IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

JAMES E BIERLY Claimant **ACCESS TECHNOLOGIES INC** Employer	**APPEAL 19A-UI-07888-SC-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 09/15/19** **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
Iowa Code § 96.4(3) – Ability to and Availability for Work
Iowa Admin. Code r. 871-24.22(2) – Able & Available - Benefits Eligibility Conditions

STATEMENT OF THE CASE:

On October 9, 2019, Access Technologies, Inc. (employer) filed an appeal from the October 2, 2019, reference 01, unemployment insurance decision that allowed benefits based upon the determination James E. Bierly (claimant) did not voluntarily quit but was discharged and the employer failed to provide evidence he was discharged for disqualifying misconduct. The parties were properly notified about the hearing. A telephone hearing was held on October 29, 2019. The claimant participated personally and Derick Tallman, IT Security and Operations Manager, participated on his behalf. The employer participated through Mitch Henry, Vice President of Information Technology, and Charlie Kiesling, Director of Human Resources. The Claimant's Exhibit A and the Employer's Exhibits 1 through 7 were admitted without objection.

ISSUES:

Did the claimant voluntarily leave employment with good cause attributable to the employer or did the employer discharge the claimant for reasons related to job misconduct sufficient to warrant a denial of benefits?
Has the claimant been overpaid unemployment insurance benefits and, if so, can the repayment of those benefits to the agency be waived?
Can charges to the employer's account be waived?
Is the claimant able to and available for work?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed full-time as an Assessment Engineer beginning on January 20, 2014, and his last day worked was July 31, 2019. The claimant's job required him to have face-to-face interaction with clients. He was responsible for growing business and selling the employer's services.

The claimant went on a four-week paternity leave during the summer of 2019. On July 25, shortly after returning, he sent an email to his supervisor Derick Tallman, IT Security and Operations Manager, requesting to be removed from the leadership training program in which he was enrolled. The claimant explained he no longer felt he could grow with the employer because he felt they were only "paying lip service to security." (Exhibit 1) He concluded the email stating he intended to continue performing his job but was no longer looking to advance within the company.

Tallman shared this email with Mitch Henry, Vice President of Information Technology. Henry and Tallman met with the claimant on Friday, July 26. They discussed the claimant's dissatisfaction with his job and the parties agreed the claimant would make an attempt to secure other employment by August 30. It was understood that the claimant may leave earlier than that or may need to stay later, but that would depend on the conversations the parties had throughout that time.

Over the weekend, the claimant shared an article to his LinkedIn profile, which had a graphic stating, "If your employer doesn't see the real value in you, it's time for a fresh start." (Claimant's Testimony) Henry learned of this when two customers and other employees who were connected to the claimant through LinkedIn alerted him to the post the following Monday. Henry met with members of management and discussed the situation.

On the morning of July 31, the claimant and Henry met again. Henry informed the claimant that his last day of work would be that day, but he would still be compensated as an employee through August 30. He explained due to the claimant's attitude and displeasure with the employer, they no longer wanted him meeting with clients. He also explained this would give the claimant the time he needed to search for a new job. He asked the claimant for a letter of resignation which the claimant provided.

The claimant filed his claim for benefits effective September 15, 2019. He has filed weekly continued claims for benefits each week for the four weeks ending October 12, 2019 and received benefits in the amount of $2,364.00. Charlie Kiesling, Director of Human Resources, participated in the fact-finding interview on behalf of the employer.

The claimant became self-employed on or about August 29, when he started his own company. He did not devote any time performing work on behalf of his company during the weeks of September 15 through October 12.

REASONING AND CONCLUSIONS OF LAW:

I. Did the claimant voluntarily leave employment with good cause attributable to the employer or did the employer discharge the claimant for reasons related to job misconduct sufficient to warrant a denial of benefits?

For the reasons that follow, the administrative law judge concludes the claimant did not voluntarily quit but was discharged on July 31 for job-related misconduct. Benefits are denied.

Iowa Code section 96.5 provides, in relevant part:

> An individual shall be disqualified for benefits, regardless of the source of the individual's wage credits:
>
> 1. Voluntary quitting. If the individual has left work voluntarily without good cause attributable to the individual's employer, if so found by the department.
>
> …

> 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 disqualification shall continue 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. 871-24.26(21) provides:

> Voluntary quit with good cause attributable to the employer and separations not considered to be voluntary quits. The following are reasons for a claimant leaving employment with good cause attributable to the employer:
>
> (21) The claimant was compelled to resign when given the choice of resigning or being discharged. This shall not be considered a voluntary leaving.

Iowa Admin. Code r. 871-24.32(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.

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).

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 findings of fact show how the disputed factual issues were resolved. After assessing the credibility of the witnesses who testified during the hearing, the reliability of the evidence

submitted, considering the applicable factors listed above, and using her own common sense and experience, the administrative law judge attributes more weight to the claimant's version of events. Neither of the parties was particularly straight forward with the other about how the claimant's employment would end and when. However, based on the witnesses' descriptions of the conversations that took place and the actions of the parties, the claimant's version of what occurred is slightly more credible.

