IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

JULIE D CARPER Claimant **HY-VEE INC** Employer	**APPEAL 17A-UI-05476-JCT** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 04/23/17** **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 May 16, 2017, (reference 01) unemployment insurance decision that allowed benefits. The parties were properly notified about the hearing. A telephone hearing was held on June 9, 2017. The claimant participated personally. The employer participated through Melissa Hill, hearing representative. Employer witnesses included Tim Flaherty (store director), Jordan Miller (assistant store director), Sue Hirschman (human resources) and Dana Estlund (accountant). Employer Exhibit 1 was received into evidence. The administrative law judge took official notice of the administrative records including the fact-finding documents. Based on the evidence, the arguments presented, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

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: The claimant was employed full-time as a second assistant manager at the Fort Dodge store, beginning March 31, 2017 and was separated from employment on April 20, 2017, when she was discharged.

The employer has a written policy which prohibits consumption and possession of alcohol by an employee while working. The claimant was made aware of the employer policies upon hire and was in training to be a manager, when she was discharged. The decision to discharge the claimant was based solely on the claimant's conduct on April 20, 2017.

Prior to April 20, 2017, the employer had received reports that the claimant appeared to emit an odor of alcohol at work but she was not confronted or tested to confirm. The claimant was scheduled to work at 7:00 a.m. and that morning, a customer service manager reported to Mr. Flaherty that the claimant emitted an odor of alcohol. At 11:00 a.m., during the claimant's break, and while she was clocked in, the claimant was observed by Jordan Miller, drinking alcohol in her car. When she emerged from her car, there were two open Natural Light beer cans in her cup holders. They were silver, and Mr. Miller observed the claimant drinking from a silver can as he watched her from his car, during her break. He took photos of the cans within the car (Employer Exhibit 1), as well as a bag of opened, empty beer cans (Employer Exhibit 1).

At the hearing, the claimant denied she had been drinking alcohol at work on April 20, 2017, but that she had consumed alcohol the evening before at the local park, collected all the beer cans in a bag, which she did not dispose of before her shift. She stated her last drink had been between 10:00 p.m. and 12:00 a.m. that she had showered and brushed her teeth. The claimant admitted to drinking from a silver can during her break, but stated it was a diet coke, and placed in the side cup holder and the open cans were being used to collect cigarette ashes. When questioned by the employer before discharge, the claimant did not offer the explanation regarding the diet coke or beer can as an ashtray, nor did she offer to retrieve the items from her car to show the employer. Mr. Miller denied seeing any diet coke can in her vehicle while photographing her car.

The employer conducted an interview and when questioned by the employer, the claimant initially denied drinking alcohol, but then confessed that she drank alcohol in her car to Mr. Flaherty and Dana Estlund. No explanation was provided as to why. Mr. Flaherty confirmed as he sat approximately three feet away from the claimant that she smelled of alcohol and Ms. Estlund, who was sitting about two feet from her, also smelled alcohol. Because the claimant had been dishonest when questioned and was drinking beer on the clock, she was discharged.

The administrative record reflects that claimant has received unemployment benefits in the amount of $1,378.00, since filing a claim with an effective date of April 23, 2017. The administrative record also establishes that the employer did participate in the May 11, 2017 fact-finding interview by way of Tim Flaherty, Jordan Miller and Sue Hirschman.

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.
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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).

"This is the meaning which has been given the term in other jurisdictions under similar statutes, and we believe it accurately reflects the intent of the legislature." *Huntoon v. Iowa Department of Job Service*, 275 N.W.2d, 445, 448 (Iowa 1979).

In an at-will employment environment, an employer may discharge an employee for any number of reasons or no reason at all if it is not contrary to public policy, but if it fails to meet its burden of proof to establish job related misconduct as the reason for the separation, it incurs potential liability for unemployment insurance benefits related to that separation. The employer has the burden of proof in establishing disqualifying job misconduct. *Cosper v. Iowa Department of Job Service*, 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. IDJS*, 364 N.W.2d 262 (Iowa App. 1984). What constitutes misconduct justifying termination of an employee and what misconduct warrants denial of unemployment insurance benefits are two separate decisions. *Pierce v. IDJS*, 425 N.W.2d 679 (Iowa App. 1988). 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 Department of Job Service*, 351 N.W.2d 806 (Iowa App. 1984).

