IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

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

CHERYL L MADOCH
Claimant

ACOSTA INC
Employer

APPEAL NO: 18A-UI-01136-JE-T

ADMINISTRATIVE LAW JUDGE DECISION

OC: 12/27/17
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 January 18, 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 February 16, 2018. The claimant provided a telephone number prior to the hearing but was not available at that number when called for the hearing and did not participate in the hearing or request a postponement of the hearing as required by the hearing notice. Matthew Michalec, former Manager and Anna Marie Gonzalez, Employer Representative, participated in the hearing on behalf of the employer. Employer's Exhibits One through Five were admitted into evidence.

ISSUE:

The issue is whether the employer discharged the claimant for work-connected misconduct.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed as a part-time impact retail merchandiser for Acosta, Inc. from June 24, 2013 to December 8, 2017. She was discharged for falsifying her records and failing to perform her job to the employer's expectations.

The claimant was required to start and end her calls in the retail store in which she was performing the scheduled work. Instead, the claimant started and ended her calls from her home on several occasions. The claimant received a final written warning May 1, 2017, for failing to meet the expectations of a merchandiser (Employer's Exhibit One). The claimant indicated on April 11 and April 12, 2017, she had "entered call data for two (store) visits that evidence suggests she did not complete" (Employer's Exhibit One). She was supposed to build merchandise racks at a Hy-Vee store in Fairfield April 11, 2017, and the data entered by the claimant showed she worked there from 12:28 p.m. to 2:19 p.m. She was also supposed to build three merchandise racks at a Hy-Vee store in Ottumwa April 12, 2017, and her data showed she worked from 10:27 a.m. to 3:51 p.m. (Employer's Exhibit One). The client learned that neither the one rack required at the Fairfield Hy-Vee nor the three racks required at the

Ottumwa Hy-Vee had been assembled even though the claimant's data indicated she completed those tasks. She did not provide the required pictures of the racks. The employer felt the claimant's performance improved for a period of time after the warning was issued but she did not sustain that improvement.

The claimant's manager pulled a GPS report on the claimant for December 5, 2017, which showed the claimant opening her call at Wal-Mart Superstore (1621) while her GPS coordinates placed her 38 miles away from the store at her base location where she started and stopped the call rather than in the store (Employer's Exhibit Two). The claimant apparently did drive to the store at some point and took pictures of products but because the clock was running when she left for the store and when she got back home it cannot be determined how long she was in the store" (Employer's Exhibit Two). On December 6, 2017, the claimant opened a call away from the store location "as proven" by an app that lets the employer track the location of each employee's tablet if she has an active call running at the time (Employer's Exhibit). The claimant stated she was in Kirksville, Missouri, but she was actually in Ottumwa. The call for Kirksville had been running for four hours when the claimant's manager sent her an email stating she was showing she was at the wrong store at which time she cleared the call and rescheduled it for the following Monday (Employer's Exhibit Two). She did not make any calls in Ottumwa December 6, 2017. On December 7, 2017, the GPS system showed the claimant at home in Bloomfield from 8:30 a.m. to 9:30 a.m. but she indicated she started a visit at the Fairfield Walmart at 8:31 a.m. At 9:44 a.m., the employer tried to reach her through email and the office phone but was unsuccessful. Her data said she finished her call at the Fairfield Walmart at 11:36 a.m. (Employer's Exhibit Two). At 1:36 p.m. she began entering data for a call to Fairfield Hy-Vee on the employer's web browser, instead of her tablet, and entered the start time as 1:48 p.m. and ending at 2:48 p.m. According to the employer's GPS system the claimant was on her way back to her home in Bloomfield by 2:15 p.m. (Employer's Exhibit Two).

The employer determined the claimant falsified her records and time and attempted to call the claimant several times to notify her that her employment was terminated but when it was unable to reach her it sent her an email on December 13, 2017, informing her of her discharge.

The claimant has claimed and received unemployment insurance benefits in the amount of $1,208.00 for the eight weeks ending February 10, 2018.

The employer did not participate in the fact-finding interview.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment for disqualifying job 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:
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> 2. Discharge for misconduct. If the department finds that the individual has been discharged for misconduct in connection with the individual's employment:
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> 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.
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> 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). A claimant is not qualified to receive unemployment insurance benefits if an employer has discharged him for reasons constituting work-connected misconduct. Iowa Code section 96.5-2-a. Misconduct that disqualifies an individual from receiving unemployment insurance benefits occurs when there are deliberate acts or omissions that constitute a material breach of the worker's duties and obligations to the employer. See 871 IAC 24.32(1).

The claimant repeatedly opened and closed calls from her home rather than from the stores where she was expected to open and close calls and also falsified time and performance information she provided to the employer. The employer issued the claimant a final written warning May 1, 2017, after she falsely claimed to have built racks at two Hy-Vee locations. When the claimant stated she had difficulty performing her job on occasion, the employer gave her a tablet so she would always have access to the internet and be able to communicate with the employer. Despite that adaptation, however, the claimant failed to consistently use the tablet as required. When the employer audited her performance in early December 2017 it found three consecutive days when she was still opening and closing calls from home and was not where she was supposed to be at the times she stated.

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.
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> (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.
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> (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.
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> (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 claimant did not receive benefits due to fraud or willful misrepresentation and employer failed to participate in the finding interview, the claimant is not required to repay the overpayment and the employer remains subject to charge for the overpaid benefits.

The claimant's overpayment of benefits to date, in the amount of $1,208.00 for the eight weeks ending February 10, 2018, is waived as to the claimant and that amount shall be charged to the employer's account.

DECISION:

The January 18, 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 did not participate in the fact-finding interview. Consequently, the claimant's overpayment of benefits to date, in the amount of $1,208.00, is waived as to the claimant and shall be charged to the employer's account.

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Julie Elder
Administrative Law Judge

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Decision Dated and Mailed

je/scn