

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

THOMAS A MOORE
Claimant

CARLETON LIFE SUPPORT SYSTEMS INC
Employer

APPEAL 15A-UI-13128-JP-T
**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 11/01/15
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 November 19, 2015, (reference 01) unemployment insurance decision that allowed benefits. The parties were properly notified about the hearing. A telephone hearing was held on December 16, 2015. Claimant participated. Employer participated through human resources director Rob, Baugous and production supervisor for the fabrication department, Jason Bock.

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: Claimant was employed full time as a machinist from February 22, 1982, and was separated from employment on October 26, 2015, when he was discharged.

The employer has a progressive disciplinary policy that calls for a verbal warning, then a written warning, then a suspension, and finally discharge. However, depending on the nature of the offense, the employer can skip steps.

Prior to October 23, 2015, the employer communicated to the fabrication team, which communicated with its members that they were not supposed to keep uncontrolled parts. Claimant was a part of the fabrication team. Mr. Bock instructed employees since 2013 not to keep uncontrolled parts in drawers or lockers. Uncontrolled parts are referred to as kitty parts and kitty parts have not been allowed since 2013. When a job is issued to a machinist, the

machinist is assigned to a machine. Each job is in a queue. The machinist has the raw material to complete just the job, there should not be any excess material. If a machinist feels the standard is incorrect they need to report it and it is investigated. The parts that were in claimant's locker should have either been scraped or given to the supervisor. There should not be any overrun parts. The employee should do the number of parts for the job and then move on to the next job. The employer has certain requirements that parts must be maintained under certain criteria for its clients. Parts being outside of control could have resulted in a serious safety concern for the clients. The employer follows AS9100 for its quality control. If the employer is out of compliance with quality control, it could result in a loss of a contract.

On October 23, 2015, the employer did a review of employees' lockers. Claimant had multiple parts that belonged to the employer in his personal locker. These were uncontrolled parts, which meant they could be damaged in the locker and then introduced to assembly areas without being inspected. The parts were in process and not finished. Claimant put the parts in his locker so he could finish them later and use them when it was convenient. The employer understood that claimant was storing the parts so that if he fell behind in production, he could supplement the parts to get his numbers up. Claimant had placed his own personal lock on his locker instead of using the employer supplied lock. The employer does not allow employees to use their own locks.

On October 26, 2015, claimant was discharged. The employer was very concerned about claimant's misconduct because he was using a personal lock on his locker, the amount of parts he had in his locker, and the parts were uncontrolled. Three other employees were also discharged for having parts in their lockers.

The administrative record reflects that claimant has received unemployment benefits in the amount of \$2586.00, since filing a claim with an effective date of November 1, 2015, for the six weeks ending December 12, 2015. The administrative record also establishes that 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 due to job-related misconduct. Benefits are denied.

It is the duty of an administrative law judge and 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, as the finder of fact, 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. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996). 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 evidence you believe; whether a witness has made inconsistent statements; the witness's conduct, age, intelligence, memory and knowledge of the facts; and the witness's interest in the trial, their motive, candor, bias and prejudice. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996).

This administrative law judge assessed the credibility of the witnesses who testified during the hearing, considering the applicable factors listed above, and used my own common sense and experience. This administrative law judge finds the employer's version of events to be more credible than claimant's recollection of those events.

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 Co.*, 453 N.W.2d 230 (Iowa Ct. App. 1990). 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).

Workers in claimant's industry reasonably have a high standard of care required in the performance of their job duties to properly ensure quality control under the AS9100 standards. The employer does follow the AS9100 standards for quality control. If the employer is out of compliance with its quality control, it may result in a loss of a contract.

In 2013, Mr. Bock instructed employees, including claimant, they are not to keep uncontrolled parts (also referred to as kitty parts) in drawers or lockers. Even though the practice may have

been to keep uncontrolled parts in drawers or lockers prior to Mr. Bock's directive, the employer is entitled to establish reasonable work rules and expect employees to abide by them. Claimant was on notice in 2013 he was not to keep uncontrolled parts in his locker; however, on October 23, 2015, the employer conducted an unannounced search of employees' lockers and discovered four employees, including claimant, had uncontrolled parts in their lockers. These employees were clearly in violation of the directive given by the employer. The employer understood that claimant was storing the parts so that if he fell behind in production, he could supplement the parts to get his numbers up. The problem with this was the way the parts were being stored. The parts could be damaged in claimant's locker and then when claimant used them to supplement his numbers, the damaged parts could have been given to the employer's client. This is a safety concern for the employer and its clients. It could have also cost the employer a contract.

Claimant's argument that he was never told not to keep uncontrolled parts is not persuasive. The employer told the fabrication team, including claimant that they are not to store uncontrolled parts in drawers or their lockers. Furthermore, when claimant stored the uncontrolled parts in his locker, he used his own personal lock to lock his locker; despite the employer providing each employee a lock for their locker and claimant had been previously told to remove his personal lock. Claimant's use of his personal lock indicates he clearly did not want anyone from the employer to look into his locker.

The employer is entitled to establish reasonable work rules and expect employees to abide by them. Since others have also been discharged for similar conduct, disparate application of the policy is not evident. Claimant clearly ignored the employer's directive when he stored uncontrolled parts in his locker and tried to hide this conduct by using his own personal lock despite being told not to use his own lock. Claimant's conduct was against the best interest of the employer and its clients and is misconduct without prior warning or specific policy violation. 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.

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.

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 § 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 § 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 states pursuant to § 602.10101.

871 IAC 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 § 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 § 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 § 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 § 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 § 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 § 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 they 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. Since the employer did not participate in the fact-finding interview the claimant is not obligated to repay to the agency the benefits he received and the employer's account shall be charged.

DECISION:

The November 19, 2015, (reference 01) 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 unemployment insurance benefits in the amount of \$2586.00 and is not obligated to repay the agency those benefits. The employer did not participate in the fact-finding interview and its account shall be charged.

Jeremy Peterson
Administrative Law Judge

Decision Dated and Mailed

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