

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

FRANK A NOBLET
Claimant

FQSR LLC
Employer

APPEAL 15A-UI-04380-KC-T
**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 03/15/15
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

STATEMENT OF THE CASE:

The employer filed an appeal from the April 1, 2015, (reference 01) unemployment insurance decision that granted benefits. The parties were properly notified of the hearing. A telephone hearing was held on May 12, 2015. The claimant participated. The employer participated through Deborah Kass, Senior Vice President of Human Resources, and Argus Wiley, Manager. Both parties waived written notice of the issue of possible overpayment of benefits, an issue that was not included on the original notice of hearing. Exhibits A – B were received into evidence.

ISSUES:

Was the claimant discharged for disqualifying, work-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: Beginning on March 12, 2012, the claimant was employed full time as a managing partner in a restaurant. He last worked on March 9, 2015. He was separated from employment on March 18, 2015, when the employer terminated his employment.

The claimant arrived at work at approximately 10:30 a.m. on March 9, 2015. He had not made a bank deposit for receipts of restaurant income for the weekend of March 7 and March 8, 2015. The claimant was the only person in the restaurant with the key to the safe and who regularly made bank deposits.

The claimant knew the employer's policies regarding deposits and inventory control. He signed his receipt of the company policy on March 12, 2012. The claimant, as manager, was responsible for completing a safe audit with a witness. Both individuals needed to verify the daily amount. The manager was responsible for making a daily deposit. When a night-drop was not available for weekend deposits, the deposit had to be made before 10:30 a.m. the following day. Wiley, the claimant's supervisor, was responsible for determining whether deposit verification had been completed.

Wiley spoke with the claimant on the morning of March 9, 2015. The claimant had not submitted the required cash responsibility sheet. In response, the claimant e-mailed some deposit verifications to Wiley and then told him to "shove the deposit verifications so far up your ass that your back breaks." After speaking with Wiley, the claimant abruptly left the restaurant he managed. He left the keys to the restaurant on a desk and told an employee, Darnell Quinn, where he put the keys. Wiley went to the claimant's restaurant and found that the claimant had left. Wiley called another manager to the restaurant and stayed to manage the shift.

An investigation began after the claimant walked out. Two employees, from other restaurants within the employer's group, completed independent audits of the inventory of the claimant's restaurant. Wiley completed a third audit of the inventory. Results of the three audits indicated the claimant's inventory was inaccurate and short approximately \$2,600 in products when compared with the reported inventory. Wiley documented that 72 cases of buffalo mix were identified in the restaurant's computer inventory, however only one case of buffalo mix was found in the physical inventory. No store in the employer's region maintained such a large inventory of that specific product. Wiley thought it indicated the claimant was concealing financial issues by manipulating data on the inventory report on a repetitive basis.

On March 12, 2015, Wiley received a deposit alert from a bank manager that there were no deposits verified for March 7 and March 8, 2015 in the restaurant the claimant managed. The receipts for those dates were approximately \$2,016 and \$2,311, respectively.

Based on receipts and bank notification information, upper management for the employer determined the claimant had not made a \$4,300 deposit before he left on March 9, 2015, there was no money in the safe, and his inventory had sustained a loss in excess of \$2,000. No one else in the restaurant made deposits to the bank or had access to the inner safe during the period in question. On March 12, 2015, Wiley called another restaurant manager, Ashley Simpson, to check the store safe. Simpson found no deposits in the safe for March 7 and March 8, using the keys that the claimant left on March 9, 2015. The employer did not file a complaint with law enforcement. The camera system in the restaurant was not operating during the weekend of March 7 and March 8, 2015.

Kass conducted investigations of the claimant's complaint that his direct supervisor was having an affair with a subordinate in the restaurant the claimant managed and of the issues from the period of March 7 - March 9, 2015. (Exhibit B) Kass advised the claimant to take administrative leave or use vacation, pending the outcome of both investigations. The claimant took one week of vacation. He understood from Kass that he would return to work on March 17, 2015.

