

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

TAMIKA R BROWN
Claimant

APPEAL 17A-UI-06040-JCT

**ADMINISTRATIVE LAW JUDGE
DECISION**

**WAYPOINT SERVICES FOR WOMEN
CHILDREN**
Employer

**OC: 05/14/17
Claimant: Respondent (2)**

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Code § 96.5(1) – Voluntary Quitting
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 5, 2017, (reference 01) unemployment insurance decision that allowed benefits. The parties were properly notified about the hearing. A telephone hearing was held on June 27, 2017. The claimant participated personally. The employer participated through Angie Hackenmiller, human resources specialist. Chad van Hauen, human resources business partner, attended as an observer. Tanisha Phelps, center director, and Terri Godwin, manager, also testified for the employer. 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 discharged for disqualifying job-related misconduct?
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 employed full-time first as an assistant teacher and then as a lead teacher beginning in December 2016. She was separated from employment on May 10, 2017, when she was discharged. The employer discharged the claimant for violating the employer's discipline policy and for dishonesty when questioned.

The employer provides childcare services, and the claimant was assigned to the “rainbow room”, which housed four and five year olds. At the time of hire, the claimant was provided training on the employer’s written policies, including the discipline policy, which states:

We will never discipline by:

- Striking, slapping, or any other form of punishment that causes physical discomfort
- Punishing a whole group for the misbehavior of one member of the group
- Denying food or drink
- Humiliating the child verbally or physically
- Yelling
- Forcing a child to sit for long periods of time
- Using anger or scare tactics to frighten a child

(Employer Exhibit 1)

Prior to discharge, the claimant was issued a coaching in November 2016 for violating the employer’s policies when she called a child, “Mr. McNasty” and in front of other children, in response to nose-picking (See administrative record/fact-finding documents.) As a result of the claimant’s comment, which she admitted, other children repeated the comment.

The final incidents occurred during the period of May 3, 4, 8 and 9, 2017. On May 3, 2017, the claimant was observed by Tanisha Phelps telling children in her classroom to “shut up” and to “shut your mouths.” The claimant admitted to the conduct, stating she was frustrated. On May 4, 2017, the employer received a complaint from a parent of a different classroom, who could hear the claimant yelling at children from her classroom. The employer was not provided exact words and the claimant had no recollection of the incident. Then, on May 8, 2017, the claimant called a child a “liar” in front of the child, to his grandmother, and to Ms. Phelps. The claimant admitted to the comment.

The incidents on May 9, 2017 are of dispute. The employer received a complaint from a parent regarding a child who had a scratch or bruise on his neck, and who had been dunking his chicken at lunch in the communal milk pitcher. The child was lactose intolerant and drank milk different than that in the communal pitcher. The claimant did not redirect the child to his own milk or remove the communal milk from the table. Removing food as punishment violates the employer’s policy if the food is not replaced. The claimant denied any knowledge of the scratch or bruise but acknowledged she had made the child discard his chicken, stating he could not have milk containing lactose. The claimant asserted replacement chicken was provided.

As a result of the incidents, the employer conducted an investigation. When the employer interviewed the assistant teacher, two kitchen cooks, and eight children, no one corroborated the claimant’s assertion that she ordered new chicken after the food was dumped. Further, the employer required cooks to log extra food requests and could not find an entry regarding the replacement of chicken that day. The claimant could not remember the details of who or how the replacement chicken was obtained and distributed. She was subsequently discharged.

The administrative record reflects that claimant has received unemployment benefits in the amount of \$1,815.00, since filing a claim with an effective date of May 14, 2017. The administrative record also establishes that the employer did participate in the June 2, 2017 fact-finding interview. Ms. Hackenmiller, Ms. Phelps and Ms. Godwin attended the interview for the employer.

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:

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).

"This is the meaning which has been given the term in other jurisdictions under similar statutes, and we believe it accurately reflects the intent of the legislature." *Huntoon v. Iowa Department of Job Service*, 275 N.W.2d, 445, 448 (Iowa 1979).

