

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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**THOMAS A DROULLARD**  
Claimant

**EAGLE WINDOW & DOOR MFG**  
Employer

**APPEAL 19A-UI-04979-CL-T**  
**ADMINISTRATIVE LAW JUDGE  
DECISION**

**OC: 06/24/18**  
**Claimant: Respondent (2)**

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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 June 14, 2019, (reference 02) unemployment insurance decision that allowed benefits based upon a separation from employment. The parties were properly notified about the hearing. A telephone hearing was held on July 16, 2019. Claimant participated. Employer participated through human resource business partner Valerie Parr and value stream manager Bill Lynch. Employer's Exhibits 1 and 2 were received.

**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 began working for employer on March 31, 1988. Claimant last worked as a full-time assembler. Claimant was separated from employment on May 16, 2019, when he was terminated.

Employer has sexual harassment policy stating that employer has zero tolerance for harassing behavior. Employer conducts a training regarding the policy every two years. Claimant was aware of the policy and what constitutes harassing behavior.

On May 2, 2019, an employee reported to the human resource department that claimant made numerous harassing comments in the previous weeks. The employee reported claimant talked to a female employee about giving a breast examination and the employee "whipping them out." The employee reported that when the female employee made a comment about being hot, claimant suggested she take her pants off. The employee reported that claimant walked by the employee and touched her butt, and then turned around and winked stating it was an accident.

Finally, the employee alleged claimant told a male co-worker that the only way he would stare at the female employee's butt is if she were naked.

Claimant was on a two-week vacation when these allegations were made. Employer started investigating the allegations by interviewing five witnesses.

On May 13, 2019, when claimant returned to work, human resource business partner Valerie Parr and value stream manager Bill Lynch informed him of the allegations and interviewed him. Claimant denied the allegations, although he stated it was possible he accidentally ran into an employee's butt and then apologized. Parr and Lynch suspended claimant pending the result of their investigation. Parr and Lynch took claimant's badge at the time they informed him of the suspension. Parr and Lynch also instructed claimant the investigation was confidential and warned him not to discuss the investigation with other employees.

On May 14, 2019, one of claimant's co-workers, Lenny, called him and stated the investigation was orchestrated by another co-worker, Mark Davis. Lenny asserted the female employee in question was in love with Davis and complied when Davis encouraged her to file the complaint. Claimant then called Davis and told him that he knew Davis was behind the investigation. Davis denied the allegation. Claimant also stated that if he ever saw Lynch outside the office, he would give him what he had coming and stated that the female employee in question was a "fat, fucking cunt" and had a target on her back.

On May 15, 2019, Davis reported the phone call he received from claimant to the employer. Parr called claimant and asked him if he threatened anyone. Claimant denied that he had. Parr asked claimant if he was sure. Claimant then stated that if he did he was sorry and it was because he was mad.

On May 16, 2019, employer terminated claimant's employment.

Employer warned claimant on November 15, 2016; April 28, 2017; July 6 and 25 and October 24, 2018, about using profanity and/or violating its policy requiring its employees to remain respectful in the workplace.

The administrative record reflects that claimant has received unemployment benefits in the amount of \$3,221.00, since his separation from employment on May 16, 2019, for seven weeks until the week ending July 13, 2019. Employer participated 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.

Iowa Code § 96.5(2)a provides:

An individual shall be disqualified for benefits, regardless of the source of the individual's wage credits:

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 to prove the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law. *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). What constitutes misconduct justifying termination of an employee and what misconduct warrants denial of unemployment insurance benefits are two separate decisions. *Pierce v. Iowa Dep't of Job Serv.*, 425 N.W.2d 679 (Iowa Ct. App. 1988). The law limits disqualifying misconduct to substantial and willful wrongdoing or repeated carelessness or negligence that equals willful misconduct in culpability. *Lee v. Emp't Appeal Bd.*, 616 N.W.2d 661 (Iowa 2000).

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).

In this case, employer failed to establish claimant sexually harassed a female employee. Claimant testified personally and denied engaging in the conduct. Employer relied solely on anonymous hearsay that claimant engaged in the conduct. Claimant's testimony carries more weight. Although the administrative law judge finds it credible that employees reported claimant

engaged in the conduct, employer failed to present credible evidence showing the conduct itself actually occurred.

However, employer did establish with credible evidence that claimant called an employee, Mark Davis, to talk about the investigation even though he was instructed not to do so and then threatened other employees during that phone call. Claimant admits that he was told not to talk to other employees about the investigation and that he called Davis anyway. Claimant asserts that employer had already decided to terminate him at that point. Even if that is true, claimant was still employed at the time of the phone call and deliberately disobeyed employer's instruction. Therefore, claimant gave employer more grounds on which to base its decision. Although claimant denies making threatening comments regarding Lynch and the female employee during the phone call, Parr credibly testified that when she called claimant to confront him about the issue, he apologized and stated that if he made threats it was only because he was angry. That bolsters Davis's assertions that claimant made threats during the call.

With employer's presentation of evidence regarding claimant's phone call to Davis, along with the many other warnings claimant received about remaining respectful in the workplace, it has established claimant was terminated for job-related misconduct.

The next issue is whether claimant was overpaid benefits and should have to repay those benefits. Iowa Code § 96.3(7)a-b 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.

b. (1) (a) 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. The employer shall not be relieved of charges if benefits are paid because the employer or an agent of the employer failed to respond timely or adequately to the department's request for information relating to the payment of benefits. This prohibition against relief of charges shall apply to both contributory and reimbursable employers.

(b) 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.

(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.

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.

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 participate in the fact-finding interview, the claimant is obligated to repay to the agency the benefits he received and the employer's account shall not be charged.

**DECISION:**

The June 14, 2019, (reference 02) 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 \$3,221.00 and is obligated to repay the agency those benefits. The employer did participate in the fact-finding interview and its account shall not be charged.

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Decision Dated and Mailed

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