

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

KIMBERLY K SCHMADEKE
Claimant

KELLY SERVICES USA LLC
Employer

APPEAL 17A-UI-00993-JP-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

**OC: 12/25/16
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 January 19, 2017, (reference 01) unemployment insurance decision that allowed benefits. The parties were properly notified about the hearing. A telephone hearing was held on February 16, 2017. Claimant participated. Employer participated through senior staffing supervisor Jennifer Petsche. Official notice was taken of the administrative record of claimant's wage history, with no objection.

ISSUES:

Was the claimant discharged for disqualifying job-related misconduct?

Has the claimant been overpaid unemployment insurance benefits, and if so, can the repayment of those benefits to the agency be waived?

Can 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 employer is a temp agency. Claimant started with the temp agency in April 2013 and was last assigned at Ruffalo Noel Levitz on September 14, 2015 as customer service representative in a long-term temporary assignment. Claimant's assignment ended on November 28, 2016 for making inappropriate comments. Claimant was also separated from the employer on November 28, 2016 for making inappropriate comments while on the assignment.

The employer has a written policy that prohibits employees from making offensive/inappropriate comments. The policy provides for anywhere from a written warning to discharge. Claimant was aware of the policy.

Several months prior to November 27, 2016, claimant testified a coworker (hereinafter "the coworker") that worked for Ruffalo Noel Levitz had been making offensive comments to her.

Claimant testified the coworker would have a conversation with her and during the conversation the coworker would make racial comments. The comments would occur in a one-on-one conversation with claimant. Claimant testified the coworker would make comments to try to get her to respond with an offensive comment. Claimant testified the coworker would say comments about minorities, including "we needed to start lynching them again." Claimant would sometimes not respond to the coworker. Other times, claimant would respond back with an offensive/inappropriate comment. The last offensive/inappropriate comment claimant made to the coworker was, "If they're going to act like monkeys, maybe they should go grow bananas." No other employees, besides the coworker, heard claimant make this comment. The last time claimant made a comment like this was around the first week of November 2016. Claimant testified she felt pressured that if she did not make these comments she would be an outcast. Around the beginning of November 2016, the coworker had told claimant that the coworker was going to quit. During the second week of November 2016, the coworker gave claimant a post-it note with an offensive comment on it about minorities. Claimant tore the note up and told the coworker that the comment was wrong. Later, claimant taped the post-it note together and carried it around in her purse. Claimant did not report the coworker's comments or the post-it note when they happened.

Around the middle of November 2016, the coworker told claimant that the coworker was not going to quit. On November 27, 2016, claimant reported the coworker's behavior (comments) to the manager Ruffalo Noel Levitz for the first time. Claimant told the manager that she did not feel comfortable coming forward sooner because she feared retaliation and she did not feel comfortable. The manager assured claimant that it would be ok. The manager initially told claimant there would be no repercussions. Claimant told the manager that she could not work anymore because of the coworker's comments. Claimant presented the post-it note to the manager. The manager indicated to claimant that she may get a written warning, but encouraged her to talk. Claimant told the manager about the coworker's comments and about her comments to the coworker.

On November 28, 2016, claimant met with the manager at the assignment again. The manager wanted more information from claimant about the coworker. The manager then went to the personnel department and when the manager came back, the manager separated claimant from the assignment. Claimant contacted the employer on November 28, 2016. Claimant told Ms. Petsche what happened and admitted to making the comment to the coworker. Claimant was then discharged from the employer. Ms. Petsche testified that because the coworker works for Ruffalo Noel Levitz, she is not aware if the coworker was discharged.

Claimant was the person that reported the harassment on November 27, 2016; her coworker did not report the comments. Prior to November 27, 2016, claimant had not reported any incident of harassment or inappropriate comments to the employer or the assignment.

When claimant spoke to the manager at the assignment and the employer she also told them about another temp employee assigned at Ruffalo Noel Levitz that had made a racial comment. Ms. Petsche testified that unlike claimant, the temp employee denied making the comment and that temp employee was disciplined, but not discharged.

Claimant had no prior disciplinary warnings while on assignment at Ruffalo Noel Levitz. Claimant had been separated from a previous assignment while working for the employer in June 2013 for making an inappropriate comment.

