

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

STEVEN GORDY
Claimant

APPEAL NO: 16A-UI-11062-JE-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

DANI'S AUTO SUPPLY LLC
Employer

OC: 09/18/16
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 5, 2016, 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 October 27, 2016. The claimant participated in the hearing. Doug Gorden, Service Writer and Danielle Gorden, Owner, participated in the hearing on behalf of the employer.

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 mechanic for Dani's Auto Supply from April 28, 2016 to September 14, 2016. He was discharged for failing to perform his work satisfactorily even though he had the ability to do so.

On July 5, 2016, the claimant sent Service Writer Doug Gorden a text message questioning why Mr. Gorden was checking his work. Mr. Gorden called the claimant to ask what he was referring to and the claimant "blew up." The claimant stated Mr. Gorden needed to run his shop differently and Mr. Gorden "didn't know anything." He finished by saying Mr. Gorden "needed to be a man, not a cry baby." On July 6, 2016, the claimant sent Mr. Gorden a message stating he would not be at work that day because he was going fishing. He later sent Mr. Gorden a message asking him to call him and when he did the claimant apologized for their conversation the evening before. The claimant returned to work July 7, 2016, and from that day forward Mr. Gorden noticed a rapid deterioration in the quality and volume of the claimant's work.

On July 28, 2016, the claimant was supposed to complete an engine change on a Tiburon. He worked on the change for one week without completing it when it should not have taken more than one day. Mr. Gorden then switched the claimant to a different job and finished the Tiburon himself. Around the same time customers started returning complaining of problems with their

vehicles that the claimant worked on. He failed to put several bolts back in or did not tighten bolts down. Most of the customers who complained had the knowledge to fix their vehicles themselves but did not have the time to do the work. The poor quality of the work embarrassed Mr. Gorden, who would check his work and replace or tighten bolts after the claimant left. Mr. Gorden talked to the claimant when customers complained but the claimant's performance did not improve.

On August 8 or 9, 2016, the claimant left two hours early because he was tired. The claimant was scheduled to take vacation August 15 through 19, 2016, and on August 8, 2016, Mr. Gorden told him he needed to finish the white Buick and the Intrepid before he left for vacation. On August 12, 2016, the claimant told Mr. Gorden both vehicles were done. Mr. Gorden was in the process of driving the Buick to the customer's home and the car died. Mr. Gorden had to have the Buick towed back to the shop for additional work. On August 13, 2016, Mr. Gorden checked the Intrepid to make sure the work was completed and done correctly and discovered transmission and power steering fluid leaking and a piece of plastic hanging from under the car. On August 15 and 16, 2016, Mr. Gorden worked on the Intrepid and in addition to the fluid leaks discovered the power steering pump only had one bolt holding it in because the claimant had left the other bolts out. When the claimant returned from vacation August 21, 2016, Mr. Gorden talked to him and told him about the problems with the Buick and Intrepid. He also told the claimant he could not afford those kinds of mistakes as it was a young company.

On September 13, 2016, the claimant had been working on a Volkswagen Jetta engine change for six days and spent five or six hours on a fuel leak on the sixth day. The engine change typically takes approximately nine hours to complete. One of the parts the claimant needed arrived at 4:45 p.m., 15 minutes before the claimant was off work but the claimant left at 5:00 p.m. without finishing the job. Mr. Gorden took over and by 5:20 p.m. the vehicle was done.

Mr. Gorden talked to the claimant on four occasions after July 5, 2016, about the quality of his work but felt like the claimant acted like it was not a "big deal." On September 14, 2016, Mr. Gorden talked to the claimant about the quality of his work, the length of time it takes him to complete a job, and all the work Mr. Gorden had to do after the claimant said the work was completed. He told the claimant the job "just wasn't working out" and notified the claimant his employment was terminated.

The claimant has claimed and received unemployment insurance benefits in the amount of \$2,255.00 for the five weeks ending October 22, 2016.

The employer personally participated in the fact-finding interview through the statements of Service Writer Doug Gorden. 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 § 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).

The claimant performed his work satisfactorily until July 5, 2016, when he became upset because Mr. Gorden had to begin checking his work. The claimant lashed out at Mr. Gorden stating he did not know how to run his shop and telling him he "needed to be a man not a crybaby." He then called off work July 6, 2016, stating he was going fishing. The claimant's actions July 5 and 6, 2016, were inappropriate and unprofessional. Mr. Gorden had every right to check the claimant's work and the more he checked it the more errors he discovered. Even though the claimant apologized for his words and actions after the fact, his work performance continued downhill after July 5, 2016. He took multiple days to complete jobs that should not have taken more than one day and repeatedly performed poor work. Customers were returning frequently with complaints and even though Mr. Gorden talked to the claimant about his performance the quality of his work and speed of completion did not improve.

The claimant was an experienced mechanic and Mr. Gorden should not have had to check everything he did to make sure bolts were put back in place and tightened and that his work was

done correctly and it should not have taken the claimant days to complete relatively simple tasks.

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 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 Service Writer Doug Gorden. Consequently, the claimant's overpayment of benefits cannot be waived and he is overpaid benefits in the amount of \$2,255.00 for the five weeks ending October 22, 2016.

DECISION:

The October 5, 2016, 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. 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 \$2,255.00 for the five weeks ending October 22, 2016.

Julie Elder
Administrative Law Judge

Decision Dated and Mailed

je/rvs