IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

DAVID CHAMPAGNE
Claimant

BIG RIVER RESOURCES LLC
Employer

APPEAL NO: 13A-UI-09946-ET

ADMINISTRATIVE LAW JUDGE DECISION

OC: 07/28/13
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 22, 2013, 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 25, 2013. The claimant participated in the hearing. Deb Green, Human Resources Manager; Stan Janson, Manager of Operations; and Michelle McCoy, Production Coordinator; participated in the hearing on behalf of the employer. Employer's Exhibits One, One-A through E, and Two were admitted into evidence.

ISSUE:

The first 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 process team lead for Big River Resources from September 7, 2004 to June 19, 2013. He was discharged for attitude and behaviorial issues.

On May 11, 2011, the employer issued the claimant a final written warning for tardiness. On December 28, 2012, the claimant's annual evaluation was held and under the category of "Adheres to Policy," the employer wrote, "I want David to maintain the highest level of professionalism at all times. LEAD BY EXAMPLE," (Employer's Exhibit 1-A). Under the category of "Interpersonal Relationships," the employer indicated, "David needs to work on how he conveys information to his team and other co-workers" (Employer's Exhibit 1-A). Under the category of "Leadership," the employer stated, "David needs to work on some of his leadership skills to become a better leader. Example: Speak respectfully to all employees and work on giving constructive criticism in the manner that the employee will learn from. Lead by example" (Employer's Exhibit 1-A). Finally, under "Specific Areas of Improvement," the reviewer told the claimant, "Be polite, do not promote, engage or encourage any type of negative behavior in the work place. Address difficult situations immediately. Convey enthusiasm, even tempered and work with a calm demeanor" (Employer's Exhibit 1-A).

In January 2013 a co-worker reported a conversation he had with the claimant about the employer. The co-worker was present when Production Manager Michelle McCoy was calling the claimant about working overtime and the claimant said, "Fuck her. I'm not coming in. Fuck her and her overtime. I'm not giving fucking John or fucking Shelly the satisfaction" (Employer's Exhibit One). He also complained that John cost him "$25,000.00 because of overtime and stated John did not know what he was doing. He continued by stating that neither John nor Shelly "know what the fuck they are doing. The claimant made these comments while most of the teams were in the control room with him and could overhear him. The employer investigated the incident and met with the claimant. "They explicitly informed David Champagne that there would be no more formal correction notices given to him. If he did not adjust his behavior, he would be terminated" (Employer's Exhibit One). The employer was not able to completely verify the claimant's remarks and therefore decided to "make certain Team Leader expectations were defined" (Employer's Exhibits 1-B). They had the Team Leaders sign a no gossip agreement and went over it with each team leader and discussed the employer's expectations of team leads in this particular area. The claimant signed it February 8, 2013 (Employer's Exhibit 1-B).

On April 26, 2013, Human Resources Manager Deb Green told the claimant that if his "continued negative comments and behavior did not change," the employer would terminate his employment. He replied that he understood the employer would discharge him but stated he was not changing his behavior for anybody.

On May 2, 2013, the employer reviewed and had each team leader sign a document "detailing Team Leader expectation" (Employer's Exhibit 1-C). That document talked about respecting co-workers and supervisors at all times and communicating any frustrations regarding interpersonal relationships with a supervisor or the plant manager; "solve problems not create them and demonstrate a commitment to open communications in a friendly, no-hostile environment; the employer was committed to providing all employees a "friendly work environment" and stated the claimant was placing his own needs above those of his team by allowing his interpersonal relationship with another manager in his department to negatively affect the atmosphere, that the claimant's assertiveness "can easily be construed as aggressiveness, especially when you are perceived as pressing issues with problems that are in no way under your scope of authority;" conduct himself in a productive, professional manner while at work and keep his employees productive; lead his team without disruptive distractions such as gambling, playing cards, and excessive cell phone and computer usage; and the employer stated it expected honesty from team leads at all times regardless of the situation (Employer's Exhibit 1-C). The bottom of the page contained a sentence that reads, "David, if at any time you fail to meet any of these expectations you will be immediately dismissed for cause" (Employer's Exhibit 1-C). The claimant signed the document. On May 14, 2013, the team lead expectations were again reviewed with all four team leaders (Employer's Exhibit 1-D).