As it relates to the investigation of the claimant's allegations about his supervisor, Kass spoke with nine employees who may have had direct knowledge of whether Wiley had an affair with a subordinate. No one reported direct knowledge of any such relationship and each person indicated that an employee, Brian Whiting, who had been demoted, was the source of the allegations.

Kass and Regional Vice President Tony Meceli, decided to terminate the claimant's employment for three reasons: the absence of over \$2,000 from reported restaurant inventory, over \$4,000 in restaurant receipts which were not deposited in the bank for March 7 and March 8, 2015, and the insubordinate manner in which the claimant left the restaurant on the last day that he worked. On March 18, 2015, Kass and Meceli met with the claimant and told him that his job was terminated for the previously identified reasons.

The administrative record reflects that the employer provided a brief statement about the events leading to the separation however, the employer did not provide live testimony, did not provide the specific rule or policy, violation of which, resulted in the claimant's termination, and did not supply the name and contact information for a rebuttal witness with direct knowledge of the underlying matter. The claimant participated in the fact-finding interview and provided written documents in support of his claim. (Exhibits A and B)

The claimant received unemployment insurance benefits based on this claim. Since filing a claim with an effective date of March 15, 2015, the claimant received ten weeks of unemployment benefits ending May 30, 2015, for a total amount of \$4,320.

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 § 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).

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). 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).

The Iowa Supreme Court has ruled that if a party has the power to produce more explicit and direct evidence than it chooses to present, the administrative law judge may infer that evidence not presented would reveal deficiencies in the party's case. *Crosser v. Iowa Dep't of Pub. Safety*, 240 N.W.2d 682 (Iowa 1976).

The claimant's behavior was misconduct in the following ways: failing to timely make bank deposits, failing to account for a large inventory discrepancy, inappropriate behavior towards his supervisor, and leaving the restaurant he managed during a shift with the keys to the safe in an open area available to employees. The claimant left the restaurant after he was confronted about discrepancies in the inventory and lack of bank deposits for two days' receipts. He did not demonstrate that the employer's concerns were unfounded. Leaving the restaurant in the middle of the shift and putting his keys on the desk was also inappropriate. He held the only key to the vault in the restaurant and he left it out for any employee to use. The claimant's prior complaint about a possible personal relationship between his supervisor and one of the claimant's employees is not related to his own conduct and does not justify his behavior. This is evidence of deliberate conduct in violation of company policy and procedure. The employer's request to submit bank deposits timely and to address inventory discrepancies, and the expectation that he would remain during a shift for which he was scheduled as manager were not unduly burdensome or unreasonable. Benefits are denied.

Iowa Code § 96.3(7)a-b, as amended in 2008, 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.

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 § 96.8, subsection 5.

b. (1) 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 § 96.8, subsection 5. 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 § 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. The employer shall not be charged with the benefits.

(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 states pursuant to § 602.10101.

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 § 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.

The employer's participation in the fact-finding interview is at issue. The administrative record establishes that the employer did not submit detailed, factual information of the quantity and quality that if unrebutted would be sufficient to result in a decision favorable to the employer. The employer did not provide live testimony. The employer did not provide the name and telephone number of a rebuttal witness with direct knowledge of the matter. The employer's involvement at the fact-finding level was insufficient to constitute "participation" as defined in Iowa Code § 96.3(7)(b).

The administrative record reflects that claimant has received unemployment benefits in the amount of \$4,320, since filing a claim with an effective date of March 15, 2015, for ten weeks ending May 30, 2015.

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. 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 did not participate in the fact-finding interview the claimant is not obligated to repay to the agency the benefits he received and the employer's account shall be charged.

DECISION:

The April 1, 2015, (reference 01) unemployment insurance decision is reversed. The claimant was discharged from employment due to job-related misconduct. The claimant's receipt of benefits for a ten-week period ending May 30 2015 was made in error. The claimant was overpaid benefits in the amount of \$4,320 and 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.

Kristin A. Collinson
Administrative Law Judge

Decision Dated and Mailed

kac/css