

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

CHRISTOPHER M KASCSAK
Claimant

APPLE CORPS L P
Employer

APPEAL 18A-UI-04372-H2T

**ADMINISTRATIVE LAW JUDGE
DECISION**

**OC: 03/18/18
Claimant: Respondent (2)**

Iowa Code § 96.5(2)a – Discharge/Misconduct
Iowa Code § 96.3(7) - Recovery of Benefit Overpayment
871 IAC 24.10 – Employer Participation in the fact-finding Interview

STATEMENT OF THE CASE:

The employer filed an appeal from the April 4, 2018, (reference 01) unemployment insurance decision that allowed benefits. The parties were properly notified about the hearing. A telephone hearing was held on May 2, 2018. Claimant participated. Employer participated through Justin Trenkamp, Regional Manager and Geoff Thompson, General Manager. Claimant's Exhibit A was admitted into the record.

ISSUES:

Was the claimant discharged due to job-connected 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 hospitality manager beginning on March 5, 2016 through March 21, 2018, when he was discharged. When he was hired, the claimant was given a copy of the employer's handbook which included rules and regulations regarding smoking. The employer prohibits smoking either regular cigarettes or e-cigarettes in any place in their restaurant. After he was promoted to hospitality manager the claimant was responsible for enforcing the company rules for the employees he supervised.

On February 9 while in the office of the restaurant, the claimant smoked a non-nicotine containing e-cigarette in the office. He also provided the e-cigarette to a 17-year-old employee who took at least one puff off of the e-cigarette while in the office. The claimant's actions were captured by surveillance video that was eventually reviewed by the employer after they received an employee complaint about the incident. The employer conducts investigations out of their

home office and it often takes considerable time for them to coordinate schedules in order to complete an investigation.

No manager has the authority to disregard any of the employer policies or to allow other employees to disregard the policies. After completing the investigation the employer discharged the claimant for violating their no smoking policy and for providing an e-cigarette or "vape" to an underage minor employee of the restaurant.

The claimant has received unemployment benefits after the separation on a claim with an effective date of March 18, 2018. The employer did not participate personally in the fact-finding interview as no one answered the telephone when the fact-finder called to begin the interview.

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 section 96.5(2)a provides:

An individual shall be disqualified for benefits, regardless of the source of the individual's wage credits:

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. 871-24.32(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 Code § 453A.2 (1) prohibits a person under eighteen years of age from smoking or using any tobacco or alternative nicotine products or vapor products. Administrative rules further define vapor product to include any product even if it does not contain nicotine. The claimant broke Iowa law when he provided a non-nicotine vapor product to a seventeen-year-old employee working in the restaurant. Claimant's actions also violate the employer's rules which prohibit smoking or use of e-cigarettes inside the building. The claimant's argument that he was allowed to do so by past manager and by Mr. Thompson are not credible. Mr. Thompson flatly denies allowing any employee to 'vape' inside the restaurant. In any event, the claimant as a manager knew he did not have the authority to pick and choose which of the employer's policies he followed. Additionally as a manager, it was his responsibility to set an example for employees he supervised. Violating the handbook in front of employees is conduct not in the employer's best interest.

While the claimant argues he had a mere lapse in judgment, his argument is not credible in light of the fact that his actions are not only a violation of the employer's policies, but state law. While the employer disciplined the underage employee less harshly than the claimant, such discrepancy is understandable in light of the fact that the manager allowed her to commit the violation. The claimant's actions are not mitigated by the fact that he allowed the underage employee to "vape" non-nicotine substance as such is still illegal under the Iowa Code. The claimant knew the policy and chose to violate it. He further violated state law by allowing an underage minor to "vape." The claimant's actions, even if a one-time violation of the employer's rules and policies are sufficient job-connected misconduct to disqualify him from receipt of unemployment insurance benefits. Benefits are denied.

Iowa Code section 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.

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 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.

Because the claimant's separation was disqualifying, benefits were paid to which the claimant 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 the benefits he received to the agency and the employer's account shall be charged.

DECISION:

The April 4, 2018, (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 been overpaid unemployment insurance benefits in the amount of \$2,320.00 and he is not obligated to repay the agency those benefits. The employer did not participate in the fact-finding interview and their account shall be charged.

Teresa K. Hillary
Administrative Law Judge

Decision Dated and Mailed

tkh/rvs