

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

BOYD C JAMES
Claimant

KINSETH HOTEL CORPORATION
Employer

APPEAL 15R-UI-10882-JCT
ADMINISTRATIVE LAW JUDGE
DECISION

OC: 05/31/15
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 June 30, 2015, (reference 02) unemployment insurance decision that allowed benefits based upon separation. The parties were properly notified about the hearing. A telephone hearing was held before Administrative Law Judge Beth Scheetz on July 31, 2015. The claimant participated personally. The employer participated through Dina Smith, hearing representative with Employer's Unity LLC. Employer witnesses included Andy Ruiz, accounting supervisor, and Sandy Van Den Bosch, controller. Katie Barry, claims specialist with Employer's Unity LLC., provided testimony regarding employer participation in the fact-finding interview. Employer Exhibit One (12 pages) was admitted into evidence. A hearing decision was issued by Administrative Law Judge Scheetz on August 3, 2015, and the employer appealed to the Employment Appeal Board.

The hearing was remanded on the limited issue of reopening the record to admit the employer's exhibits into the record, and allowing the parties an opportunity for direct and cross-examination. As a result, a second telephone hearing was held on October 15, 2015 with Administrative Law Judge Jennifer L. Coe. Although properly notified for the hearing, the claimant did not furnish a phone number for himself or representative to participate. The employer participated through Dina Smith, hearing representative with Employer's Unity LLC. Employer witnesses included Andy Ruiz, accounting supervisor, and Sandy Van Den Bosch, controller. Employer Exhibits A through R were admitted into evidence.

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 staff accountant and was separated from employment on June 5, 2015, when he was discharged (Employer Exhibit One, Page Two).

The employer has a policy which limits cell phone use during work hours (Employer Exhibit One, Page Twelve). The claimant received a copy of the employer's policies and handbook upon hire (Employer Exhibit C and Employer Exhibit D). The claimant was informed he could use his cell phone at work, while on duty to listen to music only and for emergency purposes, according to his manager, Andy Ruiz. On January 19, 2015, the claimant was emailed by his manager, that his cell phone use at the work place was creating issue at work (Employer Exhibit One, page Three and Employer Exhibit One, Page Four). On March 13, 2015, the claimant received a coaching and counseling form to address several deficiencies in his work performance. Also referenced in the form was the claimant's use of the cell phone (Employer Exhibit One, Page Seven). On April 23, 2015, the claimant met with his manager, Andy Ruiz, and again was instructed that he could no longer use his cell phone while on duty. The employer had tried to let the claimant use it for music only but it was disrupting his work, and the claimant was observed using it for emails, and not just music (Employer Exhibit One, Page Eight). Due to ongoing issues, the claimant was made aware his job was in jeopardy and separation would be occurring July 21, 2015 (Employer Exhibit One, Page Nine). The claimant was also instructed he could be discharged sooner if he failed to perform his job duties. In the employer's discussion with the claimant, the employer identified that the claimant repeatedly had his cell phone out, and consequently was struggling with time management and focusing and the phone was determined to be a distraction (Employer exhibit H-2). On June 4, 2015, the power temporarily went out in North Liberty. The claimant's son was being cared for by his father, and the claimant was observed on his cell phone without permission, and subsequently discharged on June 5, 2015.

The administrative record reflects that claimant has received unemployment benefits in the amount of \$6181.54, since filing a claim with an effective date of May 31, 2015, through the week ending October 10, 2015. The administrative record also establishes that the employer did participate in the fact-finding interview by way of Katie Barry.

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 § 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.

The unemployment insurance law disqualifies claimants discharged for work-connected misconduct. Iowa Code § 96.5-2-a. The rules define misconduct as (1) deliberate acts or

omissions by a worker that materially breach the duties and obligations arising out of the contract of employment, (2) deliberate violations or disregard of standards of behavior that the employer has the right to expect of employees, or (3) carelessness or negligence of such degree of recurrence as to manifest equal culpability, wrongful intent, or evil design. 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 misconduct within the meaning of the statute. 871 IAC 24.32(1).

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.*

After assessing the credibility of the witnesses who testified during the hearing, considering the applicable factors listed above, and using her own common sense and experience, the administrative law judge finds the claimant had been repeatedly counseled about his use of the cell phone at work. Generally, continued refusal to follow reasonable instructions constitutes misconduct. *Gilliam v. Atlantic Bottling Co.*, 453 N.W.2d 230 (Iowa Ct. App. 1990). The claimant knew his job was in jeopardy as indicated by the notice provided to the claimant on May 22, 2015 (employer exhibit one, page nine and employer exhibit H-2). This did not relieve him of obligation to comply with the employer's policies and procedures. The final incident on June 4, 2015, of using his personal cell phone while the power was out temporarily, while his son was being cared for by his father, in the middle of summer (as opposed to winter) is not an emergency. The claimant knew or should have known his conduct was in disregard of the employer's interests and reasonable standards of behavior that the employer has a right to expect of its employees. Benefits are withheld. Work-connected misconduct as defined by the unemployment insurance law has been established in this case. Benefits are denied.

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 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 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 fact-finding interview. 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.

DECISION:

The June 30, 2015, (reference 02) unemployment insurance 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 \$6181.54 and is obligated to repay the benefits. The employer's account shall be relieved of charges.

Jennifer L. Coe
Administrative Law Judge

Decision Dated and Mailed

jlc/pjs