

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

NEAL W SIMONSEN

Claimant

APPEAL NO. 15A-UI-05302-TN-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

CARGILL MEAT SOLUTIONS CORP

Employer

OC: 04/05/15

Claimant: Respondent (2)

Section 96.5-2-a – Discharge After Disciplinary Suspension/Misconduct

STATEMENT OF THE CASE:

Cargill Meat Solutions Corp filed a timely appeal from a representative's decision dated April 22, 2015, reference 01, which showed claimant eligible to receive unemployment insurance benefits. After due notice was provided, a telephone hearing was held on June 9, 2015. Although duly notified, the claimant was not available at the telephone number provided. Two messages were left for the claimant. The employer participated by Ms. Martha Gutierrez, Human Resource Associate.

ISSUE:

The issue is whether the claimant received a disciplinary suspension from work due to misconduct in connection with his employment.

FINDINGS OF FACT:

Having considered the evidence in the record, the administrative law judge finds: Neal Simonsen was employed by Cargill Meat Solutions Corporation from March 31, 2014 until April 8, 2015 when he was discharged from employment. Subsequently, a decision was made to reinstate Mr. Simonsen to work on a "last chance agreement." Claimant was reinstated May 22, 2015. Mr. Simonsen was employed as a full-time production worker for the company and was paid by the hour.

Mr. Simonsen received a disciplinary suspension from April 8, 2015 until May 22, 2015 after he was observed violating a company rule by going to the company's break room prior to his authorized time. Although the established break time for Mr. Simonsen's department was 7:45 a.m., Mr. Simonsen was observed going to the break area at 5:02 a.m. Because the claimant had been previously warned specifically about going to break early on two occasions, a decision was made to terminate Mr. Simonsen from his employment with the company. After being discharged, Mr. Simonsen requested that his union representatives intervene.

Subsequently, it was agreed that the claimant's time away from work from April 8, 2015 through May 22, 2015 should be treated as a disciplinary suspension based upon the claimant's intentional violation of a known company rule and the claimant was reinstated pending the last chance agreement.

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 Admin. Code r. 871-24.32(9) provides:

(9) Suspension or disciplinary layoff. Whenever a claim is filed and the reason for the claimant's unemployment is the result of a disciplinary layoff or suspension imposed by the employer, the claimant is considered as discharged, and the issue of misconduct must be resolved. Alleged misconduct or dishonesty without corroboration is not sufficient to result in disqualification.

The employer has the burden of proof in this matter. See Iowa Code section 96.6(2). Misconduct must be substantial in order to justify a denial of unemployment insurance benefits. Misconduct that may be serious enough to warrant the discharge of an employee may not

necessarily be serious enough to warrant the denial of unemployment insurance benefits. See Lee v. Employment Appeal Board, 616 N.W.2d 661 (Iowa 2000). The focus is on deliberate, intentional or culpable acts by the employee. See Gimbel v. Employment Appeal Board, 489 N.W.2d 36, 39 (Iowa Ct. of Appeals 1992).

In the case at hand, the evidence in the record establishes that Mr. Simonsen violated a known company rule by going to a company break area two hours and 43 minutes before his scheduled break time. The evidence also establishes the claimant had been previously specifically warned for the same offense on two occasions. Because the claimant's violation was considered to be serious and because the claimant had been previously warned, a decision was made to terminate Mr. Simonsen from his employment on April 8, 2015.

Subsequently, through the intervention of Mr. Simonsen's union representatives, the claimant was reinstated to work on May 22, 2015. The employer considered the time between April 8, 2015 and May 22, 2015 to be in the nature of a disciplinary suspension for the claimant's willful violation of a known company rule.

The administrative law judge concludes that the employer has sustained its burden of proof in showing the claimant's disciplinary suspension took place because the claimant had intentionally violated a known company rule that he had been previously warned about. The employer has sustained its burden of proof in establishing disqualifying misconduct as the reason for the claimant's disciplinary suspension. Because the claimant was suspended for misconduct, he was disqualified from the receipt of unemployment insurance benefits until he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount and is otherwise eligible.

Because the claimant has been deemed ineligible for benefits, any benefits claimant has received could constitute an overpayment. The administrative record reflects that the claimant has received unemployment insurance benefits in the amount of \$2,517.00 since filing a claim for benefits with an effective date of April 5, 2015, for the week ending dates April 11, 2015 through May 23, 2015. The administrative record also establishes that the employer did not participate in the fact-finding interview or make a firsthand witness available for rebuttal.

Iowa Code § 96.3-7, 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) 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. 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. The employer shall not be charged with the benefits.

(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.

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 section 96.3(7). In this case, claimant has received benefits but was not eligible for those benefits. Since the employer did not participate in the fact-finding interview, the claimant is not obligated to repay the agency the benefits he received and the employer's account shall be charged.

DECISION:

The representative's decision dated April 22, 2015, reference 01, is reversed. The claimant received a disciplinary suspension from work for misconduct in connection with his employment. Unemployment insurance benefits are withheld until the claimant has worked in and been paid wages for insured work equal to ten times his weekly benefit amount and is otherwise eligible. Claimant has been overpaid unemployment insurance benefits in the amount of \$2,517.00. Claimant is not obligated to repay that amount. The employer shall be charged based upon the employer's failure to participate in the fact-finding in this matter.

Terence P. Nice
Administrative Law Judge

Decision Dated and Mailed

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