

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

ASHLEY ROUTSON
Claimant

APPEAL 17A-UI-03044-JCT

**ADMINISTRATIVE LAW JUDGE
DECISION**

WELLS FARGO BANK NA
Employer

OC: 02/19/17
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 March 10, 2017, (reference 01) unemployment insurance decision that allowed benefits. The parties were properly notified about the hearing. A telephone hearing was held on April 12, 2017. The claimant did not respond to the notice of hearing and register a phone number to participate. The employer participated through Thomas and Thomas Kuiper. Brent Samuel, Executive Resolutions QA Manager, testified for the employer. 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 as an executive resolutions QA analyst and was separated from employment on February 23, 2017, when she was discharged for falsification of her timecard.

The employer has a code of ethics which stated that falsification of company documents can result in immediate discharge. The claimant was made aware of the employer's policies and code of ethics upon hire and signed an acknowledgment. The claimant had no prior warnings for similar conduct before discharge.

The claimant was discharged upon completion of an investigation of her timekeeping records, after a peer employee reported to Mr. Samuelli that she believed the claimant's timekeeping was not accurate to time actually worked. Employees are responsible for submitting weekly timecards to management for approval, which reflect time actually worked. Employees receive a pop-up message before submitting a timecard attesting to the timecard being truthful and accurate. The employer can use identification badge swipes of when an employee enters a building to investigate any discrepancies. Mr. Samuelli asserted that the employer also allows employees to flex time during their week, but the timecard must be accurate in terms of time logged in and out. For example, if an employee takes an extended lunch from 12:00 to 12:40 p.m. (instead of 30 minutes), they are expected to record their start/stop times as 12:00 and 12:40, but are permitted to stay 10 minutes late to work their full shift.

Upon the report of possible falsification, the employer initiated an investigation looking at the claimant's timecards from a period of February 1, 2016 through February 9, 2017. The employer concluded that based on its findings, the claimant had falsified a total of 28 hours worked (for which she was not actually at work) at a rate of pay of \$21 per hour. The employer reported the claimant had over 20 instances of submitting timecards reflecting time worked that did not match her entry time into the premises, in light of a two to five minute walk to her work station from the doors. The fabricated times ranged from 11 minutes to five hours. The claimant was interviewed and had no explanation for her actions. She was subsequently discharged. The claimant did not attend the hearing or submit any written documentation/statement in lieu of participation to the Appeals Bureau.

The administrative record reflects that claimant has received unemployment benefits in the amount of \$1310.00, since filing a claim with an effective date of February 19, 2017. The administrative record also establishes that the employer did not participate in the March 9, 2017 fact-finding interview or make a witness with direct knowledge available for rebuttal. Rather, the employer's representative, Sarina Bradshaw, submitted a written statement in lieu of participation, consisting of three lines, "I am submitting my fact-finding in writing. Ashley Routson was discharged for violation company policy on 2/23/2017 with the final incident being falsification of time keeping records. Attached is Ashley's sign acknowledgment." (See administrative record). No additional details about the final incident were furnished. Ms. Bradshaw did not participate live or make available the name of a witness with direct knowledge available for rebuttal. Ms. Bradshaw did not attend the hearing or furnish a written statement in lieu of participation for the April 12, 2017 hearing.

REASONINGS AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged for reasons that constitute misconduct, and benefits are denied.

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).

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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 witness 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 a current act of work-connected misconduct as defined by the unemployment insurance law.

In this case, the employer discharged the claimant following an investigation which revealed over twenty instances (for a total of 28 hours) of timecards submitted for work not actually

performed. The employer's reasonable policies and code of ethics require an employee accurately report time worked and the claimant was aware of the policies. Further, each time the claimant would submit a timecard, she would receive a pop-up message attesting to her timecard being accurate. The discrepancies reported by the employer in this case were not a few minutes but rather ranged from 11 minutes to five hours that the claimant recorded working when she was not actually at work. The administrative law judge is not persuaded based on this range that the claimant inadvertently or mistakenly submitted an inaccurate timecard. The claimant did not attend the hearing to refute the employer's credible testimony. It cannot be ignored that the claimant worked in the banking/financial industry, where trust and honesty are integral, given potential access to client monies and records.

Honesty is a reasonable, commonly accepted duty owed to the employer. The administrative law judge is persuaded the claimant knew or should have known her conduct was contrary to the best interests of the employer. Therefore, based on the evidence presented, the claimant was discharged for falsification of her timecards, which would constitute misconduct. Benefits are withheld.

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 state 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 \$1310.00. 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.

Iowa Administrative Code rule 817 IAC24.10(1) defines employer participation in fact-finding interviews as follows:

Employer and employer representative participation in fact-finding interviews.
24.10(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.

Based on the evidence presented and the supporting administrative record, the employer's participation in writing consisted of two sentences, and contained no reference to policies, dates involving the final incident or supporting information such as an investigative report, that would detail the incident triggering discharge, nor was any contact information provided regarding a witness with first-hand knowledge made available for rebuttal purposes. The administrative law judge is not persuaded the vague, undetailed, two sentence written statement furnished by the employer in lieu of attending the fact-finding interview meets the sufficiency requirements as defined in Iowa Administrative Code rule 817 IAC24.10(1). Therefore the administrative law judge concludes the employer did not satisfactorily participate in the fact-finding interview. Since the employer did not participate in the fact-finding interview the claimant is not obligated to repay the benefits she received and the employer's account shall be charged.

DECISION:

The March 10, 2017, (reference 01) decision is reversed. The claimant was discharged for disqualifying 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 \$1310.00, and is not obligated to repay the agency those benefits. The employer did not participate in the fact-finding interview and its account shall be charged.

Jennifer L. Beckman
Administrative Law Judge

Decision Dated and Mailed

jlb/rvs