

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

RONALD L FRIEDMAN
Claimant

APPEAL NO: 14A-UI-13112-ET

**ADMINISTRATIVE LAW JUDGE
DECISION**

EAGLE WINDOW & DOOR MFG
Employer

**OC: 11/09/14
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 December 9, 2014, 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 2, 2015. The claimant participated in the hearing. Jennifer Shimon, Human Resources Generalist; Mike Nickeson, Maintenance Facilities; and Tom Kuiper, Employer Representative; participated in the hearing on behalf of the employer. Employer's Exhibit One was 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 full-time maintenance technician II for Eagle Window & Door Manufacturing from February 23, 1989 to November 5, 2014. He was discharged for inappropriate, unprofessional, and disrespectful behavior.

On October 28, 2014 the claimant was in the maintenance office with Maintenance Scheduler Michelle Wulfekuhle and Maintenance Technicians Mark Schultz and Jason Palmer. Ms. Wulfekuhle was attempting to get information about a work order and while asking about the work and how it should be done the claimant made disparaging and disrespectful comments about PLC Technician Ken Aureden and Kevin Munson. The claimant was under the mistaken impression that Mr. Aureden was an electrician, and had issues with both he and Mr. Munson since they were hired in 2013 and was upset Mr. Aureden made more money than he did; but also had problems interacting with other employees before that time. On October 28, 2014, the claimant was sarcastic and complaining about what Ms. Wulfekuhle was asking of him, stating, "Why do I have to do these jobs. Give them to the 'hired electrician.' I don't understand why they get paid to screw up the machines. All they do is sit in their offices. I'm tired of doing all of Ken's work while he goes to classes." The claimant was argumentative with Ms. Wulfekuhle and the conversation became heated and uncomfortable. Mr. Schultz and Mr. Palmer both left the room and Ms. Wulfekuhle was very upset by what the claimant was saying to her and how he was speaking to her.

Maintenance Facilities and Security Manager Mike Nickeson returned to the facility mid-afternoon and Ms. Wulfekuhle said she needed to talk to him about the earlier situation with the claimant. She told him the claimant was complaining about Mr. Aureden and Mr. Munson again and Mr. Nickeson directed her to recount the conversation in an email. When Mr. Nickeson received the email he provided the information to Human Resources Generalist Jennifer Shimon, who conducted an investigation and took statements from the witnesses present and found all of their statements consistent.

In April 2012 the employer experienced a change in leadership. The claimant's previous manager was not holding employees accountable for their actions and would say things like "that's just Ron (the claimant) being Ron." After the change in leadership, management made it clear that his behavior was not acceptable and would not be tolerated.

On October 11, 2012 the claimant received a documented discussion for his interaction with another employee on the floor. The other employee stated the claimant did not have the equipment locked out properly and the claimant became very rude and told the employee it was none of his business.

On February 25, 2014 the claimant received a written warning for making comments about Mr. Aureden on the floor in front of others including the operations manager. He stated Mr. Aureden was "fucking things up" and "was not worth the extra money because he doesn't know anything." He also stated Mr. Aureden sat in his "office a lot not doing anything" and said he did not want Mr. Aureden in his "area because he doesn't fucking know anything." A few days later the claimant spoke to the safety specialist about Mr. Aureden and the safety specialist stopped him and told him to take his concerns to his supervisor. Despite being told to stop making negative comments about Mr. Aureden, the claimant continued without speaking to his supervisor about Mr. Aureden's role.

On June 12, 2014 the claimant received a final written warning and three-day suspension after making negative comments about Mr. Aureden and supervisory employees while working on a project June 7, 2014 (Employer's Exhibit One). The claimant stated the project was "all fucked up" because Mr. Aureden, Mr. Nickeson, and another supervisory employee did not know what they were doing and "Ken Aureden had the wiring set up incorrectly - again all fucked" (Employer's Exhibit One). The claimant also had a verbal confrontation and became argumentative with another employee who questioned whether they were following proper procedure (Employer's Exhibit One). The warning stated, "You continue to speak negatively about coworkers and your leadership, question their abilities, and complain to people who have no ability to address your concerns instead of bring any issues you have to your Supervisor. You are spending a significant amount of time negatively talking about others, and should spend more time focusing on you own tasks" (Employer's Exhibit One). It also discussed the claimant's yelling and swearing and stated that his behavior was creating a hostile and offensive work environment (Employer's Exhibit One). Under "Solution:" the warning said, "You will cease your criticism of any other employee or leader immediately, your actions and comments in the workplace are expected to be constructive and respectful... You will act in a professional manner at all times when you are communicating with other employees and members of management" (Employer's Exhibit One). Under "Action:" the warning stated, "This Final Written Warning serves as formal notice to you that your behaviors are unacceptable and jeopardizes your employment standing with the company...Further inappropriate conduct will result in termination" (Employer's Exhibit One).

The employer's policy requires employees to treat everyone with dignity and respect. After the October 28, 2014 incident, and following the progressive disciplinary action policy, the employer terminated the claimant's employment November 5, 2014.

The claimant has claimed and received unemployment insurance benefits in the amount of \$832 since his separation from this employer.

The employer personally participated in the fact-finding interview through the statements of Jennifer Shimon.

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 § 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).

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 of omissions that constitute a material breach of the worker's duties and obligations to the employer. See 871 IAC 24.32(1).

The claimant had been warned about his negative interactions with other employees and his negative comments about Mr. Aureden. He had received a documented discussion and a written warning, prior to receiving a final written warning and three-day suspension for his behavior June 12, 2014. The warning stated that if the claimant's behavior and attitude did not change his employment would be terminated. At that time, the claimant knew, or should have known that his job was in jeopardy and if he continued to behave in the same way his employment would be terminated. Despite those warnings, the claimant's behavior continued unabated; including making repeated, negative statements about Mr. Aureden to Ms. Wulfekuhle October 28, 2014.

The claimant was upset Mr. Aureden was hired at a higher pay rate than that of the claimant, who never seemed to get past that fact. He repeatedly made negative, disrespectful, and unprofessional comments about Mr. Aureden in front of other employees and members of management even though he was repeatedly told and warned his conduct would no longer be tolerated. He clearly had no respect for Mr. Aureden and testified he had no respect for Supervisor Jeff West or Maintenance Facilities and Security Manager Mike Nickeson. His feelings showed when made the inappropriate, unprofessional, and negative comments about Mr. Aureden, co-workers and management.

While it is unfortunate that a 25-year employee of the company effectively forced the employer to terminate his employment for creating a negative and hostile work environment, 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.

(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.

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. In this case, the claimant has received benefits but was not eligible for those benefits. While there is no evidence the claimant received benefits due to fraud or willful misrepresentation, the employer participated in the fact-finding interview personally through the statements of Human Resources Generalist Jennifer Shimon. Consequently, the claimant's overpayment of benefits cannot be waived and he is overpaid benefits in the amount of \$832.

DECISION:

The December 9, 2014, reference 01, 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 received benefits but was not eligible for those benefits. Therefore, the claimant is overpaid benefits in the amount of \$832.

Julie Elder
Administrative Law Judge

Decision Dated and Mailed

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