IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

68-0157 (9-06) - 3091078 - EI

JERI L CASADY
Claimant

THE AMERICAN BOTTLING COMPANY
Employer

APPEAL NO: 18A-UI-07039-JE-T

ADMINISTRATIVE LAW JUDGE DECISION

OC: 05/20/18
Claimant: Respondent (2)

Section 96.5-2-a – Discharge/Misconduct
Section 96.3-7 – Recovery of Benefit Overpayment

STATEMENT OF THE CASE:

The employer filed a timely appeal from the June 19, 2018, reference 01, decision that allowed benefits to the claimant. After due notice was issued, a hearing was held by telephone conference call before Administrative Law Judge Julie Elder on July 18, 2018. The claimant participated in the hearing. Stephanie Dixon, Associate Human Resources Manager and David Fernandez, Manager, participated in the hearing on behalf of the employer.

ISSUE:

Whether the employer discharged the claimant for work-connected misconduct as defined by Iowa law.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was hired as a full-time utility worker for The American Bottling Company from March 7, 2016 to May 23, 2018. She was discharged under the employer's progressive disciplinary policy for work performance issues and violating the employer policies.

On December 21, 2017, the claimant received a verbal warning in writing after there was a soda changeover on the line and the claimant did not change the code on the case from Diet Dr. Pepper to regular Dr. Pepper and the employer had to redo 542 cases.

On January 3, 2018, the claimant received a written warning for violating the employer's policy prohibiting cell phones on the production floor after her supervisor observed her texting while on the floor. The claimant had previously received a verbal warning and a written warning for the same offense.

On February 2, 2018, the claimant was suspended for three days because she was working as a palletizer and the line went down. When her supervisor walked up he found her playing a game on the employer's computer called Monkey Gems.

On May 23, 2018, the claimant's employment was terminated following an incident on May 17, 2018, at which time the claimant, who was working as a palletizer, failed to complete her end of night duties of putting the cardboard in the baler and having a forklift driver remove the cardboard from the machine and take it to the recycling center. The claimant and two other utility workers went to clock out and another employee who found the cardboard still in the machine became upset and stated the claimant did not have a forklift driver remove the cardboard. The claimant went back out to the machine and said there were no forklift drivers to do it but there was at least one line still running so there were forklift drivers there. The other employee was very upset and screamed at the claimant and she called a forklift driver to get the cardboard before leaving. She reported the verbal altercation to the employer and through its investigation of that situation, it discovered the claimant did not complete her end of night duties. The next step in the claimant's progressive discipline was termination and the employer discharged the claimant May 23, 2018.

The claimant has claimed and received unemployment insurance benefits in the amount of $3,723.00 for the eight weeks ending July 14, 2018.

The employer participated personally in the fact-finding interview through the statements of Manager David Fernandez.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment for no disqualifying reason.

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).

The employer has the burden of proving disqualifying misconduct. *Cosper v. Iowa Department of Job Service*, 321 N.W.2d 6 (Iowa 1982). The propriety of a discharge is not at issue in an unemployment insurance case. An employer may be justified in discharging an employee, but the employee's conduct may not amount to misconduct precluding the payment of unemployment compensation. The law limits disqualifying misconduct to substantial and willful wrongdoing or repeated carelessness or negligence that equals willful misconduct in culpability. *Lee v. Employment Appeal Board*, 616 N.W.2d 661, 665 (Iowa 2000).

The claimant received a verbal warning in writing, a written warning, and a three day suspension in the last six months of her employment. With the exception of agreeing that she used her cell phone on the floor January 3, 2018, the claimant does not take responsibility for any of the situations that led to her termination. With regard to her failure to perform the flavor changeover December 21, 2018, the claimant acknowledges she did not check the first case but assigns blame to the operator whom she was covering for and argues that other employees' mistakes have resulted in more than 542 cases being redone. In discussing the February 2, 2018, incident where the line experienced down time because she was playing a game on a work computer, she said she was not playing long, it was a Friday, she was working overtime, and denies that her actions caused down time. The claimant stated that the final incident that occurred May 17, 2018, was not a serious violation because the first shift employees that followed her would simply need to push a button to finish the task that was part of her end of night duties, ignoring the fact that the manager told all the utility workers they needed to put the cardboard in the baler and have a forklift take the partial bale out of the baler and to recycling. She argues that because first shift did not have the same policy she should not have to follow the policy of her second shift manager.

Under these circumstances, the administrative law judge concludes the claimant's conduct demonstrated a willful disregard of the standards of behavior the employer has the right to expect of employees and shows an intentional and substantial disregard of the employer's interests and the employee's duties and obligations to the employer. The employer has met its burden of proving disqualifying job misconduct. *Cosper v. IDJS*, 321 N.W.2d 6 (Iowa 1982). Therefore, benefits are denied.

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.

The unemployment insurance law requires benefits be recovered from a claimant who receives benefits and is later denied benefits even if the claimant acted in good faith and was not at fault. However, a claimant will not have to repay an overpayment when an initial decision to award benefits on an employment separation issue is reversed on appeal if two conditions are met: (1) the claimant did not receive the benefits due to fraud or willful misrepresentation, and (2) the employer failed to participate in the initial proceeding that awarded benefits. In addition, if a claimant is not required to repay an overpayment because the employer failed to participate in the initial proceeding, the employer's account will be charged for the overpaid benefits. Iowa Code section 96.3(7)a, b.

The claimant received benefits but has been denied benefits as a result of this decision. The claimant, therefore, was overpaid benefits.

Because the employer participated in the fact-finding interview, the claimant is required to repay the overpayment and the employer will not be charged for benefits paid.

The employer participated in the fact-finding interview personally through the statements of Manager David Fernandez. Consequently, the claimant's overpayment of benefits cannot be waived and she is overpaid benefits in the amount of $3,723.00 for the eight weeks ending July 14, 2018.

DECISION:

The June 19, 2018, reference 01, 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 received benefits but was not eligible for those benefits. The employer personally participated in the fact-finding interview within the meaning of the law. Therefore, the claimant is overpaid benefits in the amount of $3,723.00 for the eight weeks ending July 14, 2018.

_____
Julie Elder
Administrative Law Judge

_____
Decision Dated and Mailed

je/scn