IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

KIMBERLEY EVENS
Claimant

CASEYS MARKETING COMPANY
Employer

APPEAL NO: 14A-UI-09221-ET

ADMINISTRATIVE LAW JUDGE DECISION

OC: 08/10/14
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 27, 2014, 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, 2014. The claimant participated in the hearing. Malinda Crawford, Store Manager and Alisha Weber, Unemployment Insurance Consultant UIC, participated in the hearing on behalf of the employer.

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 assistant manager for Casey's from May 12, 2013 to July 29, 2014. She was discharged after threatening and harassing a co-worker.

On July 24, 2014, Store Manager Malinda Crawford went in to the store at 4:00 a.m. and associate Zelda Anderson asked if she could speak to her in the office. Ms. Anderson proceeded to tell her about an interaction she had with the claimant and associate Kimberly Armstead July 23, 2014. Another employee had called Ms. Crawford a few nights earlier and said the claimant was delivering a pizza and took Ms. Armstead, who was not on the clock, with her on a delivery while wearing sweat pants and a tee-shirt. Ms. Crawford went to the store immediately around 7:00 or 7:30 p.m. and both the claimant and Ms. Armstead were on a delivery so she waited for them to return. When they came back the claimant was driving and Ms. Armstead was in the passenger seat. Ms. Armstead was not on the clock and Ms. Crawford told her she needed to leave unless she was going to buy something. She brought the claimant into the office and told her she knew better than to have an employee who was not on the clock or in proper attire in the vehicle and if there was an accident she would not be covered.

The employer held a meeting July 1, 2014, and emphasized that employees could not work at all if they were not on the clock. All employees, including the claimant, signed the document. During the meeting between Ms. Crawford and the claimant, the claimant indicated she did not know Ms. Armstead could not accompany her on a delivery and Ms. Crawford stated she did know and reminded her of the meeting and emails from the corporate office addressing the situation. The claimant said she did not know her way around town and Ms. Crawford replied the employer has a GPS and the claimant has had it out and played with it on previous occasions and the claimant did not deny that was the case. Ms. Crawford told the claimant she could not have another employee go with her on a delivery or do any other kind of work when not on the clock. She did not take any disciplinary action against the claimant or Ms. Armstead as a result of that incident.

On July 24, 2014, Ms. Anderson told Ms. Crawford she clocked in and was going into the office when the claimant and Ms. Armstead effectively cornered her and kept stepping forward toward her while telling her to keep her mouth shut or she would be the next one called into the office or fired. Ms. Anderson told Ms. Crawford she did not know what they were talking about or what prompted the exchange and neither of them knew why the claimant and Ms. Armstead thought Ms. Anderson was the employee who reported the incident to Ms. Crawford. After telling Ms. Anderson their conduct was inappropriate and uncalled for and apologizing to her, Ms. Crawford said she would call the area manager and tell her what happened. The area manager came into the store around 8:15 a.m., before Ms. Crawford had an opportunity to call her, and Ms. Crawford related the situation to her. After hearing about the incident, the area supervisor called the district manager and they discussed the situation, the area manager instructed Ms. Crawford to discharge both the claimant and Ms. Armstead because their behavior was harassment and no one should feel scared in their workplace. Ms. Crawford notified the claimant her employment was terminated July 29, 2014.

The claimant has claimed and received unemployment insurance benefits in the amount of $1,960.00 since her separation from this employer.

Ms. Crawford personally participated in the fact-finding interview.

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.

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). The claimant could have been discharged for taking Ms. Armstead on a pizza delivery with her when she was not on the clock, dressed in proper attire or covered by the employer's insurance, and did so with the full knowledge that her actions were a violation of the employer's policy as emphasized in the July 1, 2014, meeting and the corporate emails about that very subject. Instead, Ms. Crawford talked to her about the situation and told her not to do it again. Despite that mild admonishment, the claimant and Ms. Armstead blamed Ms. Anderson for telling Ms. Crawford about the incident when in fact Ms. Anderson was not the employee who notified her and had no knowledge of the situation. They intimidated and threatened Ms. Anderson by both stepping forward toward her until she was effectively backed into a corner and telling her to "keep her mouth shut" or they would get her fired. Their actions were also a violation of the employer's policy, and a more serious violation than taking Ms. Armstead on the pizza delivery. The employer was correct that no employee should feel scared, threatened or harassed in their workplace, and there was no excuse for the claimant and Ms. Armstead's behavior toward Ms. Anderson.

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.

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.

(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 participated in the fact-finding interview personally through the statements of Ms. Crawford. Consequently, the claimant's overpayment of benefits cannot be waived and she is overpaid benefits in the amount of $1,960.00.

DECISION:

The August 27, 2014, reference 01, decision is reversed. The claimant was discharged from employment due to job-related misconduct. Benefits are withheld until such time as she has worked in and been paid wages for insured work equal to ten times her weekly benefit amount, provided she is otherwise eligible. The claimant has received benefits but was not eligible for those benefits. Therefore, the claimant is overpaid benefits in the amount of 1,960.00.

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Julie Elder
Administrative Law Judge

_____
Decision Dated and Mailed

je/css