On May 25, 2013, the claimant sent an email to an employee of another team leader, stating, "Our oil did not pass the outside lab tests. I think you may know why. Stop doing what your (sic) doing. I've pulled all trends. I can see that you are making up production with shitty oil. Production numbers don't mean anything if you can't sell the product" (Employer's Exhibit 1-E). That comment was reported to Production Manager Michelle McCoy May 27, 2013, and she told the claimant he needed to apologize and that further disciplinary action may occur.

On June 4, 2013, an employee on the claimant's crew asked him to step in and address an issue he was having with a lab technician under a different team lead and the claimant replied, "You are just upset because you are married and you can't tap that ass."

After that comment was reported, Human Resources Manager Deb Green met with the claimant and told him his behavior was inappropriate and he needed to apologize to his team member who asked him for help. She also told him that further disciplinary action could be forthcoming for both incidents. She then reported that situation, as well as the May 25, 2013, email, to Ms. Green at the end of May 2013 or the beginning of June 2013. On June 7, 2013, Ms. McCoy sent an email to Ms. Green detailing the claimant's last inappropriate comment from June 4, 2013. The employer reviewed the claimant's conduct and attitude over the past few years, its' stating and restating its expectations of a team lead, and the fact it had told the claimant he would not receive any further warnings and made the decision to terminate the claimant's employment June 19, 2013.

The claimant has claimed and received unemployment insurance benefits since his separation from this employer.

The employer did participate in the fact-finding interview held August 21, 2013.

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:
>
> 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.
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> 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.

871 IAC 24.32(8) provides:

> (8) Past acts of misconduct. While past acts and warnings can be used to determine the magnitude of a current act of misconduct, a discharge for misconduct cannot be based on such past act or acts. The termination of employment must be based on a current act.

The employer has the burden of proving disqualifying misconduct. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). An event that causes an employee's termination from employment must be one which is considered to be a current act of misconduct. Iowa Code section 96.7-2-a-6. While past acts and warnings can be used to determine the magnitude of the current act of misconduct, a discharge or disciplinary suspension for misconduct cannot be based on such past act(s). The termination or disciplinary suspension of employment must be based on a current act. See 871 IAC 24.32(8). In determining whether the conduct that prompted the discharge constituted a "current act," the administrative law judge considers the date on which the conduct came to the attention of the employer and the date on which the employer notified the claimant that the conduct subjected the claimant to possible discharge. See also *Greene v. EAB*, 426 N.W.2d 659, 662 (Iowa App. 1988).

The claimant unquestionably exhibited bad behavior, a poor attitude, lack of good judgment, and generally inappropriate and unprofessional behaviors and attitudes on a fairly regular basis, his last act of what could be considered misconduct occurred June 4, 2013. Ms. McCoy was aware of both the May 25, 2013, email and the June 4, 2013, comment to one of his team members, within approximately two days of each event, and she did tell him his actions were unacceptable and made him apologize, she also told him further disciplinary action could follow. The employer had notified the claimant it would not issue him any further final written warnings so at that time he was on notice that his employment could be terminated at any time. Despite repeated counseling sessions and warnings, the claimant refused to change his behavior, stating, in fact, he would not change for anyone.

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.

The remaining issues are whether the employer participated in the fact-finding interview and whether the claimant's overpayment of benefits may be waived.

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 § 96.3-7-a, -b.

871 IAC 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.
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> (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.
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> (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 employer meaningfully participated in the fact-finding interview. Consequently, the claimant is overpaid unemployment insurance benefits and the overpayment cannot be waived. The claimant has received benefits but was not eligible for those benefits. The claimant is overpaid benefits in the amount of $2,772.00.

DECISION:

The August 22, 2013, 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 claimant is overpaid benefits in the amount of $2,772.00.

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Julie Elder
Administrative Law Judge

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Decision Dated and Mailed

je/pjs