

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

LOURDES HADENFELDT

Claimant

APPEAL 19A-UI-06900-DB

**ADMINISTRATIVE LAW JUDGE
DECISION**

CITY OF DES MOINES PAYROLL DEPT - B

Employer

OC: 08/04/19

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/appellant filed an appeal from the August 21, 2019 (reference 01) unemployment insurance decision that found the claimant was eligible for unemployment insurance benefits after being dismissed from work on July 30, 2019. The parties were properly notified of the hearing. An in-person hearing was held in Des Moines, Iowa on October 22, 2019. The claimant, Lourdes Hadenfeldt, participated personally and was represented by Attorneys Christopher Stewart and Charles Gribble. The employer, City of Des Moines Payroll Dept - B, participated through witness Allen Tunks and was represented by Attorney Meg Norberg. Heather Redenius and Carol Moser observed on behalf of the employer. Jason Clayworth, a reporter for the Des Moines Register, observed via telephone. Administrative Law Judge Andrew Duffelmeyer observed for training purposes only. Employer's Exhibits 1 through 8, and 10 were admitted. Claimant's objection to Exhibit 9 was sustained and Exhibit 9 was not admitted. The administrative law judge took official notice of the claimant's unemployment insurance benefits records, including the fact-finding documents.

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 a police officer. She was employed from June 19, 2017 until July 30, 2019, when she was discharged from employment. Claimant's job duties included responding to calls for service and conducting traffic stops. Captain Michael McTaggart was claimant's immediate supervisor.

Claimant was made aware of the employer's written policies, including the Des Moines Police Department General Orders and Operations Division Standard Operating Procedures ("SOP"). Claimant understood that these policies were applicable to her while she worked off duty jobs in her official capacity as a police officer.

SOP Chapter 12-3 regarding report preparation states that "[o]fficers should take the time to ensure that reports are clear and concise, with attention to proper grammar" and that "reports should be drafted in a manner that includes all factual elements necessary for prosecution of the case in court." See Exhibit 6. SOP Chapter 12-6 states that "[i]t is critically important that all personnel be properly prepared for court and such preparation is a responsibility of the officer called to testify." See Exhibit 6.

Des Moines Police Department General Orders Chapter 1 states that "[e]mployees shall not conduct themselves in a manner, on or off duty, that casts doubt on their integrity, honesty, judgment, or character; brings discredit to this agency; or impairs the agency's efficient and effective operation." See Exhibit 6. Paragraph II(A)3(f) states that "[e]mployees shall be accurate, complete, and truthful in all matters of the police department; except as deemed appropriate by established case law." See Exhibit 6. It further provides that "[e]mployees shall be prepared for truthful and accurate testimony for court and legal proceedings. This includes detailed reviews of the case records, files or other resources along with coordinating their preparation and appearance with prosecutors." See Exhibit 6.

Des Moines Police Department General Orders Chapter 13(d) states that "[e]mployees shall testify in a clear, distinct manner, answering questions promptly and truthfully. Employees shall conduct themselves in a professional manner during their entire court appearance." See Exhibit 6. Des Moines Police Department General Orders Chapter 26(c)1(n) provides that officers wearing cameras shall record and preserve traffic stops with citizens. See Exhibit 6.

On or about May 15, 2019, Robert Rehkemper, attorney for Olesya Holker, sent a letter to the employer regarding claimant's actions in his client's criminal case. See Exhibit 1. The employer initiated an investigation and the claimant was placed on administrative leave.

The complaints in the May 15, 2019 letter stemmed from an incident on February 28, 2019, when the claimant was working off duty in her police uniform for the City of Des Moines assisting in snow removal. It is common for police officers to work extra shifts for the City of Des Moines. Police officers remain subject to the policies of the employer while working off duty in their official capacity as a police officer.

On February 28, 2019, snow trucks were removing snow at 12th Street and High Street in Des Moines, Iowa. Ms. Holker proceeded to drive down 12th Street around the snowplow and around the claimant's patrol vehicle. See Exhibits 2 and 3. Claimant attempted to get Ms. Holker to stop by using her air horn and waving her hands. See Exhibit 3. Claimant exited her vehicle and approached Ms. Holker's vehicle. See Exhibit 3. Claimant tapped on the hood of Ms. Holker's vehicle in order to get her attention. See Exhibits 2 and 3. The vehicle stopped. See Exhibit 3. Claimant then had a verbal conversation with Ms. Holker through the passenger's side window.

Claimant reported to dispatch, reported in her written police report and reported in a subsequent deposition that Ms. Holker swerved her vehicle towards her and that the vehicle's passenger side mirror struck her in the right arm. See Exhibits 2 and 4. The claimant reported to a medical clinic that she was struck with a vehicle mirror. See Exhibit 7.

Claimant failed to manually activate her body camera during the traffic stop; however, the video of the encounter (without audio) was recorded and preserved. See Exhibit 3. The video recording of the encounter shows the claimant tapped on the hood of Ms. Holker's vehicle and the vehicle coming to a stop. See Exhibit 3. The video recording clearly shows that the passenger side mirror of Ms. Holker's vehicle did not strike the claimant at any time. See Exhibit 3. The video recording shows that Ms. Holker did not swerve her vehicle towards the claimant. See Exhibit 3.

