

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

LEE F MARKS
Claimant

APPEAL 17A-UI-05284-NM-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

ALLEN MEMORIAL HOSPITAL
Employer

**OC: 04/09/17
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 May 12, 2017, (reference 01) unemployment insurance decision that allowed benefits. The parties were properly notified of the hearing. A telephone hearing was held on June 5, 2017. The claimant participated and testified. The employer participated through Vice President of Human Resources Steve Seesterhann and Manager of Plant Services Warren Bell. Employer's Exhibits 1 through 5 were received into evidence.

ISSUES:

Was the claimant discharged for disqualifying job-related misconduct?

Has the claimant been overpaid any unemployment insurance benefits, and if so, can the repayment of those benefits to the agency be waived?

Can any 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 maintenance worker 1 from September 19, 2007, until this employment ended on April 13, 2017, when he was discharged.

On April 10, 2017, one of claimant's coworkers approached management with concerns that claimant had falsified some of his work records for the several days prior. Once the complaint was received the employer reviewed security footage to see what information they could obtain. Footage was reviewed for April 7 through 9, 2017. Each day claimant was observed going into the maintenance office on four separate occasions. The employer does not have camera's inside to office, so they were unable to determine what tasks claimant was performing, but Bell testified his regular job duties would require claimant to go into the office four times daily for 10 to 15 minutes, for a total of 40 to 60 minutes each day.

Claimant was observed in the office for a total of 129 minutes on April 7, 224 minutes on April 8, and 195 minutes on April 9. On both April 8 and April 9 there were times where claimant was in the office for over two hours. None of the items listed on claimant's work logs reflect more than 45 minutes on any given activity and none reflect activities that would cause him to be in the office for the periods of time he was observed to be on the security footage. (Exhibits 1 through 3). Based on the inconsistencies in the security footage and claimant's work records, the employer concluded claimant was falsifying his work logs and terminated his employment.

Claimant testified there were a variety of activities listed on his log that could be completed in the office, but could not recall if he actually did complete any of these activities in the office on the dates in question. Claimant also testified that the times listed on his work log were approximations, as he had previously been advised that he did not need to write down every small task he completed.

The claimant filed a new claim for unemployment insurance benefits with an effective date of April 9, 2017. The claimant filed for and received a total of \$2,784.00 in unemployment insurance benefits for the weeks between April 9 and May 27, 2017. The employer's representative, Seesterhann, was available at the scheduled date and time for the fact-finding interview on May 11, 2017. At the scheduled interview time Seesterhann's phone rang, but when he picked up no one was on the other line. The call was disconnected and his phone again rang with the same result. Seesterhann assumed there was a problem with his phone reception and immediately moved to a location with better reception. Seesterhann learned from his office that they had received a call as well and were able to get a telephone number for the fact-finder. The fact-finder left instructions for the employer to call back within a half hour if it wished to participate. Within the 30 minute period Seesterhann twice called the fact-finder back and left messages for her both times. Seesterhann did not receive a return call. The fact finder determined claimant qualified for benefits.

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.

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.

871 IAC 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 Department of Job Service*, 275 N.W.2d 445, 448 (Iowa 1979).

The employer has the burden of proof in establishing disqualifying job misconduct. *Cosper v. Iowa Dep't of Job Serv.*, 321 N.W.2d 6 (Iowa 1982). The issue is not whether the employer made a correct decision in separating claimant, but whether the claimant is entitled to unemployment insurance benefits. *Infante v. Iowa Dep't of Job Serv.*, 364 N.W.2d 262 (Iowa Ct. App. 1984). The Iowa Court of Appeals found substantial evidence of misconduct in testimony that the claimant worked slower than he was capable of working and would temporarily and briefly improve following oral reprimands. *Sellers v. Emp't Appeal Bd.*, 531 N.W.2d 645 (Iowa Ct. App. 1995). 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). 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).

The decision in this case rests, at least in part, on the credibility of the witnesses. It is the duty of the administrative law judge as 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 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. *Id.* 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 believable evidence; whether a witness has made inconsistent statements; the witness's appearance, conduct, age, intelligence, memory and knowledge of the facts; and the witness's interest in the trial, their motive, candor, bias and prejudice. *Id.*

After assessing the credibility of the witnesses who testified during the hearing, reviewing the exhibits submitted by the parties, considering the applicable factors listed above, and using her own common sense and experience, the administrative law judge finds the employer's version of events to be more credible than the claimant's recollection of those events.

Claimant's testimony regarding the discrepancies in his task log is unconvincing. While it may be true that the employer did not expect claimant to log every minuscule task he completed, on at least two occasions, there are more than two hours of time that claimant spent in the office that cannot be accounted for on his time log. No reasonable person would consider a task or tasks taking more than two hours to complete to be negligible enough to leave it off a time log. The employer is entitled to establish reasonable work rules and expect employees to abide by them. The employer has presented substantial and credible evidence that claimant deliberately falsified his time log. This conduct shows a deliberate disregard for the employer's interest and is disqualifying misconduct.

The next issue in this case is whether the claimant was overpaid unemployment insurance benefits.

Iowa Code § 96.3(7) provides, in pertinent part:

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.

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 § 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).

In this case, the claimant has received benefits but was not eligible for those benefits. The law could not be clearer that claimant cannot be charged. Iowa Code section 96.3(7) provides that, unless fraud or misrepresentation is shown, “benefits shall not be recovered” from a claimant if the employer does not participate in fact finding. There is no indication that the claimant in this case engaged in any fraud or misrepresentation. Accordingly, he cannot be charged for any overpayment that “occurred because of a subsequent reversal on appeal regarding the issue of the individual’s separation from employment.” Iowa Code §96.3(7)(b)(1)(b).

As for the employer, the Code states that an employer is to be charged if “the employer failed to respond timely or adequately to the department’s request for information relating to the payment of benefits...” Iowa Code §96.3(7)(b)(1)(a). Here the employer responded to the notice of a fact finding conference by being at the number to be called. For some reason, two attempts of the employer to answer the call at the time of the interview were unsuccessful. The employer then

twice called Workforce and left messages that were not returned. It therefore cannot be concluded that benefits were paid because the employer failed to respond timely or adequately to the department's request for information relating to the payment of benefits. Instead benefits were paid because the employer could not connect with the agency and did not receive a timely return call from the agency, after the employer responded to this by placing its own call. The employer thus cannot be charged for the overpayment. Since neither party is to be charged then the overpayment is absorbed by the fund.

DECISION:

The May 12, 2017, (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 \$2,784.00 and is not obligated to repay the agency those benefits. The employer did not participate in the fact-finding interview through no fault of its own and its account shall not be charged. The overpayment must be charged to the fund.

Nicole Merrill
Administrative Law Judge

Decision Dated and Mailed

nm/rvs