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*. Assessing the credibility of the witnesses and

reliability of the evidence in conjunction with the applicable burden of proof, as shown in the factual conclusions reached in the above-noted findings of fact, the administrative law judge concludes that the employer has satisfied its burden to establish by a preponderance of the evidence that the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law.

The employer has a reasonable policy which prohibits use of alcohol while an employee is clocked in at work. Honesty is also a reasonable, commonly accepted duty owed to the employer. The claimant was made aware of the employer policies three weeks prior to discharge, when she was hired. The claimant worked in the capacity as an assistant manager, and as such, would be reasonably held to a higher standard, as she was in a leadership role. The claimant should have been setting a positive example, upholding the employer's policies and promoting the employer's best interests.

In this case, the claimant was discharged after consuming alcohol in her vehicle, as observed by Jordan Miller, on April 20, 2017, while clocked in at work. The employer offered credible testimony that the claimant was observed emitting an odor of alcohol, as observed by three employees, including a customer service manager at 7:00 a.m., and then Mr. Flaherty and Ms. Estlund around 11:00 a.m. Further, Mr. Miller personally observed the claimant drink from a silver can in her vehicle and then saw open, Natural Light beer cans in her cup holders after her break.

A lay witness may express an opinion regarding another person's sobriety, provided the witness has had an opportunity to observe the other person. *State v. Murphy*, 451 N.W.2d 154 (Iowa 1990), citing *State v. Davis,* 196 N.W.2d 885, 893 (Iowa 1972). Moreover, a witness, either lay or expert, may testify to an "ultimate fact which the [fact-finder] must determine." *Grismore v. Consolidated Prods., Co.,* 232 Iowa 328, 361, 5 N.W.2d 646, 663 (1942). The principle is also found in our rules of evidence. *See* Iowa R.Evid. 704 (testimony in form of opinion or inference not objectionable because it embraces ultimate fact issue). A contrary rule would, of course, lead to the absurd result of potentially excluding the most relevant testimony available. *State v. Murphy*, 451 N.W.2d 154 (Iowa 1990), referring to *Grismore,* 232 Iowa at 346, 5 N.W.2d at 663.

Even in the absence of a drug-alcohol test being performed, the administrative law judge finds the employer's testimony, to be more credible than the claimant's explanation that she was drinking diet coke and using the open beer can for an ashtray in her vehicle. Further, it cannot be ignored that the claimant initially was dishonest with the employer when questioned before admitting to alcohol use, even though she then denied use at the hearing. Arguably, if the claimant had not been drinking alcohol, she would have offered the diet coke and ashtray explanations when initially questioned by the employer, or even offered to show them proof that the beer can contained ashes or there was a diet coke can in her car, but she did not. Based on the evidence presented, the administrative law judge concludes the claimant was discharged for being dishonest when questioned and for alcohol use in her vehicle during her April 20, 2017 shift. The administrative law judge is persuaded the claimant knew or should have known her conduct was contrary to the best interests of the employer. Therefore, based on the evidence presented, the claimant was discharged for misconduct, even without prior warning. Benefits are denied.

The next issue to address is whether the benefits paid to the claimant are subject to recovery. 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 § 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 § 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 states pursuant to § 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 she was not entitled. The claimant has been overpaid benefits in the amount of $1,372.00. 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 it 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. The employer satisfactorily participated in the fact-finding interview. Since the employer did participate in the fact-finding interview, the claimant is obligated to repay the benefits she received, and the employer's account shall not be charged.

DECISION:

The May 16, 2017, (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 been overpaid unemployment insurance benefits in the amount of $1,372.00, 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.

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Jennifer L. Beckman
Administrative Law Judge

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Decision Dated and Mailed

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