Iowa unemployment insurance law disqualifies claimants who voluntarily quit employment without good cause attributable to the employer or who are discharged for work-connected misconduct. Iowa Code §§ 96.5(1) and 96.5(2)a. The burden of proof rests with the employer to show that the claimant voluntarily left his employment. *Irving v. Emp't Appeal Bd.*, 883 N.W.2d 179 (Iowa 2016). A voluntary quitting of employment requires that an employee exercise a voluntary choice between remaining employed or terminating the employment relationship. *Wills v. Emp't Appeal Bd.*, 447 N.W.2d 137, 138 (Iowa 1989); *Peck v. Emp't Appeal Bd.*, 492 N.W.2d 438, 440 (Iowa Ct. App. 1992). It requires an intention to terminate the employment relationship accompanied by an overt act of carrying out that intention. *Local Lodge #1426 v. Wilson Trailer*, 289 N.W.2d 608, 612 (Iowa 1980). Where there is no expressed intention or act to sever the relationship, the case must be analyzed as a discharge from employment. *Peck v. Emp't Appeal Bd.*, 492 N.W.2d 438 (Iowa Ct. App. 1992).

The employer has not established that the claimant voluntarily left his employment. The claimant expressed dissatisfaction with the employer, but indicated his intent to remain in employment in the email he sent to Tallman. After a discussion, the parties mutually agreed that the claimant would be actively seeking another job with a goal separation date of August 30, but agreed the employment relationship would continue until he obtained new employment. On July 31, Henry notified the claimant that his last day of physical work would be July 31 and he would be separated on August 30. While the claimant gave the employer the resignation letter after that discussion, it was not a voluntary resignation as he did not have the option of remaining employed. Therefore, the case will be analyzed as a discharge.

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). 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). 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).

Under the definition of misconduct for purposes of unemployment benefit disqualification, the conduct in question must be "work-connected." *Diggs v. Emp't Appeal Bd.*, 478 N.W.2d 432 (Iowa Ct. App. 1991). The court has concluded that some off-duty conduct can have the requisite element of work connection. *Kleidosty v. Emp't Appeal Bd.*, 482 N.W.2d 416, 418 (Iowa 1992). Under similar definitions of misconduct, for an employer to show that the employee's off-duty activities rise to the level of misconduct in connection with the employment, the employer must show by a preponderance of the evidence that the employee's conduct (1) had some nexus with the work; (2) resulted in some harm to the employer's interest, and (3) was conduct which was (a) violative of some code of behavior impliedly contracted between employer and employee, and (b) done with intent or knowledge that the employer's interest would suffer. See also, *Dray v. Director*, 930 S.W.2d 390 (Ark. Ct. App. 1996); *In re Kotrba*, 418 N.W.2d 313 (SD 1988), quoting *Nelson v. Dept of Emp't Security*, 655 P.2d 242 (WA 1982); 76 Am. Jur. 2d, Unemployment Compensation §§ 77–78.

The employer has met the burden of proof to establish that the claimant acted deliberately or with recurrent negligence in violation of company policy, procedure, or prior warning. The employer has an interest in fostering a positive image with its employees and clients. The claimant expressed dissatisfaction at work to the employer which he is within his rights to do. However, he then also publicly expressed that dissatisfaction on LinkedIn by sharing the article that he knew would be seen by clients and other employees. While the claimant contends he only found the article interesting, it was an escalation of the dissatisfaction he was expressing at work. The escalation reasonably caused concern to the employer about having the claimant remain employed and meeting with clients. The claimant's conduct was a deliberate disregard of the employer's interests and outside the scope of behavior the employer can reasonably expect from its employees. Accordingly, benefits are denied.

II. Has the claimant been overpaid unemployment insurance benefits and, if so, can the repayment of those benefits to the agency be waived and the employer's account charged?

For the reasons that follow, the administrative law judge finds the claimant was overpaid unemployment insurance benefits and the employer participated in the fact-finding interview. Therefore, the claimant shall repay the benefits and the employer's account will not be charged.

Iowa Code section 96.3(7)a, b, as amended in 2008, provides:

> Payment – determination – duration – child support intercept.
>
> 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.
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> 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.
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> (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(1) 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.

Because the claimant's separation was disqualifying, benefits were paid to which he 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 benefits, even though the claimant acted in good faith and was not otherwise at fault. Iowa Code § 96.3(7). 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. Iowa Admin. Code r. 871-24.10(1). 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), Iowa Admin. Code r. 871-24.10.

In this case, the claimant has received benefits but was not eligible for those benefits. Since the employer participated in the fact-finding interview through Kiesling, the claimant is obligated to repay to the agency the benefits he received and the employer's account shall not be charged.

III. Is the claimant able to and available for work?

As benefits are denied, the issue of whether the claimant is able to and available for work is moot.

DECISION:

The October 2, 2019, reference 01, unemployment insurance 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 $2,364.00 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.

As benefits are denied, the issue of whether the claimant is able to and available for work is moot.

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Stephanie R. Callahan
Administrative Law Judge

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Decision Dated and Mailed

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