

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

AMANDA J BRONEMANN
Claimant

APPEAL 18R-UI-01958-JP-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

GIT-N-GO CONVENIENCE STORES INC
Employer

**OC: 10/29/17
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 November 17, 2017, (reference 01) unemployment insurance decision that allowed benefits. The parties were properly notified about the hearing. A telephone hearing was held on April 4, 2018. Claimant participated. Employer participated through supervisor Jeff English. Claimant Exhibit A was admitted into evidence with no objection. Official notice was taken of the administrative record with no objection.

ISSUES:

Was the claimant discharged for disqualifying job-related misconduct?

Has the claimant been overpaid unemployment insurance benefits, and if so, can the repayment of those benefits to the agency be waived?

Can 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: Claimant was employed full-time as a store manager from January 19, 2016, and was separated from employment on October 24, 2018, when she was discharged. The store that claimant managed is located on the south side of Des Moines.

The employer has a policy that requires employees to have a cellphone on them at all time and to answer calls from the employer. The employer also has a policy that requires managers to open the store on time. When employees are promoted to managers, managers are informed they are required to come to work and cover any shift if an employee does not show up for that shift. Claimant was aware of this procedure. If a store is not opened by 6:00 a.m., the employer's security firm contacts the employer's merchandisers (employees for the employer) and informs them that the store was not opened.

The final incidents that led to discharge occurred on October 22, 2017 and October 23, 2017. On Sunday, October 22, 2017, the assistant manager that was scheduled to open the store did not show up for work at the store claimant managed. The assistant manager was scheduled to open the store at 6:00 a.m. Claimant was not scheduled to work on October 22, 2017. Because the store was not open by 6:00 a.m., the employer's security firm contacted a merchandiser and reported that the store was not open. The merchandiser then opened the store and covered the shift until the next shift came in at 4:00 p.m. The merchandiser attempted to contact claimant, but was not successful. The merchandiser then contacted Mr. English because the merchandiser could not get a hold of claimant. Mr. English then attempted to contact claimant a little after 6:30 a.m., but he was unsuccessful. Mr. English left a message for claimant that her store was not open. Mr. English instructed claimant to contact Mr. English or the merchandiser that was covering the store. Mr. English called claimant four or five times on October 22, 2017, but he had to leave a message every time. Around 4:00 p.m., claimant called the store and spoke to the night shift employee that started at 4:00 p.m. Claimant testified she called to confirm that night shift employee had reported for his shift. Claimant did not return Mr. English or the merchandiser's phone calls on October 22, 2017.

On October 23, 2017, the assistant manager that was scheduled to open the store did not show up for work at the store claimant managed. The assistant manager was scheduled to open the store at 6:00 a.m. Claimant was not scheduled to work on October 23, 2017. Because the store was not open by 6:00 a.m., the employer's security firm contacted a merchandiser and reported that the store was not open. The merchandiser attempted to contact claimant, but was not successful. The merchandiser then contacted Mr. English because the merchandiser could not get a hold of claimant. Mr. English attempted to call claimant four or five times on October 23, 2017 and left messages for her to call him. Mr. English then called other employees to find someone to cover the shift. At 11:45 a.m., an employee from another store came in and covered the shift until 4:00 p.m., when the night shift employee came to work. Around 7:32 p.m. on October 23, 2017, claimant received a text message from Mr. English. Claimant Exhibit A. Mr. English asked claimant what happened the past two days because the store was unable to get a hold of her. Claimant Exhibit A. Mr. English explained that the assistant manager was sick so the employer called her but she did not respond. Claimant Exhibit A. Mr. English told claimant that they will meet on October 24, 2017. Claimant Exhibit A. Claimant responded that she has been out of town for the past two days with her family. Claimant Exhibit A. Claimant testified she was in Urbandale.

On October 24, 2017, Mr. English and Lanette Butt met with claimant. The employer discussed claimant's occasions of opening the store late and why she did not show up on October 22 and 23, 2017. Claimant kept reiterating she was not scheduled to work on October 22 and 23, 2017. -The employer then told claimant she was discharged.

On November 1, 2016, the employer gave claimant a written warning for opening the store late. Claimant Exhibit A. On June 7, 2017, the employer gave claimant a written warning for opening the store late. Claimant Exhibit A. On July 13, 2017, the employer gave claimant a written warning for opening the store late. Claimant Exhibit A. On August 24, 2017, the employer gave claimant a written warning for opening the store late on August 24, 2017. On October 11, 2017, the employer gave claimant a written warning for missing a mandatory manager's meeting on October 9, 2017. Claimant Exhibit A.

The administrative record reflects that claimant has received unemployment benefits in the amount of \$2,457.00, since filing a claim with an effective date of October 29, 2017, for the eight weeks-ending December 23, 2017. The administrative record also establishes that the employer did participate in the fact-finding interview.

