IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

DAVID JAMISON Claimant **IOWA FINANCE AUTHORITY** Employer	**APPEAL 18A-UI-05239-NM-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 03/25/18** **Claimant: Respondent (2)**

Iowa Code § 96.5(2)a – Discharge for Misconduct
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 April 25, 2018, (reference 01) unemployment insurance decision that allowed benefits. The parties were properly notified of the hearing. A telephone hearing was held on June 5, 2018. The claimant did not personally participate or testify, but was represented at the hearing by attorney Bruce Stoltze Jr. The employer participated through Hearing Representative Sam Krauss, Assistant Attorney General Jeffrey Peterzalek, and Chief of Staff Jake Ketzner. Also present as an observer on behalf of the employer was Senior Legal Counsel Ryan Koopmans. Members of the media present as observers were: Katarina Sostaric, Iowa Public Radio; Ryan Foley, Associated Press; and Jason Clayworth, Des Moines Register. Employer's Exhibits A through D and claimant's Exhibits 1 through 11 and 13 through 16 were received into evidence. Official notice was taken of portions of the administrative record related to benefits claimant has received to date.

As a preliminary matter, a Motion to Compel filed on behalf of the claimant on June 4, 2018 under Iowa Administrative Code Rule 871-26.9(7) was addressed. Stoltze requested a postponement of the hearing on the matters in order to provide for notice of a hearing on the motion. The administrative law judge denied the postponement request on the grounds that the motion was improper at the time it was filed. Iowa Administrative Code Rule 871-26.9(7) refers to Iowa Administrative Code Rule 871-26.9(5) which directs that motions related to discovery will not be considered unless a good-faith, but unsuccessful effort to resolve the issue with opposing party has been made. Here, no formal discovery was promulgated by the claimant on the employer. To the extent that an informal discovery request was made, the claimant was provided with all materials requested within the possession or control of the employer.

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: Claimant was employed full time as the Director of Iowa Finance Authority from January 14, 2011, until this employment ended on March 24, 2018, when he was discharged.

On March 23, 2018, Ketzner's office received a phone call from an employee working for the employer as one of claimant's subordinates. The employee was requesting a meeting with Governor Kim Reynolds. Ketzner informed the employee that the Governor was unavailable, but sensed something was wrong and asked if the employee would like to meet with someone right away. The employee indicated she would and a meeting was arranged for that evening between the employee and Ketzner. When Ketzner arrived at the meeting, the employee with whom he had previously spoken and another subordinate employee were both present. Ketzner was asked by the employees if their meeting would be confidential and it was disclosed to him that the purpose of the meeting was to discuss allegations that the claimant was engaging in sexual harassment in the workplace.

Over the course of the meeting the two employees provided very specific, detailed allegations of sexual harassment to Ketzner. During his testimony Ketzner outlined several of the specific allegations made by one of the employees, such as claimant bragging about the size of his genitalia and treating employees who did not go along with his conduct adversely. Ketzner noted that the employees were very emotional and visibly shaking while relaying their allegations to him. Ketzner also noted the complaints of behavior brought forth by each employee corroborated the allegations made by the other. Following the meeting one of the two employees agreed to make a written statement detailing her allegations against claimant. (Exhibit A). After the meeting concluded Ketzner relayed the allegations to Governor Reynolds, who requested to meet with him to discuss the accusations made against the claimant.

The following morning, March 24, 2018, Ketzner met with Governor Reynolds, her Senior Counsel Ryan Koopmans, Department of Management Director Dave Roederer, and Director of the Department of Administrative Services, Janet Phipps. During this meeting Ketzner relayed the allegations made against the claimant to the Governor, as well as his impressions regarding the veracity of the claims. At one point Ketzner was asked by the Governor about his recommended course of action. Ketzner told Governor Reynolds, based on his conversations with the two employees, he believed their claims to be true and would recommend immediate termination. The behavior claimant was alleged to have engaged in violated the employer's sexual harassment policy, which claimant most recently received a copy of on July 6, 2017. (Exhibits C and D). It was also noted, in February 2018, claimant completed training on sexual harassment in the workplace. (Exhibit B). Governor Reynolds, relying on Ketzner's impressions and recommendations, and the detailed allegations, approved the termination of claimant's employment.

Later that same day, March 24, 2018, Ketzner met with the claimant. Ketzner advised the claimant that he had received complaints of sexual harassment against him and, based on these complaints, his employment was being terminated effective immediately. Ketzner observed claimant appeared surprised, asked if he could hear the specific allegations, and requested an opportunity to respond to those allegations. Ketzner declined to share the specific allegations with him and told the claimant his termination was effective immediately. Ketzner explained he believed no further investigation was necessary, as he found the allegations against claimant credible and did not need any additional information.

The claimant filed a new claim for unemployment insurance benefits with an effective date of March 25, 2018. The claimant filed for and received a total of $3,185.00 in unemployment insurance benefits for the weeks between April 8 and June 2, 2018. The employer declined to participate in a fact-finding interview regarding the separation on April 24, 2018. The fact finder determined claimant qualified for benefits.

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 section 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.

871 IAC 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 Department of Job Service*, 275 N.W.2d 445, 448 (Iowa 1979).