In an at-will employment environment, an employer may discharge an employee for any number of reasons or no reason at all if it is not contrary to public policy, but if it fails to meet its burden of proof to establish job related misconduct as the reason for the separation, it incurs potential liability for unemployment insurance benefits related to that separation. The employer has the burden of proof in establishing disqualifying job misconduct. *Cosper v. Iowa Department of Job Service*, 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. IDJS*, 364 N.W.2d 262 (Iowa 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. IDJS*, 425 N.W.2d 679 (Iowa App.

1988). Misconduct serious enough to warrant discharge is not necessarily serious enough to warrant a denial of job insurance benefits. Such misconduct must be “substantial.” *Newman v. Iowa Department of Job Service*, 351 N.W.2d 806 (Iowa App. 1984).

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 employer has 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.

In this case, the claimant was responsible for providing childcare to four and five year olds in a safe and healthy environment. As such, the employer prohibited discipline by way of yelling, humiliating, verbally abusing or removal of food (Employer Exhibit 1). The claimant was aware of the employer’s policies and had previously been warned after calling a little boy, “Mr. McNasty” in response to nose-picking. Between May 3 and 9, 2017, the claimant was observed yelling at children, telling them to “shut up” and “shut your mouth”, and calling a child a “liar”. The employer also concluded the claimant was dishonest when questioned about removing food from a child and not replacing it, after he was dunking his chicken in the communal milk pitcher. The employer determined the claimant was dishonest based on the questioning of three adults, eight children and review of a food log that did not contain a request for extra food, even though the claimant asserted she ordered extra chicken after making the child dump his food.

Administrative agencies are not bound by the technical rules of evidence. *IBP, Inc. v. Al-Gharib*, 604 N.W.2d 621, 630 (Iowa 2000). A decision may be based upon evidence that would ordinarily be deemed inadmissible under the rules of evidence, as long as the evidence is not immaterial or irrelevant. *Clark v. Iowa Dep’t of Revenue*, 644 N.W.2d 310, 320 (Iowa 2002). Hearsay evidence is admissible at administrative hearings and may constitute substantial evidence. *Gaskey v. Iowa Dep’t of Transp.*, 537 N.W.2d 695, 698 (Iowa 1995).

While none of the individuals interviewed by the employer participated in the hearing, the administrative law judge finds the employer’s hearsay testimony to be more credible than the conflicting, inconsistent evidence presented by the claimant. Further, the administrative law judge is persuaded even if the claimant did replace chicken for a child who was dunking it in milk on May 9, 2017, her actions on May 3, 4, and 8, 2017 clearly and repeatedly violated the employer’s discipline policy.

Based on prior warning and the employer’s policy, the claimant knew or should have known her actions of yelling, calling names, telling children to shut up could result in her discharge. Even without firsthand testimony to corroborate chicken not being replaced on May 9, 2017, the administrative law judge is persuaded that the claimant was discharged for reasons that would

constitute misconduct. The claimant's violations of a known work rule (the employer's discipline policy) were a willful and material breach of the duties and obligations to the employer and a substantial disregard of the standards of behavior the employer had the right to expect of the claimant. Misconduct has been established. Benefits are denied.

The next issue to address is whether the benefits paid to the claimant are subject to recovery. 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 section 96.6, subsection 2, means submitting detailed factual information of the quantity and quality that if un rebutted 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 she was not entitled. The claimant has been overpaid benefits in the amount of \$1,815. 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 it 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. The employer satisfactorily participated in the fact-finding interview by way of Ms. Hackenmiller, Ms. Godwin and Ms. Phelps. Since the employer did participate in the fact-finding interview, the claimant is obligated to repay the benefits she received, and the employer's account shall not be charged.

DECISION:

The June 5, 2017, (reference 01) decision is reversed. The claimant was discharged from employment due to job-related misconduct. Benefits are withheld until such time as she has worked in and been paid wages for insured work equal to ten times her weekly benefit amount, provided she is otherwise eligible. The claimant has been overpaid unemployment insurance benefits in the amount of \$1,815.00, 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.

Jennifer L. Beckman
Administrative Law Judge

Decision Dated and Mailed

jlb/scn