

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

TERRI L BROWN
Claimant

APPEAL 15A-UI-14050-H2T

**ADMINISTRATIVE LAW JUDGE
DECISION**

**DES MOINES INDEPENDENT COMMUNITY
SCHOOL DISTRICT**
Employer

**OC: 11/29/15
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 December 17, 2015 (reference 01) unemployment insurance decision that allowed benefits. The parties were properly notified about the hearing. A telephone hearing was held on January 13, 2016. Claimant participated. Employer participated through (representative) Rhonda Wagoner, Benefits Specialist; Shelia Mason, Director of Human Resources; and Todd Liston, Director of Transportation. Employer's Exhibit One through Four were entered and received into the record. Claimant's Exhibit A was entered and received into the record.

ISSUES:

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 bus driver beginning on November 22, 1993 through December 1, 2015; when she was discharged.

On November 4, the claimant allowed a bus associate to treat a special needs student in an improper manner. The claimant failed to follow the employer's policies and procedures, a copy of which had been given to her and on which she had been trained. Employer's Exhibit Four is video, sound, and picture that accurately reflects what occurred on the bus the claimant was driving. The video shows what the bus driver allowed the bus associate to do and to say to a child during the 14-minute bus ride on November 4, 2015.

When the visibly upset crying special needs student got on the bus, two teacher's aides from the school got on with him to help secure him in his seat. This student's IEP requires he be secured in his seat with a wraparound seat belt. The child wears a vest that has two hooks at the shoulders and two hooks at the hips to which the seat belt is connected. The child is able to unhook the belts, so the seatbelt straps must be tight enough so that he cannot stand up while belted in. The bus associate did not secure the straps tightly enough so the child was able to repeatedly stand up. The claimant tells the two school aides "ok, we got him, she got him" and then the claimant tells the aides "I think it might be better if you all leave." The claimant then tells the visibly upset child to "stop acting like a two-year old." The claimant was responsible for what occurred on the bus and had an obligation to intervene on behalf of the child when she saw rules violations occurring.

As the student got on bus, the bus aide yelled at the student and told him he was "too big to be crying" and that if he did not stop crying she would "[k]ick him off my bus." The claimant did not try to stop the bus aide from yelling at or threatening to kick the child off the bus despite knowing that the bus aide had no authority to remove the child from the bus. At hearing the claimant made it clear that she thought the bus aide had mistreated the child but she did not think she should be held accountable for what the bus aide did or said.

At one point on the video the claimant can be heard telling a child to sit down. The claimant had responsibility for ensuring the children were following the policies and procedures, and demonstrated that when she told a child to sit down. It also makes clear that the claimant/bus driver could hear and see what was occurring on the bus. She also could very clearly how the bus aide was speaking to the child and what the bus aide was saying to the child.

During this time the bus aide was also busy on her personal cell phone. As the bus was moving, she was not watching the students but was busy on her cell phone. The bus aide ignored her job duties to pay attention to her personal cell phone. At no time did the bus driver ask the bus aide to put away her personal cell phone and to pay attention to her duties caring for the children. The claimant can be heard telling the bus aide they were going to take home the child in question first, so it was clear she was aware of all that was happening. The child, who continued to cry throughout the ride, stood for periods of time without the bus aide even noticing as she was busy on her cell phone. When the bus aide yelled at the student and shook her finger in his face while saying "you better leave it alone, I'm not gonna tell you again," the claimant did nothing to stop her. The bus aide's behavior only served to make the student more upset and to cry harder. While the bus aide continued to make comments to the student like "why are you crying" and to threaten to kick him off the bus, the claimant did and said nothing to try and deescalate the situation or to intervene. It was part of her job responsibilities to intervene and to attempt to deescalate.

At approximately seven minutes into the video, the student is standing again. The bus aide tells him to sit down and he does not. The bus aide attempts to secure him back in his seat but does not have him secured tightly enough so he must sit down. The bus aide then allows the student to stand while she goes back to her cell phone. The student hits another student sitting in the seat ahead of him on the head. The bus aide then yells at the student and says "that is what you are not going to do." She pulls him down by the arm into the seat and sits down beside him. For the next seven minutes the bus aide pins the student against the side of the bus more and more tightly. Eventually the bus aide has the student pinned with his face against the side of the bus and the window frame. All of this is visible to the claimant, the bus driver, who does nothing to stop the bus aide from pinning the child against the window frame. The bus aide continues to press harder and harder until the student has his cheek pressed against the glass and is unable to move his head. The bus aide does not release the child until the bus arrives at his stop and someone comes onto the bus to get him off. The claimant did nothing to intervene on behalf of the child and did see the events as they took place.

The next day the child's mother complained to the school principal that her child, the student, had marks on his face that she believed came from when he was riding the bus. The principal began an investigation which included watching the video of the bus ride. The investigation led the employer to determining that the claimant violated their policies in how she spoke to the child, when she told him he was acting like a two-year old and how she failed to intervene on behalf of the child and stop the bus aide from pinning him against the side of the bus. The claimant had access to call for assistance or to even pull over the bus to help calm the student down but did not do so. The claimant allowed the bus aide to engage in behavior that she admitted was wrong and a violation of the employer's policies and procedures.

The claimant has received unemployment benefits after the separation on a claim with an effective date of November 29, 2015.

The employer did participate personally in the fact-finding interview through Rhonda Wagoner, although Ms. Wagoner had not watched the video when she was responsible for providing details to the fact finder about the incidents leading to the discharge.

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.

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).

Generally, continued refusal to follow reasonable instructions constitutes misconduct. *Gilliam v. Atlantic Bottling Company*, 453 N.W.2d 230 (Iowa App. 1990).

The claimant did not intervene to help the child even though she testified she knew that the bus aide was not treating the child appropriately. She also spoke to the child in a demeaning manner when she told him he was acting like a two-year old. The claimant's failure to stop the bus aide or to intervene makes her responsible in part for what occurred. The claimant's actions do amount to misconduct sufficient to disqualify her from receipt of unemployment insurance benefits. Benefits are denied.

Iowa Code § 96.3-7, 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) 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. 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. The employer shall not be charged with the benefits.

(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 she received to the Agency and the employer's account shall not be charged.

DECISION:

The December 17, 2015 (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 been overpaid unemployment insurance benefits and she 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

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