IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

MISTY D LUND Claimant **AMMESA INC** Employer	**APPEAL NO. 17A-UI-03702-B2T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 02/26/17** **Claimant: Respondent (1)**

Iowa Code § 96.5-2-a – Discharge for Misconduct
Iowa Code § 96.3-7 – Recovery of Overpayment of Benefits
871 IA Admin. Code 24(10) – Employer Participation in Fact Finding

STATEMENT OF THE CASE:

Employer filed an appeal from a decision of a representative dated March 29, 2017, reference 01, which held claimant eligible for unemployment insurance benefits. After due notice, a hearing was scheduled for and held on May 16, 2017. Claimant participated personally and with witness Josh McDonald. Employer participated by Diane Ricketts-McCool, Annie Bailey, and Mitzi Willis. Claimant's Exhibit A and Employer's Exhibits 1 through 6 were admitted into evidence.

ISSUES:

Whether claimant was discharged for misconduct?

Whether claimant was overpaid benefits?

If claimant was overpaid benefits, should claimant repay benefits or should employer be charged due to employer's participation or lack thereof in fact finding?

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds: Claimant last worked for employer on November 23, 2016. Claimant argues that employer discharged claimant on November 23, 2016 because she made inadvertent mistakes while at work. Employer argues that claimant walked off the job on November 23, 2016 and did not call or show for her next three scheduled shifts.

Employer stated that claimant voluntarily quit on November 23, 2016 when she drove off from work following multiple incidents at a commercial establishment claimant was cleaning. Claimant had locked herself out of the building where she was working, so she called her supervisor. The supervisor came and let claimant back into the building, and they discovered that claimant had left water running and it was flooding the floor in the building. Employer went to get a water extractor and claimant also went across the street to her boyfriend's residence to

pick up her own water extractor. Upon both parties' return to the building, they began working on the extracting, and for some reason went back outside the building. At that time, claimant's significant other, who'd arrived at the building, began berating the supervisor and more generally the employer company. The boyfriend told claimant to hop into the car, and they left. Employer stated initially that she told claimant before leaving that she needed to call the office the next day, but, as the next day was Thanksgiving, the supervisor changed her story to employer asking claimant to contact on the next business day.

Employer stated that claimant did not call or show for work on the next three business days, so then they believed that claimant had quit when she walked off her job. Employer stated that there was still ongoing work available for claimant at the time she quit.

Employer filled out an incident report on the evening of the incident. Said two page report did include the claimant's boyfriend's alleged statements, but did not include any mention as to the need contact employer the next business day. None of employer's other incident reports listed claimant's need to be in contact with employer, but the supervisor stated she always tells people to contact the employer as the supervisor has no ability to terminate any employee. Only the general manager or owner may terminate the employee.

Claimant and her boyfriend stated that claimant was terminated by employer. Claimant stated that she was terminated by her supervisor, and believed that her supervisor had the power to terminate her. She further stated that her supervisor never indicated that claimant was to contact employer the next work day.

Not only had claimant locked herself out of the client's building and flooded the floor on November 23, 2016, she'd also received warnings for mistakes on November 3, 2016 and November 18, 2016. On the most recent warning, which claimant stated she'd received the day before, employer decided that claimant's pay would be reduced for November 21, 2016 to $7.25 per hour. Employer also stated on that warning that claimant would not be paid if she were to again call in from her cell phone.

Claimant has received unemployment benefits in this matter.

Employer did substantially participate in fact finding in this matter by having two participants in the phone hearing.

REASONING AND CONCLUSIONS OF LAW:

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).

Iowa Code § 96.3(7)a-b, as amended in 2008, 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 section 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 section 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 state pursuant to section 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 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.

Initially, the administrative law judge determines that claimant was terminated from her job, and not that claimant voluntarily quit. In making that determination, the administrative law judge looks at the incidents surrounding the job separation, claimant's work history, and the alleged statements of all relevant parties. Employer stated that claimant voluntarily quit. In support of this belief, employer brought forth claimant's supervisor who stated she never fired claimant; claimant's boyfriend demanded claimant walk off the job; and that the supervisor told claimant to be in immediate contact with employer the next day. The next day was Thanksgiving, so it wouldn't have made sense for the supervisor to give this statement to employer. As the witness later revised her statement, the validity of the alleged statement is called into question. Employer stated that claimant then didn't call or show for work for the next three days, and she was deemed a quit. When claimant wasn't told to call, it's easy to understand why she didn't.