The administrative record reflects that claimant has received unemployment benefits in the amount of \$2,247.00, since filing a claim with an effective date of December 25, 2016, for the

seven weeks ending February 11, 2017. Ms. Petsche testified she e-mailed Iowa Workforce Development (IWD) prior to the fact-finding interview to let the fact-finder know the employer was going to participate. Ms. Petsche did not receive a call for the fact-finding interview at the scheduled start time. Ms. Petsche waited approximately five minutes and then called the 800 number. Ms. Petsche was told that the fact-finder was running behind and the employer would get a call. While Ms. Petsche was on this call, the employer received a message from the fact-finder. Ms. Petsche then called the fact-finder back and was informed that the employer would get a call to participate, but the employer did not get a call back and the employer did not participate.

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. 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).

Misconduct must be "substantial" to warrant a denial of job insurance benefits. *Newman v. Iowa Dep't of Job Serv.*, 351 N.W.2d 806 (Iowa Ct. App. 1984). When based on carelessness, the carelessness must actually indicate a "wrongful intent" to be disqualifying in nature. *Id.*

Negligence does not constitute misconduct unless recurrent in nature; a single act is not disqualifying unless indicative of a deliberate disregard of the employer's interests. *Henry v. Iowa Dep't of Job Serv.*, 391 N.W.2d 731 (Iowa Ct. App. 1986). Poor work performance is not misconduct in the absence of evidence of intent. *Miller v. Emp't Appeal Bd.*, 423 N.W.2d 211 (Iowa Ct. App. 1988).

The employer has presented substantial and credible evidence that claimant made offensive comments to a coworker. Although the final incident occurred in early November 2016 and claimant was not discharged until the end of November 2016, the employer discharged claimant the same day it discovered that she had made the offensive comment. Claimant's argument that her comment was only made during a one-on-one conversation with a coworker and the coworker did not report the incident so there was no misconduct, is not persuasive. "The use of profanity or offensive language in a confrontational, disrespectful, or name-calling context may be recognized as misconduct, even in the case of isolated incidents or situations in which the target of abusive name-calling is not present when the vulgar statements are initially made." *Myers v. Emp't Appeal Bd.*, 462 N.W.2d 734 (Iowa Ct. App. 1990).

Claimant's arguments that she felt pressured to make inappropriate comments or be an outcast and that she felt pressure to not report the incidents are also not persuasive. Although the coworker may have started the offensive comments during a conversation with claimant, claimant made a choice to participate in the conversation and respond with an offensive comment. Claimant had the option to ignore the coworker's comment like she had in the past. Claimant also could have reported the coworker's comments to the manager at the assignment like she eventually did on November 27, 2016. Furthermore, if claimant feared retaliation, she could have just reported the incident to the employer and requested a different assignment. However, claimant did not report the coworker to anyone until November 27, 2016 and she made the conscious decision to participate in the conversation with her coworker and make an offensive comment as opposed to being an outcast, despite having been previously separated from an assignment for making an inappropriate comment.

Claimant's offensive comment is considered disqualifying misconduct, even without prior warning. 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 she 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), Iowa Admin. Code r. 871-24.10.

In this case, the benefits were not received due to any fraud or willful misrepresentation by the claimant and the employer did not participate in the initial proceeding to award benefits. As such, the claimant is not obligated to repay to the agency benefits she received in connection with this employer's account. However, the employer did not participate in the initial proceeding to award benefits because it did not receive a call back from the fact-finder for the fact finding interview after it contact IWD when it did not receive a call at the scheduled start time for the fact-finding interview. Iowa Code § 96.3(7)(b)(1)(a) provides: "[t]he 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." (emphasis added). In this case the employer did not fail to timely or adequately respond to a request for information because the employer did not receive a call back after it called IWD to participate in the fact-finding interview. The benefits paid to the claimant in this case were not because the employer failed to respond timely or adequately to the department's request for information. As such, the employer cannot be charged for the overpayment either and the overpayment shall be absorbed by the fund.

DECISION:

The January 19, 2017, (reference 01) unemployment insurance decision is reversed. Claimant was discharged from employment due to job-related misconduct. Benefits are withheld until such time as claimant has worked in and been paid wages for insured work equal to ten times her weekly benefit amount, provided she is otherwise eligible.

Claimant has been overpaid unemployment insurance benefits in the amount of \$2,247.00 and is not obligated to repay the agency those benefits. Further, the employer's account shall not be charged.

Jeremy Peterson
Administrative Law Judge

Decision Dated and Mailed

jp/rvs