IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

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

RICK D KEPHART
Claimant

JOSEPH T RYERSON & SONS INC
Employer

APPEAL NO: 19A-UI-02134-JE-T

ADMINISTRATIVE LAW JUDGE DECISION

OC: 02/10/19
Claimant: Respondent (2)

Section 96.5-2-a – Discharge/Misconduct
Section 96.3-7 – Recovery of Benefit Overpayment

STATEMENT OF THE CASE:

The employer filed a timely appeal from the March 1, 2019, reference 01, decision that allowed benefits to the claimant. After due notice was issued, a hearing was held by telephone conference call before Administrative Law Judge Julie Elder on April 8, 2019. The claimant did not respond to the hearing notice and did not participate in the hearing. Beth Scherer, Human Resources Generalist; James Perron, Operations Manager; and Karen Stonebraker, Employer Representative; participated in the hearing on behalf of the employer.

ISSUE:

The issue is whether the employer discharged the claimant for work-connected misconduct.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed as a full-time shift area lead for Joseph T Ryerson & Son from May 23, 2011 to February 6, 2019. He was discharged for violations of company policy.

The claimant worked the 2:30 p.m. to 3:30 a.m. shift. On January 31, 2019, a supervisor reported to the employer that a can of Twisted Tea, an alcoholic beverage, was found in a garbage can of a work station. Operations Manager James Perron reviewed hours of video from the night of January 31, 2019, and observed an employee drinking the Twisted Tea, another employee smoking in the warehouse, a different employee stealing two bags of salt for the sidewalk, and the claimant failing to wear his personal protective equipment (PPE). The employer interviewed the claimant February 1, 2019, and he indicated he was not aware of any of the issues listed above. The employer interviewed the claimant a second time February 5, 2019, and he stated he gave an employee permission to smoke in the warehouse with the door open because it was extremely cold outside but said he told the employee he could only smoke in the warehouse that night on that shift. He indicated he had some issues with the employee who was observed drinking and knew he had some problems with alcohol but denied any knowledge he was drinking on the job. He acknowledged he was not wearing his hard hat and arm guard walking between areas but asserted it was “not a big deal.” The employer

suspended the claimant pending further investigation. The employer continued to watch video of the claimant's shift and saw the same employee smoking in the warehouse again on February 1, 2019, at 10:09 p.m. The claimant was standing next to the employee who was smoking in the warehouse. After reviewing all of the circumstances, the employer terminated the claimant's employment February 6, 2019.

The claimant was suspended for one shift January 18, 2019, for making disparaging remarks to a temporary employee about his recent legal issues in front of the entire shift at the beginning of shift huddle.

The claimant has claimed and received unemployment insurance benefits in the amount of $1,285.00 for the four weeks ending March 9, 2019.

The employer did not personally participate in the fact-finding interview. The employer's representative submitted written documentation to the fact-finder prior to the interview.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment for disqualifying job misconduct.

Iowa Code section 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 disqualification shall continue 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 of proving disqualifying misconduct. *Cosper v. Iowa Department of Job Service*, 321 N.W.2d 6 (Iowa 1982). A claimant is not qualified to receive unemployment insurance benefits if an employer has discharged him for reasons constituting work-connected misconduct. Iowa Code section 96.5-2-a. Misconduct that disqualifies an individual from receiving unemployment insurance benefits occurs when there are deliberate acts or omissions that constitute a material breach of the worker's duties and obligations to the employer. See 871 IAC 24.32(1).

The claimant was responsible for the entire 200,000 square foot warehouse and the employees working the 2:30 p.m. to 3:30 a.m. shift. It is unreasonable to expect the claimant could know everything going on that shift or everything every employee was doing. The fact that an employee consumed alcohol on that shift without the claimant's knowledge is not misconduct on the part of the claimant. The same holds true for the theft of the sidewalk salt. The claimant could not be every place at once and if an employee was intent on stealing company property it would not be difficult to do so without the claimant being aware of the situation. That said, however, the claimant did know about the employee smoking in the warehouse and gave him permission to do so on at least two occasions, including the day the employer first interviewed him about all of these incidents. Because the weather was cold the claimant elected to allow an employee to smoke inside the warehouse in violation of state law and the employer's policy. The claimant also failed to wear his PPE which is another violation of the employer's policy. As a lead the claimant had a higher duty to follow and model the employer's rules and policies for employees. The claimant did not do so in allowing the employee to smoke in the warehouse and in failing to wear his PPE.

Under these circumstances, the administrative law judge concludes the claimant's conduct demonstrated a willful disregard of the standards of behavior the employer has the right to expect of employees and shows an intentional and substantial disregard of the employer's interests and the employee's duties and obligations to the employer. The employer has met its burden of proving disqualifying job misconduct. *Cosper v. IDJS*, 321 N.W.2d 6 (Iowa 1982). Therefore, benefits are denied.

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.

The unemployment insurance law requires benefits be recovered from a claimant who receives benefits and is later denied benefits even if the claimant acted in good faith and was not at fault. However, a claimant will not have to repay an overpayment when an initial decision to award benefits on an employment separation issue is reversed on appeal if two conditions are met: (1) the claimant did not receive the benefits due to fraud or willful misrepresentation, and (2) the employer failed to participate in the initial proceeding that awarded benefits. In addition, if a claimant is not required to repay an overpayment because the employer failed to participate in the initial proceeding, the employer's account will be charged for the overpaid benefits. Iowa Code section 96.3(7)a, b.

The claimant received benefits but has been denied benefits as a result of this decision. The claimant, therefore, was overpaid benefits.

Because the employer participated in the fact-finding interview, the claimant is required to repay the overpayment and the employer will not be charged for benefits paid.

The employer did not personally participate in the fact-finding interview. The fact-finder called Human Resources Generalist Beth Scherer February 28, 2019, at 2:08 p.m. and left a message. The fact-finder did not receive a return call from the employer. Consequently, the claimant's overpayment of benefits must be waived and his overpayment of benefits in the amount of $1,285.00 for the four weeks ending March 9, 2019, shall be charged to the employer's account.

DECISION:

The March 1, 2019, reference 01, 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 received benefits but was not eligible for those benefits. The employer did not personally participate in the fact-finding interview within the meaning of the law. Therefore, the claimant's overpayment of benefits is waived and his overpayment, in the amount of $1,285.00 for the four weeks ending March 9, 2019, shall be charged to the employer's account.

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Julie Elder
Administrative Law Judge

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Decision Dated and Mailed

je/scn