

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

TROY A FREYERMUTH
Claimant

APPEAL 17A-UI-11753-JCT

**ADMINISTRATIVE LAW JUDGE
DECISION**

ENTELEE INC MST
Employer

**OC: 10/15/17
Claimant: Respondent (1)**

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Code § 96.5(1) – Voluntary Quitting – Layoff Due to Lack of Work
Iowa Admin. Code r. 871-24.1(113) – Definitions – Separations
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 November 8, 2017, (reference 01) unemployment insurance decision that allowed benefits. The parties were properly notified about the hearing. A telephone hearing was held on December 6, 2017. The claimant participated personally. The employer was represented by Thomas Kuiper, hearing representative with Talx UCM Services/Equifax. Mr. Kuiper also testified on the issue of employer participation for the fact-finding interview. Brenda Wiese, division manager, and Mark Truitt, division manager, testified to the separation. Employer Exhibit 1 was admitted into evidence. The administrative law judge took official notice of the administrative records including the fact-finding documents. Based on the evidence, the arguments presented, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUES:

Was the claimant separated from employment for any disqualifying reason?
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: The claimant was last employed full-time as a designer and was separated from assignment but not employment on October 5, 2017. The evidence is disputed as to whether the claimant was discharged for falsification of time cards or due to a lack of work when he was removed from his assignment but informed he was still eligible for future assignments, and no assignment was available.

The undisputed evidence is the claimant was last employed on contract for employer client, Bandag, until the claimant's site manager, John White, informed the claimant on October 5, 2017, that his contract was complete, and his services were no longer needed. The claimant reported it was due to funding being cut. The claimant then contacted Patrick Patrum, technical recruiter, to be reassigned, and has had multiple contacts with him. Mr. Patrum has informed the claimant that he is still eligible for work, but he has been unable to find any new contract for him. Neither Mr. White nor Mr. Patrum attended the hearing, or provided a written statement for the hearing. No request for postponement was made by the employer to allow either witness to participate.

The employer asserted the claimant was not removed from the assignment, but rather discharged from the assignment and employment, due to allegedly falsifying his timecard on October 3, 2017, when he logged on to the employer timekeeping system as starting work at 7:30 a.m. but physically swiped his badge to enter the building at 7:54 a.m. The employer reported the client raised concern of the claimant's whereabouts based upon being billed by the hour for his services. The claimant denied falsifying his timecard, and stated that he would complete his timecard each week at the end of the week by manually logging and entering a start time of 7:30 a.m. The claimant stated he entered that time regardless of the exact minute he arrived but would stay late if he arrived later and appropriately mark the end time. The claimant was not advised that he was expected to clock in and out contemporaneously with his arrival/departure or that he was forbidden from flexing time or completing his timecard at the end of the week. The claimant did receive a copy of the employer's policies which prohibit falsification of records (Employer Exhibit 1). The claimant stated that while his log in times that he manually made may not have been accurate in terms of his arrival time, that he did work his full shifts each day and denied falsification of his timecard. The claimant acknowledged prior to discharge, he was informed via email he needed to properly take lunch as directed by the employer (Employer Exhibit 1).

The administrative record reflects that claimant has received unemployment benefits in the amount of \$3,185.00, since filing a claim with an effective date of October 15, 2017. The administrative record also establishes that the employer did not participate in the November 7, 2017 fact-finding interview or make a witness with direct knowledge available for rebuttal. Employer witness, Helen Penezic, was called, but unavailable and did not respond to the voicemail from the representative. Ms. Penezic, did not attend the hearing to explain why she did not participate. The IWD representative also contacted the employer's vendor, Talx UCM Services/Equifax, but did not make contact with a representative after being on hold for several minutes. Prior to the fact-finding interview, Talx UCM Services/Equifax sent a fax to the representative consisting of the entire employer handbook (approximately 45 pages), the claimant's acknowledgement, several screenshots, an email between the claimant and Patrick Patrum, and a copy of its claim protest.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant's separation from employment was for no disqualifying reason.

