

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

ALAN ARMSTRONG
Claimant

APPEAL NO: 15A-UI-11455-JE-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

HY-VEE INC
Employer

OC: 09/20/15
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 October 9, 2015, reference 02, 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 October 29, 2015. 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. Ashley Stanley, Human Resources Manager; Alyssa Valde, Kitchen Manager; Jared Lekar, Manager of Perishables; and Robert Mazza, Employer Representative participated in the hearing on behalf of the employer. Employer's Exhibits One through Six 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 full-time kitchen clerk for Hy-Vee from March 4, 2015 to September 19, 2015. He was discharged for repeated food safety issues.

On July 24, 2015, the claimant received a written warning for four food safety issues. On July 15, 2015, the claimant's cooling logs were incomplete. He was supposed to measure the temperature of the hot food at the end of the night and then check it again in the morning to make sure the food was cooled properly. On July 22 and 23, 2015, there were items in the cooler without date labels. Also on July 23, 2015, the claimant left utensils in the food overnight. All of the above listed items were food safety issues. The warning stated that the next issue would result in a one-week suspension.

On August 5, 2015, the claimant received a written warning and one week suspension for four cross contamination and food safety issues. On July 25, 2015, the claimant left raw bacon on a speed rack tray shelf above a shelf containing prepared cheesecake and left raw turkey over a

case of eggs. Employees can stack items on top of each other but raw food must always be placed on the bottom tray. On July 29, 2015, the claimant stayed late and did dishes. When the kitchen employees arrived the morning of July 30, 2015, the dishes were covered in grease because the claimant had not changed the water when he switched pans that had held different kinds of food which is a violation of the cross contamination and food safety policy. On August 1, 2015, the claimant left the employer's 16 ounce containers sitting on the floor. The food containers are required to be at least six inches off the floor on a shelving unit. The employer reviewed food safety issues with the claimant to insure he understood the policies and procedures and was satisfied he knew the policies. The claimant was suspended from August 10 through August 17, 2015. The warning indicated that further incidents would result in the claimant's termination from employment with Hy-Vee.

On September 17, 2015, a customer called to report she had received raw chicken from the employer's prepared hot food kitchen. The employer checked the temperature log, which verifies hot and cold items are at the correct temperature, and discovered the chicken was shown to be at 39.4 degrees in the hot case where it is supposed to be 141 degrees.

The employer met with the claimant September 19, 2015, and he admitted he filled out the temperature log September 17, 2015. The claimant was trained on food safety and cross contamination issues at the time of hire and coached about the employer's concerns at the time of each warning.

The claimant has claimed and received unemployment insurance benefits in the amount of \$399.00 since his separation from this employer.

The employer personally participated in the fact-finding interview through the statements of Human Resources Manager Ashley Stanley and Manager of Perishables Jared Lekar. The employer also submitted written documentation prior to 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:

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

As a kitchen clerk, food safety issues were the claimant's paramount responsibility. Instead, the employer is aware of eight separate incidents involving food safety and cross contamination issues resulting from the claimant's actions. The claimant was trained on the proper food handling procedures and was able to perform his job to the employer's expectations on most occasions, which gives rise to the conclusion his failure to consistently do so was the result of repeated carelessness and negligence. The claimant received two written warnings and a suspension prior to the termination. He knew or should have known that his failure to perform the essential functions of his job at all times could result in serious illness to customers and lead to his termination from employment. Despite that knowledge, however, the claimant continued to demonstrate poor performance in the areas of food safety and cross contamination.

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.

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 section 96.6, subsection 2, means submitting detailed factual information of the quantity and quality that if un rebutted 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 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 employer participated in the fact-finding interview, the claimant is required to repay the overpayment and the employer will not be charged for benefits paid.

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 Manager Ashley Stanley and Manager of Perishables Jared Lekar. Consequently, the claimant's overpayment of benefits cannot be waived and he is overpaid benefits in the amount of \$399.00.

DECISION:

The October 9, 2015, reference 02, 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. The employer personally participated in the fact-finding interview within the meaning of the law. Therefore, the claimant is overpaid benefits in the amount of \$399.00.

Julie Elder
Administrative Law Judge

Decision Dated and Mailed

je/css