

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

EMILY L HOFLAND
Claimant

GIT-N-GO CONVENIENCE STORES INC
Employer

APPEAL 17A-UI-11283-H2T

**ADMINISTRATIVE LAW JUDGE
DECISION**

**OC: 10/01/17
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 October 23, 2017, (reference 01) unemployment insurance decision that allowed benefits. The parties were properly notified about the hearing. A telephone hearing was held on November 28, 2017. Claimant participated. Employer participated through Lanette Butt, Supervisor.

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 store manager beginning on October 18, 2016 through October 5, 2017, when she was discharged. The claimant was discharged for her failure to follow her supervisor's instructions and for use of profanity toward her supervisor on October 4, 2017. The claimant, as manager of the store, was responsible for knowing and enforcing store policies. She had been given a copy of the employer's policies which put her on notice that even one instance of use of profanity would lead to discharge.

As the store manager, the claimant knew that either she or the assistant manager had to open the store every day. The claimant was to open the store at 6:00 a.m. on October 4. That meant she would be at the store by 5:30 a.m. The claimant went into the store at 4:54 a.m. on October 4 to drop off change she had picked up from the bank the day before. She called the supervisor emergency cell phone and left a message that she was sick and would not be able to work that day, despite the fact that she was already at the store. The supervisor on duty called her back

and asked what was wrong. The claimant told her she was ill and could not work. The supervisor told the claimant that she needed to call the assistant manager and make arrangements for her to open the store. The claimant refused to make the call not because she was physically unable to do so, but because she did not think the assistant manager should have to open the store because she had worked until 1:00 a.m. the night before. The supervisor repeatedly told the claimant that the proper procedure was for her to contact the assistant manager and to have her come open the store. The claimant argued with the supervisor then said to her, "you G*d damn f**king people can't tell me I can't call in for a sick day." She then hung up on the supervisor. The supervisor assumed that the claimant was doing as she had been instructed and calling the assistant manager to open the store. The claimant did not call the assistant manager. The claimant was physically capable of calling the assistant manager but chose not to follow the supervisor's instructions on the policy as she thought it was disrespectful to call the assistant manager to come into the store when she had worked the night before. The employer learned that the store was not open when the security company notified them that the alarm had not been disengaged.

A corporate employee was sent to open the store when the security company alerted the corporate office that the store was not open. The corporate employee opened the store just after 7:00 a.m. one hour late. The corporate employee called the assistant manager to come into the store to work. The assistant manager arrived at the store at 8:00 a.m. The corporate employee followed the policy that the claimant had chosen to ignore.

The claimant was not discharged for any reasons other than she failed to follow specific instructions from the supervisor and she used profanity when speaking to the supervisor.

Another manager was not discharged for failing to follow the policy, but that manager did not swear at the supervisor and hang up the phone on the supervisor as the claimant did.

The claimant has received unemployment benefits after the separation on a claim with an effective date of October 1, 2017.

The employer did participate personally in the fact-finding interview through Ms. Butts who provided the same information to the fact-finder that she provided at the appeal hearing.

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).

Generally, continued refusal to follow reasonable instructions constitutes misconduct. *Gilliam v. Atlantic Bottling Company*, 453 N.W.2d 230 (Iowa App. 1990).

The claimant worked in a small store where she, the manager, or the assistant manager had to open the store every day. It was not up to the claimant to decide which of the employer's policies she would follow. It is not illegal to have an employee work a late night and then have to be back at work early the next morning. The claimant was specifically instructed on how to follow the policy to call the assistant manager but she simply chose not to do so because she thought it was disrespectful. The claimant could have avoided the store opening late and the loss of sales for the employer if she had merely called the assistant manager at 5:00 a.m. when Ms. Butts instructed her to do so. The assistant manager ended up coming into the store when called to do so by the corporate employee. The employer's instructions to call the assistant manager to come open the store were not unreasonable under all of the circumstances.

Additionally, the claimant used profanity when speaking to her direct supervisor Ms. Butts on October 4.

In *Myers v Emp't Appeal Bd.*, 462 N.W.2d 736 (Iowa Ct. App. 1990), the court considered whether an isolated instance of profanity and a threat used in the workplace could constitute work-connected misconduct as defined by the unemployment insurance law. While the court ruled that such language could constitute disqualifying misconduct, the court cautioned that the language used must be considered with other relevant factors, including the context in which it was said and the general work environment. *Id.* at 738.

The claimant as manager would not allow employees she supervised to speak to her the way she spoke to her supervisor Ms. Butts. Claimant admits that Ms. Butts did not use profanity when speaking to her and that no profanity was allowed in the store. The claimant's use of profanity, coupled with her insubordinate refusal to follow the policy and call the assistant manager does rise to the level of disqualifying misconduct despite the fact that claimant had no prior history of discipline. The claimant was discharged for substantial job connected misconduct. 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 participated in the fact-finding interview the claimant is obligated to repay the benefits she received to the agency and the employer's account shall not be charged.

DECISION:

The October 23, 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 \$1,838.00 and she is obligated to repay the agency those benefits. The employer did participate in the fact-finding interview and their account shall not be charged.

Teresa K. Hillary
Administrative Law Judge

Decision Dated and Mailed

tkh/rvs