As a result of the incident, Ms. Holker was arrested for Interference with Official Acts – Bodily Injury. See Exhibit 10. The claimant gave her deposition in Ms. Holker's criminal case on April 23, 2019. See Exhibit 4. During her deposition, claimant stated that Ms. Holker swerved the car towards her and hit her with her mirror. See Exhibit 4, page 42, line 18, page 43, line 11. Claimant did not review the body camera video of the incident in its entirety prior to her deposition. Claimant was defensive with Ms. Holker's attorney during her deposition.

After the internal investigation, claimant was discharged for a combination of failing to make accurate reports, failing to properly prepare for court and legal proceedings, conducting herself in a way that cast doubt on her integrity, honesty, judgment, or character, failing to conduct herself in a professional manner during her deposition, and failing to record the traffic stop with her body camera. Claimant had received a previous written reprimand in November of 2018 for failing to properly obtain pertinent information regarding an assault. See Exhibit 10.

Claimant's administrative records establish that she has received unemployment insurance benefits of \$4,144.00 for eight weeks between her claim reopened date of August 25, 2019 and October 19, 2019. Heather Redenius participated by telephone on behalf of the employer in the fact-finding interview that was conducted by Iowa Workforce Development. Ms. Redenius provided verbal statements and detailed documentation regarding the reason for discharge and copies of the employer's written policies.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged for a current act of job-related misconduct. Benefits are denied.

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).

Iowa Admin. Code r. 871-24.32(4) provides:

(4) Report required. The claimant's statement and employer's statement must give detailed facts as to the specific reason for the claimant's discharge. Allegations of misconduct or dishonesty without additional evidence shall not be sufficient to result in disqualification. If the employer is unwilling to furnish available evidence to corroborate the allegation, misconduct cannot be established. In cases where a suspension or disciplinary layoff exists, the claimant is considered as discharged, and the issue of misconduct shall be resolved.

Iowa Admin. Code r.871-24.32(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.

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 administrative law judge had the ability to observe both witnesses' appearance and conduct in person during the hearing. After considering the applicable factors listed above, and in using her own common sense and experience, the administrative law judge finds the claimant's testimony that she believed she was struck by Ms. Holker's vehicle and that the vehicle swerved toward her is not credible. It is clear in the video of the encounter that the claimant was not struck by the vehicle and that the vehicle did not swerve towards the claimant. Further, claimant

admitted that she did not review the entirety of the video prior to her deposition. Accordingly, the administrative law judge finds the employer's evidence to be more credible than the claimant.

The employer has the burden of proof in establishing disqualifying job-related 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). 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 Dep't of Job Serv.*, 351 N.W.2d 806 (Iowa Ct. App. 1984). The focus of the administrative code definition of misconduct is on deliberate, intentional or culpable acts by the employee. *Id.*

When based on carelessness, the carelessness must actually indicate a "wrongful intent" to be disqualifying in nature. *Id.* Negligence does not constitute misconduct unless recurrent in nature; a single act is not disqualifying unless indicative of a deliberate disregard of the employer's interests. *Henry v. Iowa Dep't of Job Serv.*, 391 N.W.2d 731 (Iowa Ct. App. 1986). Further, poor work performance is not misconduct in the absence of evidence of intent. *Miller v. Emp't Appeal Bd.*, 423 N.W.2d 211 (Iowa Ct. App. 1988). The law limits disqualifying misconduct to substantial and willful wrongdoing or repeated carelessness or negligence that equals willful misconduct in culpability. *Lee v. Employment Appeal Bd.*, 616 N.W.2d 661 (Iowa 2000). Further, a claimant can be disqualified for benefits when their off duty conduct is a violation of a specific work rule. *Kleidosty v. Emp't Appeal Bd.*, 482 N.W.2d 416 (Iowa 1992).

This was not an incident of carelessness or poor work performance. Claimant purposefully and intentionally reported that Ms. Holker swerved towards her and struck her with her vehicle when this did not actually occur. Claimant reported this false information in her written report and testified to it in her deposition. Both of these acts were in violation of the employer's written policies, which claimant knew were to be followed even when working off duty. Claimant further failed to review the entire body camera video footage in order to properly prepare for her deposition, which was in violation of the employer's written policy. Claimant's actions in creating a false report and her omission in failing to review the entire body camera video footage prior to her deposition were intentional and constitute a substantial violation of the employer's policies and procedures.

The employer has a right to expect that an employee will not jeopardize the liability of the employer by intentionally violating reasonable policies that are established. There is substantial evidence in the record to support the conclusion that claimant's deliberate acts and omissions constituted a material breach of her employment duties and obligations. Accordingly, the employer has met its burden of proof in establishing a current act of job-related misconduct. Benefits are denied. Because benefits are denied, the issues of overpayment and chargeability must be addressed.

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 section 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 section 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 state pursuant to section 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 unemployment insurance law provides that benefits must be recovered from a claimant who receives benefits and is later determined to be ineligible for those 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 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. Since the employer participated in the fact-finding interview by 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 claimant is obligated to repay to the agency the benefits she received in connection with this employer's account. Further, this employer's account shall not be charged.

DECISION:

The August 21, 2019 (reference 01) unemployment insurance decision is reversed. Claimant was discharged from employment for a current act of job-related misconduct. Unemployment insurance benefits are denied until claimant has worked in and earned wages for insured work equal to ten times her weekly benefit amount after her separation date, and provided she is otherwise eligible. The claimant has been overpaid unemployment insurance benefits of \$4,144.00 for the eight weeks between August 25, 2019 and October 19, 2019 and is obligated to repay the agency those benefits. The employer participated in the fact-finding interview and its account shall not be charged.

Dawn Boucher
Administrative Law Judge

Decision Dated and Mailed

db/scn