Claimant's statements as to what happened in the parking lot do not cause the administrative law judge to believe that they were more credible than the statements given by the supervisor. Claimant, who meticulously remembered everything else, didn't remember what her boyfriend stated to the supervisor even though she was immediately next to the parties. Claimant's boyfriend also seemed to gloss over his interactions with the supervisor, and couldn't really explain why he came to the parking lot outside where claimant was working.

All of this testimony, and the gaps therein from all parties leads to the administrative law judge to determine that there was no quit. Employer didn't deem claimant's leaving the job as a quit at the time, and claimant stated that she didn't quit, so unless the administrative law judge sees the previously questioned statement from the supervisor that she told claimant to contact employer the next work day, the only conclusion that can be reached is that employer terminated claimant for misconduct.

A claimant is not qualified to receive unemployment insurance benefits if an employer has discharged the claimant for reasons constituting work connected misconduct. Iowa Code § 96.5-2-a. Before a claimant can be denied unemployment insurance benefits, the employer has the burden to establish the claimant was discharged for work-connected misconduct. *Cosper v. Iowa Department of Job Service*, 321 N.W.2d 6 (Iowa 1982), Iowa Code § 96.5-2-a.

In order to establish misconduct as to disqualify a former employee from benefits an employer must establish the employee was responsible for a deliberate act or omission which was a material breach of the duties and obligations owed by the employee to the employer. Rule 871 IAC 24.32(1)a; *Huntoon v. Iowa Department of Job Service*, 275 N.W.2d 445 (Iowa 1979); *Henry v. Iowa Department of Job Service*, 391 N.W.2d 731, 735 (Iowa Ct. App. 1986). The conduct must show a 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 the employee's duties and obligations to the employer. Rule 871 IAC 24.32(1)a; *Huntoon* supra; *Henry* supra. In contrast, 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 deemed misconduct within the meaning of the statute. Rule 871 IAC

24.32(1)a; *Huntoon* supra; *Newman v. Iowa Department of Job Service*, 351 N.W.2d 806 (Iowa Ct. App. 1984).

The employer bears the burden of proving that a claimant is disqualified from receiving benefits because of substantial misconduct within the meaning of Iowa Code section 96.5(2). *Myers,* 462 N.W.2d at 737. The propriety of a discharge is not at issue in an unemployment insurance case. An employer may be justified in discharging an employee, but the employee's conduct may not amount to misconduct precluding the payment of unemployment compensation. Because our unemployment compensation law is designed to protect workers from financial hardships when they become unemployed through no fault of their own, we construe the provisions "liberally to carry out its humane and beneficial purpose." *Bridgestone/Firestone, Inc. v. Emp't Appeal Bd.,* 570 N.W.2d 85, 96 (Iowa 1997). "[C]ode provisions which operate to work a forfeiture of benefits are strongly construed in favor of the claimant." *Diggs v. Emp't Appeal Bd.,* 478 N.W.2d 432, 434 (Iowa Ct. App. 1991).

The gravity of the incident, number of policy violations and prior warnings are factors considered when analyzing misconduct. In this matter, the evidence fails to establish that claimant was discharged for an act of misconduct when claimant violated employer's policy concerning having a significant other of an employee visit a job site and argue with a supervisor. Claimant was not warned concerning this policy, and employer did not show that claimant had any idea that her boyfriend would come to the job parking lot and complain to the supervisor.

The last incident, which brought about the discharge, fails to constitute misconduct because employer did not show an intentional disregard of employer's interests through claimant's boyfriend coming to the job site. The administrative law judge holds that claimant was not discharged for an act of misconduct and, as such, is not disqualified for the receipt of unemployment insurance benefits.

The overpayment issue is moot.

The issue of employer participation is moot.

DECISION:

The decision of the representative dated March 29, 2017, reference 01, is affirmed. Claimant is eligible to receive unemployment insurance benefits, provided claimant meets all other eligibility requirements.

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Blair A. Bennett
Administrative Law Judge

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Decision Dated and Mailed

bab/rvs