An unemployed person who meets the basic eligibility criteria receives benefits unless they are disqualified for some reason. Iowa Code § 96.4. Generally, disqualification from benefits is based on three provisions of the unemployment insurance law that disqualify claimants until they have been reemployed and they have been reemployed and have been paid wages for insured work equal to ten times their weekly benefit amount. The employer has the burden of providing that the claimant is disqualified for benefits pursuant to Iowa Code § 96.5. An

individual is subject to such a disqualification if the individual (1) “has left work voluntarily without good cause attributable to the individual’s employer” Iowa Code § 96.5(1) or (2) is discharged for work –connected misconduct, Iowa Code § 96.5(2) a, or (3) fails to accept suitable work without good cause, Iowa Code § 96.5(3).

Iowa Admin. Code r. 871-24.1(113)a provides:

Separations. All terminations of employment, generally classifiable as layoffs, quits, discharges, or other separations.

a. Layoffs. A layoff is a suspension from pay status initiated by the employer without prejudice to the worker for such reasons as: lack of orders, model changeover, termination of seasonal or temporary employment, inventory-taking, introduction of laborsaving devices, plant breakdown, shortage of materials; including temporarily furloughed employees and employees placed on unpaid vacations.

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.* Assessing the credibility of the witnesses and reliability of the evidence in conjunction with the applicable burden of proof, as shown in the factual conclusions reached in the above-noted findings of fact, the administrative law judge concludes that the claimant was not separated for any disqualifying reason.

Allegations of misconduct or dishonesty without additional evidence shall not be sufficient to result in disqualification. If the employer is unwilling to furnish available evidence to corroborate the allegation, misconduct cannot be established. 871 IAC 24.32(4). When it is in a party’s power to produce more direct and satisfactory evidence than is actually produced, it may fairly be inferred that the more direct evidence will expose deficiencies in that party’s case. *Crosser v. Iowa Dept. of Public Safety*, 240 N.W.2d 682 (Iowa 1976).

In this case, the employer reported the claimant was removed from his assignment and discharged from employment for reportedly falsifying his timecard on October 3, 2017. However, the claimant presented credible, first-hand evidence denying the conduct and that his site manager, John White, told him the assignment ended but not that he was discharged. The claimant then had multiple contacts with Patrick Patrum, a recruiter with the employer, who indicated the claimant was eligible for a new contract and searched for new contracts for the claimant unsuccessfully. Logically, if the claimant was no longer employed due to being discharged, Mr. Patrum would not search for new contracts.

The two people with any direct knowledge of the situation, other than the claimant, were not listed as witnesses, no request to continue the hearing was made and no written statements of those individuals were offered. Given the serious nature of the proceeding and the employer’s allegations resulting in the claimant’s discharge from employment, the employer’s nearly complete reliance on hearsay statements is unsettling. Mindful of the ruling in *Crosser, id.*, and noting that the claimant presented direct, first-hand testimony while the employer relied upon second-hand reports, the administrative law judge concludes that the claimant’s recollection of

the events is more credible than that of the employer. Based on the evidence presented, the administrative law judge concludes that the employer has not satisfied its burden to establish by a preponderance of the evidence that the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law. Rather, the credible evidence presented is the claimant's assignment ended and that he was informed he was still eligible for another contract or assignment, but none was available. Accordingly, the claimant is allowed benefits provided he is otherwise eligible.

Because the claimant is eligible for benefits, the issues of overpayment and relief of charges are moot.

DECISION:

The November 8, 2017, (reference 01) decision is affirmed. The claimant was separated from employment for no disqualifying reason. Benefits are allowed, provided he is otherwise eligible. Any benefits claimed and withheld shall be paid, provided he is otherwise eligible. The claimant has not been overpaid benefits. The employer's account is not relieved of charges associated with the claim.

Jennifer L. Beckman
Administrative Law Judge

Decision Dated and Mailed

jlb/scn