REASONING AND CONCLUSIONS OF LAW:

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

It is the duty of an administrative law judge and 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, as the finder of fact, 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. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996). 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 evidence you believe; whether a witness has made inconsistent statements; the witness's conduct, age, intelligence, memory and knowledge of the facts; and the witness's interest in the trial, their motive, candor, bias and prejudice. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996).

This administrative law judge assessed the credibility of the witnesses who testified during the hearing, considering the applicable factors listed above, and used my own common sense and experience. This administrative law judge reviewed the exhibit that was admitted into evidence. This administrative law judge finds the employer's version of events to be more credible than claimant's recollection of those events.

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).

Misconduct must be "substantial" to warrant a denial of job insurance benefits. *Newman v. Iowa Dep't of Job Serv.*, 351 N.W.2d 806 (Iowa Ct. App. 1984). When based on carelessness, the carelessness must actually indicate a "wrongful intent" to be disqualifying in nature. *Id.* Negligence does not constitute misconduct unless recurrent in nature; a single act is not disqualifying unless indicative of a deliberate disregard of the employer's interests. *Henry v. Iowa Dep't of Job Serv.*, 391 N.W.2d 731 (Iowa Ct. App. 1986). A warning weighs heavily toward a finding of intentional conduct. Generally, continued refusal to follow reasonable instructions constitutes misconduct. *Gilliam v. Atlantic Bottling Co.*, 453 N.W.2d 230 (Iowa Ct. App. 1990). Willful misconduct can be established where an employee manifests an intent to disobey a future reasonable instruction of his employer. *Myers v. Iowa Dep't of Job Serv.*, 373 N.W.2d 507 (Iowa Ct. App. 1985).

The employer is entitled to establish reasonable work rules and expect employees to abide by them. The employer's rules requiring managers to be accessible by cellphone and to ensure their stores are open on time are reasonable.

Claimant's argument that she did not receive any phone calls from the merchandisers or Mr. English on October 22, 2017 and October 23, 2017 is not persuasive. The employer has presented substantial and credible evidence that on October 22, 2017 and October 23, 2017, the employer contacted claimant by phone multiple times. Mr. English credibly testified he called claimant at least four times each day, but he had to leave her messages. Claimant failed to return any of the employer's calls about the store not being opened on time. Claimant's argument that she was not informed that managers are required to cover an employee's shift if the employee does not show up for work is also not persuasive. Mr. English credibly testified that when employees are promoted to manager, they are notified they are required to cover any shift if an employee does not show up for work. Mr. English's testimony is corroborated by Claimant Exhibit A, which claimant offered and was admitted into evidence. The first page of Claimant Exhibit A is the "FACT FINDING WORKSHEET FOR MISCONDUCT", which includes claimant's statement from the fact-finding interview. Claimant Exhibit A. Under claimant's statement, Claimant Exhibit A states: "It is my responsibility to open the store if they can't open the store[.]" Claimant Exhibit A. Claimant Exhibit A directly contradicts claimant's argument and corroborates Mr. English's testimony. When claimant finally responded to Mr. English on October 23, 2017, she informed him that she was out of town the past two days (October 22 and 23, 2017) with family. At the hearing, claimant testified she was in Urbandale, which is suburb of Des Moines, on October 22 and 23, 2017. Claimant's statement to Mr. English that she was out of town on those two days was, at the very least, misleading to the employer and "a disregard of standards of behavior which the employer has the right to expect of" its managers. Iowa Admin. Code r. 871-24.32(1)a. The employer had previously warned for not opening her store on time. Claimant Exhibit A. Furthermore, on October 11, 2017, the employer warned claimant her job was in jeopardy when she missed a mandatory meeting. Claimant Exhibit A ("Next disciplinary action taken against you will be: written consultation up to termination").

The employer presented substantial and credible evidence that claimant's conduct, refusing to answer her phone or return the employer's messages on October 22 and 23, 2017, was a

“deliberate violation or disregard of standards of behavior which the employer has the right to expect of employees[.]” Iowa Admin. Code r. 871-24.32(1)a. This is disqualifying misconduct. Benefits are denied.

The administrative law judge further concludes that claimant has been overpaid unemployment insurance benefits.

Iowa Code section 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 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 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 they 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. Since the employer did participate in the fact-finding interview the claimant is obligated to repay to the agency the benefits she received and the employer's account shall not be charged.

DECISION:

The November 17, 2017, (reference 01) unemployment insurance decision is reversed. Claimant was discharged from employment due to job-related misconduct. Benefits are withheld until such time as claimant has worked in and been paid wages for insured work equal to ten times her weekly benefit amount, provided she is otherwise eligible.

Claimant has been overpaid unemployment insurance benefits in the amount of \$2,457.00 and is obligated to repay the agency those benefits. The employer did participate in the fact-finding interview and its account shall be charged.

Jeremy Peterson
Administrative Law Judge

Decision Dated and Mailed

jp/rvs