

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

GUY KABUNDA MPANYA
Claimant

APPEAL NO: 16A-UI-09157-JE-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

TARGET CORPORATION
Employer

OC: 07/10/16
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 August 12, 2016, 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 September 23, 2016. The claimant participated in the hearing with Interpreter Moussa from CTS Language Link. Bill Nibbelink, Engineering and Facilities and Operations and Andrea Nelson, Human Resources Business Partner, participated in the hearing on behalf of the employer. Employer's Exhibits One and Two were admitted into evidence.

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 maintenance mechanic for Target Corporation from May 17, 2016 to June 7, 2016. He was discharged for sleeping on the job, following three documented verbal warnings for other issues while the claimant was in his 90 days probationary period.

The claimant worked Saturdays, Sundays, and Mondays, from 6:00 p.m. to 6:00 a.m. On June 5, 2016, Supervisor Bill Nibbelink instructed the claimant to leave the computer training room at 12:00 a.m. and go to the mini load crane area. When Mr. Nibbelink went past the computer training room again at 12:20 a.m. the claimant was still on the computer but his screen was black so Mr. Nibbelink asked the claimant if he was having problems with the computer and the claimant indicated he forgot his login code. After Mr. Nibbelink helped the claimant get back on the computer he told him to print a one page training document and go to the mini load crane area as he was supposed to be there at 12:00 a.m. At 1:30 a.m. Mr. Nibbelink noticed the claimant was not in the mini crane area and retraced the steps between the mini crane area and the computer training room. He found the claimant in the computer training room with the motion activated lights off and his head down, slumped in his

chair. The computer training room has two doors with windows and Mr. Nibbelink could easily see the claimant in the darkened room. He opened the door, startling the claimant awake. Mr. Nibbelink spoke to the claimant about clocking in and out on time and being productive when he was clocked in. The claimant stated he was tired as he had class at 8:00 a.m. and was having difficulty juggling his schedule. Mr. Nibbelink told the claimant to go to the mini crane area and stay productive and he would talk to him the following night about his reliability issues.

On May 23, 2016, the claimant received a documented verbal warning from Mr. Nibbelink about clocking in on time because he clocked in late. On May 28, 2016, the claimant received a documented verbal warning for clocking in earlier than the start time of his shift but not starting work. On June 4, 2016, the claimant received a documented verbal warning for not paying attention to his assigned duties because he spent time looking for a cell phone charger for a long period of time and clocked out late.

After the sleeping incident June 5, 2016, Mr. Nibbelink met with human resources and together they made the decision to terminate the claimant's employment effective June 7, 2016.

The claimant has claimed and received unemployment insurance benefits in the amount of \$4,740.00 for the ten weeks ending September 17, 2016.

The employer participated in the fact-finding interview through written statements from Melanie Manning, Unemployment Insurance Representative for Talx UCM Services.

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 § 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).

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).

In just over three weeks of employment the claimant accumulated three documented verbal warnings and was caught sleeping for one hour and 10 minutes June 5, 2016. Rather than accept any responsibility for his actions in sleeping on the job the claimant blames Mr. Nibbelink for not going to check on him in the mini crane area and discovering he was sleeping on the job sooner. It is not the employer's responsibility to insure an employee is where he is told to be when he is told to be there. The employer should not have to babysit an employee but rather should be able to trust that employee will be where he is assigned. It is unacceptable, inappropriate, and unprofessional for an employee to blame his supervisor because he fell asleep on the job for an extended period of time.

The sleeping situation occurred after the claimant accumulated three documented verbal warnings for issues of trust and reliability during his three week tenure with the employer while he was on a 90 day probationary period. Those three events were not due to inability to perform the job but instead involved tardiness, clocking in before the start time of his shift and not performing any work while on the clock, and looking for a charger on the employer's time and after he should have clocked out.

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 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. In this case, the claimant has received benefits but was not eligible for those benefits. While there is no evidence the claimant received benefits due to fraud or willful misrepresentation, the employer participate in the fact-finding interview by providing a written statements that contained the required information as stated in 871 IAC 24.10. Consequently, the claimant's overpayment of benefits cannot be waived and he is overpaid benefits in the amount of \$4,740.00 for the ten weeks ending September 17, 2016.

DECISION:

The August 12, 2016, 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 participated in the fact-finding interview within the meaning of the law. Therefore, the claimant is overpaid benefits in the amount of \$4,740.00 for the ten weeks ending September 17, 2016.

Julie Elder
Administrative Law Judge

Decision Dated and Mailed

je/pjs