

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

ERIK S HANSEN
Claimant

OSCEOLA FOOD LLC
Employer

APPEAL 17A-UI-08000-H2T

**ADMINISTRATIVE LAW JUDGE
DECISION**

**OC: 06/25/17
Claimant: RESPONDENT (2)**

Iowa Code § 96.5(2)a – Discharge/Misconduct
Iowa Code § 96.3(7) - Recovery of Benefit Overpayment
871 IAC 24.10 – Employer Participation in the fact-finding Interview

STATEMENT OF THE CASE:

The employer filed an appeal from the July 28, 2017, (reference 02) unemployment insurance decision that allowed benefits. The parties were properly notified about the hearing. A telephone hearing was held on August 24, 2017. Claimant participated. Employer participated through Roberto Luna, Human Resources Manager; Brian Gerling, Superintendent; Tami Curci, Claims Specialist for Employer's Unity and was represented by Chris Hunter, Hearing Representative for Employer's Unity. Employer's Exhibit 1 was entered and received into the record.

ISSUE:

Was the claimant discharged due to job connected 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: Claimant was employed full-time as a production worker in the curing department beginning on April 4, 2011 through June 29, 2017 when he was discharged. The claimant was discharged for falsifying a company document. As part of his duties for at least the last year or his employment, the claimant was required to perform checks for foreign materials in the machinery four times per shift. The check list is designed to help employees remember to perform all checks. The claimant would perform the check then fill out the check list to indicate whether the machine was acceptable and whether any foreign material was found. The claimant had been given the company handbook and policies that put him on notice that even one instance of falsifying company documents would lead to his discharge.

The employer takes the issue of foreign material in the products they produce very seriously as even once instance could have serious financial repercussions for the company and all of its employees. The employer's task force for preventing foreign material in the product meets weekly. On June 27 they performed a spot check throughout the plant to insure that employees were actually making the required checks. Mr. Gerling and another quality control employee went to the claimant's work area shortly after 9:00 a.m. The claimant was away from his machine on break. His check list indicated that he had performed all of the required checks before he went on break at 8:44 a.m. The checklist is found at page three of Employer's Exhibit 1 and shows the claimant wrote "AC" for acceptable on the bone eliminator box. Between the time the claimant allegedly made the check at 8:44 a.m. and the time Mr. Gerling arrived for the spot check, the machine had not been run. When the claimant returned from break, Mr. Gerling asked him if he had made the required checks and the claimant indicated he had done so. Mr. Gerling then had the claimant actually demonstrate and redo the check so he and the other employee could observe what he did. As the claimant began to redo the check, Mr. Gerling was immediately suspicious as the housing was full of meat. The housing should not have been full of meat if the claimant had actually run the check. When the bone eliminator was opened it was found to be so full of bone pieces that a pry bar had to be used to pull them all out. The claimant had indicated that no foreign material was found when he had done the check only a short time prior to that. The claimant then told Mr. Gerling that he had forgotten to check the bone eliminator. On that day and at hearing the claimant could not offer any explanation why he had checked acceptable and written that no foreign material was found when he completed the checklist. The claimant falsified a company document when he indicated he had made the required check when he had not.

The employer has a zero tolerance for falsification of company documents including checklist. Other employees, including supervisors have been discharged for even one instance of falsification of a company document.

The claimant has received unemployment benefits after the separation on a claim with an effective date of June 25, 2017. The employer did participate personally in the fact-finding interview through Tami Curci who provided essentially the same information to the fact-finder as was provided at the appeal hearing.

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 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 claimant knew that it was critical for him to actually perform the required checks to insure that the product produced did not include foreign materials. The claimant had been trained on how to make the checks properly. The claimant knew that if he falsified a company document even one time he would be discharged.

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 Ct. 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*, 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. *State v. Holtz*, Id.

The claimant's testimony was not as credible as that offered by Mr. Luna and Mr. Gerling. The claimant had to actually write on the form that he found "no" foreign materials after he allegedly made the check. That alone should have triggered him to remember he had not actually completed the required task. The claimant is not credible when he alleges that he simply forgot to perform the last part of the required check. Mr. Gerling was immediately suspicious when the check began and the housing was found to be full of meat. The claimant did not perform the required checks and is alleging he forgot as an excuse for his deliberate falsification of company document. His actions, even if only a one time occurrence are so serious and such a violation of the type of behavior the employer has a right to expect that they are sufficient misconduct to disqualify the claimant from receipt of unemployment insurance benefits. Benefits are denied.

Iowa Code § 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 the claimant 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). In this case, the claimant has received benefits but was not eligible for those benefits. Since the employer participated in the fact-finding interview the claimant is obligated to repay the benefits he received to the agency and the employer's account shall not be charged.

DECISION:

The July 28, 2017, (reference 02) 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 \$873.00 and he is obligated to repay the agency those benefits. The employer did participate in the fact-finding interview and their account shall not be charged.

Teresa K. Hillary
Administrative Law Judge

Decision Dated and Mailed

tkh/rvs