

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

JEFFREY L JOSEPH
Claimant

MOSAIC
Employer

APPEAL 18A-UI-10616-AW-T
**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 09/16/18
Claimant: Respondent (2)

Iowa Code § 96.5(2) – Discharge for Misconduct
Iowa Admin r. 871-24.32 – Discharge for Misconduct

STATEMENT OF THE CASE:

Mosaic, Employer, filed an appeal from the October 15, 2018 (reference 01) unemployment insurance decision that allowed benefits because claimant was discharged from work with Mosaic but no willful or deliberate misconduct was proven. The parties were properly notified of the hearing. A telephone hearing was held on November 8, 2018 at 1:00 p.m. Claimant participated. Employer participated through David Williams, Hearing Representative; Tenisha Benson, Human Resources; Tasha Ludwig, Director; and Tammy Rodningen, Supervisor. Claimant's Exhibit A was admitted. Employer's Exhibit 1 was admitted.

ISSUES:

Whether claimant's separation was a discharge due to disqualifying job-related misconduct.
Whether claimant was overpaid benefits.
Whether claimant should repay benefits and/or whether employer's account should be charged due to participation or failure to participate in the fact-finding interview.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed full-time as a Direct Support Associate from July 7, 2018 until his employment with Mosaic ended on September 20, 2018. (Benson Testimony)

Claimant's job was to provide overnight support to and supervision of individuals with intellectual disabilities living in a group home. (Benson Testimony) Of the six individuals residing in the home, five were minors. (Benson Testimony) One minor required "line of sight" support, which means that the minor must be in the claimant's line of sight at all times, except when the minor was asleep. (Ludwig Testimony) Claimant understood the need for 24-hour supervision of the residents and knew that the resident with a "line of sight" requirement had a history of eloping. (Claimant Testimony)

Claimant worked the night shift from September 14, 2018 to September 15, 2018. (Benson Testimony) At approximately 2:25 a.m. on September 15, 2018, claimant exited the group

home and went to his car parked in front of the home for a personal errand. (Claimant Testimony; Rodningen Testimony) While claimant was absent, the minor who requires "line of sight" support awoke and called the direct support associate at a neighboring house to report that he could not find claimant. (Rodningen Testimony) When the associate at the neighboring house called back 18 minutes later, the minor reported that claimant was still not present in the house. (Rodningen Testimony)

Employer investigated the incident and obtained statements from all parties involved. (Rodningen) On September 15, 2018, employer terminated claimant's employment for leaving his work location without approval and leaving residents without supervision. (Benson Testimony)

Employer has a policy regarding treatment of its residents. (Exhibit 1) The policy prohibits neglect including the failure to provide a person with sufficient services, treatment or supports necessary for the person's health, safety or well-being. (Exhibit 1) The employer also has a policy prohibiting absence from work without prior approval or proper notice and leaving the work location without approval and/or adequate staff coverage. (Exhibit A) Claimant received a copy of the employee handbook which contains the policies. (Benson Testimony) Claimant had received no prior warnings regarding similar conduct. (Benson Testimony)

The administrative record reflects that claimant filed for and has received unemployment insurance benefits in the gross amount of \$2,618.00, since filing a claim with an effective date of September 16, 2018. Employer participated in the fact-finding interview through Amanda Rivera. (Benson Testimony)

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged for disqualifying, job-related misconduct. Benefits are denied. The claimant was overpaid benefits which must be repaid. The employer participated in the fact-finding interview and its account shall not be charged.

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 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:

- 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 of misconduct has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. *Reigelsberger v. Emp't Appeal Bd.*, 500 N.W.2d 64, 66 (Iowa 1993); *accord Lee v. Emp't Appeal Bd.*, 616 N.W.2d 661, 665 (Iowa 2000).

Further, 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). A determination as to whether an employee's act is misconduct does not rest solely on the interpretation or application of the employer's policy or rule. A violation is not necessarily disqualifying misconduct even if the employer was fully within its rights to impose discipline up to or including discharge for the incident under its policy. 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). What constitutes misconduct justifying termination of an employee and what misconduct warrants denial of unemployment insurance benefits are two separate decisions. *Pierce v. Iowa Dep't of Job Serv.*, 425 N.W.2d 679 (Iowa Ct. 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 Dep't of Job Serv.*, 351 N.W.2d 806 (Iowa Ct. App. 1984). The law limits disqualifying misconduct to substantial and willful wrongdoing or repeated carelessness or negligence that equals willful misconduct in culpability. *Lee v. Employment Appeal Bd.*, 616 N.W.2d 661 (Iowa 2000).

Claimant's act of leaving six intellectually disabled individuals – five of them minors – unsupervised for *at least* 18 minutes was a deliberate act or omission constituting a material breach of the duties and obligations arising out of his contract of employment. Claimant's primary job duty was to provide constant supervision to the residents of the group home in which he worked. Claimant testified that he understands the need for 24 hour supervision because the residents are "low functioning" and have "low IQs," but argues that he knows the residents well and feels confident that nothing bad would happen to the residents while he was outside of the house for a short period of time. The administrative law judge is not persuaded by this argument; if nothing bad could happen while these residents were unsupervised, then around-the-clock supervision would not be necessary.

Furthermore, the resident who reported claimant's absence was the one who required "line of sight" supervision. The resident could have used claimant's absence as an opportunity to elope, which could result in injury to the resident or worse. If claimant is in the home, he would know when the resident woke up and could establish and maintain a line of sight to prevent an elopement from occurring.

Claimant's act of leaving the residents unsupervised evinces a willful disregard of employer's interests and a substantial disregard of claimant's duties and obligations to the employer. Claimant was discharged for disqualifying, job-related misconduct; benefits are denied.

The next issues to be determined are whether claimant has been overpaid benefits, whether the claimant must repay those benefits, and whether the employer's account will be charged.

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 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.

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), Iowa Admin. Code r. 871-24.10.

Because the claimant's separation was disqualifying, benefits were paid to which he was not entitled. Claimant has been overpaid unemployment insurance benefits in the amount of \$2,618.00. Because the employer did participate in the fact-finding interview, the claimant is obligated to repay to the agency the benefits he received and the employer's account shall not be charged.

DECISION:

The October 15, 2018 (reference 01) unemployment insurance decision is reversed. Benefits are denied until such time as the claimant works in and has been paid wages for insured work equal to ten times claimant's weekly benefit amount. The claimant has been overpaid unemployment insurance benefits in the amount of \$2,618.00 and is obligated to repay the agency those benefits. The employer participated in the fact-finding interview and its account shall not be charged.

Adrienne C. Williamson
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Decision Dated and Mailed

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