dane Descombaz. 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.

The parties are reminded that under Iowa Code § 96.6-4, a finding of fact or law, judgment, conclusion, or final order made in an unemployment insurance proceeding is binding only on the parties in this proceeding and is not binding in any other agency or judicial proceeding. This provision makes clear that unemployment findings and conclusions are only binding on unemployment issues, and have no effect otherwise.

DECISION:

The August 15, 2019 (reference 01) initial 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 benefits in the amount of $1,787.00 and must repay the benefits because the employer satisfactorily participated in the fact-finding interview. The employer's account is relieved of charges since it satisfactorily participated in the fact-finding interview.

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Jennifer L. Beckman
Administrative Law Judge

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Decision Dated and Mailed

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