

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

TRUDIE WOOD
Claimant

APPEAL NO: 13A-UI-14335-ET

**ADMINISTRATIVE LAW JUDGE
DECISION**

GOOD SAMARITAN SOCIETY INC
Employer

OC: 12/01/13
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 23, 2013, 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 24 and April 25, 2014. The claimant participated in the hearing with Attorney Donald Bohlken. Holly Turner, Administrator and Karla Rankin, Director of Environmental Services, participated in the hearing on behalf of the employer and were represented by Attorney Kendall Watkins. Employer's Exhibits A through F and Claimant's Exhibits One through 16 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 senior housing manager for Good Samaritan Society from April 20, 2010 to December 2, 2013. She was discharged for dishonesty and failure to follow the performance improvement plan issued to her by the employer October 9, 2013.

On October 9, 2013, Administrator Holly Turner met with the claimant and issued her a performance improvement plan (PIP) (Claimant's Exhibit Three; Employer's Exhibit A). The PIP required that the claimant order all "food and supplies needed on the GSS DSSI computer system" from the employer's food vendor, Martin Brothers (Claimant's Exhibit Three; Employer's Exhibit A). That task was previously performed by the cook who submitted her resignation effective in early October 2013. During the PIP meeting Ms. Turner instructed the claimant to complete retraining on the DSSI system and the claimant did so October 17, 2013 (Employer's Exhibit B). She then attempted to order food and supplies online but was not successful at that time.

Ms. Turner met with the claimant to follow-up regarding the PIP October 18, 2013, and the claimant notified her she finished the DSSI training and would be placing an order the following week. The parties met again October 28, 2013, and the claimant indicated she was not having any difficulty ordering on the DSSI system and left Ms. Turner with the impression she was currently ordering food and supplies through the online DSSI system as required by her PIP.

Approximately between November 13 and 20, 2013, Director of Environmental Services Karla Rankin complained to Ms. Turner that the claimant was having her do the DSSI online ordering for her. Ms. Turner met with the claimant again November 27, 2013, and asked her about the online ordering of food and supplies and if she was able to complete her orders online using the DSSI system. The claimant stated she was not having any problems ordering with the DSSI system.

Due to the variations between what she was being told by Ms. Rankin and the claimant, Ms. Turner asked the IT Department to locate the orders the claimant placed using the DSSI system and was told that all of the claimant's orders had been placed by telephone. Further investigation discovered the claimant had placed six orders to Martin Brothers by phone.

After considering the meetings she had with the claimant and the statements the claimant made about using the DSSI system, Ms. Turner met with her December 2, 2013, and terminated her employment for dishonesty in leaving Ms. Turner with the distinct impression she was ordering online using the DSSI system as dictated by the PIP and failing to do so.

The claimant has claimed and received unemployment insurance benefits since her separation from this employer.

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). While the claimant maintains she was expected to start using the DSSI system to place food and supply orders online "in the future," that assertion is not persuasive. "In the future" in this context clearly means the claimant was to execute the items on her PIP "from now on" as to read it otherwise amounts to nothing more than semantics rather than a plain reading of the term. It is nonsensical to believe the employer placed the claimant on a PIP and required that she begin ordering food and supplies on the DSSI system but did not expect her to begin using it immediately following her retraining October 17, 2013. The claimant attempted an order on the DSSI system the day she underwent training but was unsuccessful in completing the order. The fact that she tried to use the system after training belies the fact she was aware of the importance the employer placed on her following the PIP. Instead of trying to use the DSSI system again or asking for additional training, the claimant placed her next six orders by phone, with the exception of those placed online by Ms. Rankin at the claimant's direction. When she was pointedly asked about her use of the DSSI system by Ms. Turner October 18 and 28, 2013, the claimant deliberately left Ms. Turner with the impression she was using the online ordering system as required by her PIP. If the claimant did not believe she was violating the PIP, she would have told Ms. Turner she had not successfully used the DSSI system since her training but was placing her orders by phone or having Ms. Rankin do so online for her instead of deliberately obfuscating the issue. Consequently, not only did the claimant violate the PIP requirement by failing to order food and supplies on the DSSI system but, at the very least, she also misled Ms. Turner about the situation.

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 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 § 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 claimant has received unemployment insurance benefits in the amount of \$9,170.00 but was not entitled to those benefits as she was discharged for disqualifying job misconduct and the employer participated in the fact-finding interview personally through the statements of Cook Doug Sykes and employer representative Jenice Je. Consequently, the claimant is overpaid benefits in the amount of \$9,170.00 and the overpayment cannot be waived.

DECISION:

The December 23, 2013, 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 received benefits but was not eligible for those benefits. The overpayment cannot be waived because the employer participated in the fact-finding interview. The claimant is overpaid benefits in the amount of \$9,170.00.

Julie Elder
Administrative Law Judge

Decision Dated and Mailed

je/pjs