The employer has the burden of proof in establishing disqualifying job misconduct. *Cosper v. Iowa Dep't of Job Serv.*, 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. Iowa Dep't of Job Serv.*, 364 N.W.2d 262 (Iowa Ct. App. 1984). Generally, continued refusal to follow reasonable instructions constitutes

misconduct. *Gilliam v. Atlantic Bottling Co.*, 453 N.W.2d 230 (Iowa Ct. App. 1990). Misconduct must be "substantial" to warrant a denial of job insurance benefits. *Newman v. Iowa Dep't of Job Serv.*, 351 N.W.2d 806 (Iowa Ct. App. 1984).

The decision in this case rests, at least in part, on the credibility of the witnesses. 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*.

The attorney for the claimant argues employer's Exhibit A, along with Ketzner's testimony should not be considered, as it is inadmissible hearsay evidence under *Crosser v. Iowa Dep't of Pub. Safety*, 240 N.W.2d 682 (Iowa 1976). The claimant's argument is not convincing, however, as that case describes drawing an adverse conclusion about evidence that was not produced at hearing. To the extent that claimant is asking an adverse inference be drawn by the employer's decision not to provide the names and other information identifying the claimant's accusers, the administrative law judge declines to do so. The language in *Crosser* states the inference is discretionary when relevant evidence within the control of a party is not produced without satisfactory explanation. (*Id.* At 684). Here, the employer has provided a satisfactory explanation. The claimant's accusers had requested, from the time they first met with Ketzner, for their complaints to remain confidential to the greatest extent possible. Maintaining confidentiality is of paramount importance when dealing with allegations such as these, as unnecessarily breaking that confidence could lead to a chilling effect, preventing other employees who may experience harassment or discrimination from coming forward. As such behavior directed at any subordinate employee would be inappropriate, the names of the individuals making the allegations in this case are not near as probative as the content of the allegations themselves, which the employer provided both through Ketzner's testimony and Exhibit A.

The hearsay offered in this case is admissible under the analysis of *Schmitz v. Iowa Dep't Human Servs*., 461 N.W.2d 603, 607 (Iowa Ct. App. 1990), but that case does not govern the weighing of the evidence. "[T]he proper weight to be given to hearsay evidence in such a hearing will depend upon a myriad of factors--the circumstances of the case, the credibility of the witness, the credibility of the declarant, the circumstances in which the statement was made, the consistency of the statement with other corroborating evidence, and other factors as well." *Walthart v. Board of Directors of Edgewood-Colesburg Community School*, 694 N.W.2d 740, 744-45 (Iowa 2005).

After assessing the credibility of the witnesses who testified during the hearing, reviewing the exhibits submitted by the parties, considering the applicable factors listed above, and using her own common sense and experience, the administrative law judge finds the employer's version of events to be credible. Even if the information contained in Exhibit A is not taken into consideration, Ketzner's testimony alone is sufficient to find the employer's version of events credible, as no other version of events was presented. The claimant did not personally appear to rebut the allegations, nor did he provide any other witness to rebut the allegations made

against him. The employer's version of events is therefore credible, as it was the only version of events presented at hearing.

Ketzner received information indicating claimant had engaged in behavior that would violate the employer's policy on sexual harassment. While the claimant contends no investigation was done, that is not what the facts indicate. Ketzner met with the two individuals making the allegations against the claimant and spoke to them at length regarding their allegations. He took in observations regarding the level of detail and specificity in their allegations, their general demeanor, and the corroboration of the allegations by the other. At the end of the conversation, Ketzner determined the allegations were credible and chose to end his investigation there. While this investigation may have happened very quickly, over the course of one meeting when Ketzner first heard the complaint, and while the claimant may have hoped for a more extensive investigation or a chance to respond to the specific allegations, the employer determined this was not necessary as it found the claimant's accusers credible. Furthermore, while specific allegations were not divulged to the claimant at the time of his separation, he was told that the basis of his termination was violation of the sexual harassment policy. Claimant could have certainly advised Ketzner at that time that he was not aware of any behavior he would have engaged in that could have arguably violated the sexual harassment policy, but no evidence was presented that he made that argument.

The employer has an interest and duty in protecting the safety of all of its employees. The employer is also obligated under local, state, and federal laws to ensure the workplace is free of harassment and discrimination. Ketzner provided credible testimony that he reasonably believed claimant engaged in behavior that violated the employer's sexual harassment policy. While the employer declined to provide details on all of the allegations made against the claimant, even if we only consider one of the allegations, such as speaking with his subordinates about his genitals, that behavior in and of itself would be sexual harassment and constitute disqualifying misconduct. Claimant's behavior was in violation of specific work rules and against commonly known acceptable standards of work behavior. Claimant's behavior was contrary to the best interests of employer and the safety of its employees and is disqualifying misconduct even without prior warning. Benefits are denied.

The next issue in this case is whether the claimant was overpaid unemployment insurance benefits.

Iowa Code § 96.3(7) provides, in pertinent part:

> 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.

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

DECISION:

The April 25, 2018, (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 been overpaid unemployment insurance benefits in the amount of $3,185.00, but is not obligated to repay the agency those benefits. The employer did not participate in the fact-finding interview and its account shall be charged.

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Nicole Merrill
Administrative Law Judge

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Decision Dated and Mailed

nm/rvs