

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

RYAN M HOWELL
Claimant

APPEAL 16R-UI-02215-SC

**ADMINISTRATIVE LAW JUDGE
DECISION**

BRIDGESTONE RETAIL OPERATIONS LLC
Employer

**OC: 11/15/15
Claimant: Appellant (1)**

Iowa Code § 96.5(2)a – Discharge for Misconduct
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:

Ryan M. Howell (claimant) filed an appeal from the December 4, 2015 (reference 01) unemployment insurance decision that allowed benefits based upon the determination Bridgestone Retail Operations, LLC (employer) failed to furnish sufficient evidence that it discharged him for disqualifying misconduct. The parties were properly notified about a telephone hearing that was conducted on January 6, 2016 with Administrative Law Judge Teresa Hillary. Judge Hillary reversed the fact-finder's decision. She found the claimant was not eligible for benefits and had been overpaid unemployment insurance benefits.

The claimant appealed the decision to the Employment Appeal Board (EAB) who remanded the case for a new hearing. The parties were properly notified about the hearing. The hearing was held on May 13, 2016 at 150 East Des Moines Street in Des Moines, Iowa at 9:00 a.m. The claimant participated personally and was represented by Attorney Maggie E. White. The employer participated through Area Manager Ben Moliterno, Managing Partner John Newton, and Maintenance Technician Eric Bradley, and was represented by Maggie A Hanson. Claimant's Exhibit A was received. Employer's Exhibits One through Five were received.

ISSUES:

Was the claimant discharged for disqualifying job-related misconduct?

Has the claimant been overpaid unemployment insurance benefits and, if so, can the repayment of those benefits to the Agency be waived?

Can 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 Managing Protégé in the retail division beginning on June 30, 2015. He had worked in the employer's operations division for ten years before transferring to the retail division. The claimant was separated from employment on October 21, 2015, when he was discharged.

On October 18, 2015, the claimant was the only manager or manager in training at the workplace. There was a customer vehicle in the shop that was Maintenance Technician Eric Bradley's responsibility. The customer had been at the employer's premises for an extended period of time. The claimant directed Bradley to complete additional work on the vehicle, as there was some confusion about the reason for the customer's visit.

After Bradley completed the additional work, he approached the claimant. The claimant was talking to another employee, of whom Bradley was unaware. Bradley attempted to get the claimant's attention to discuss the customer's vehicle. Bradley said the claimant's name twice but the claimant ignored him. Bradley then reached out and put his hand around the claimant's wrist to get his attention. The claimant was still walking forward so his arm and elbow were pulled behind him. The claimant turned around and pushed Bradley. Bradley fell and skidded across the floor. He just missed hitting his head on a lift. This was done in front of customers and two co-workers. Bradley asked a co-worker to finish the customer's vehicle and left his shift. The claimant finished out his shift. He did not seek medical attention nor did he report the incident that day to his supervisor Managing Partner John Newton or Area Manager Ben Moliterno.

On the morning of Monday, October 19, 2015, the claimant told Newton that he had been injured the day before as a result of an altercation between himself and Bradley. Newton sent the claimant for medical treatment. The claimant was diagnosed with an unspecified injury of his right elbow and a strained muscle or tendon in his rotator cuff. Newton also contacted Moliterno about the situation.

On Moliterno's directive, Newton collected statements from Bradley and one of the co-workers who witnessed the altercation, Maintenance Technician Eric Lemke. Both stated that Bradley was attempting to get the claimant's attention and he merely touched the claimant's arm or wrist. The other employee who was present during the incident stated that he did not see anything. The claimant returned to work to provide a written statement about the incident. He reported that Bradley grabbed him with both hands and jerked on his wrist twice.

The claimant was scheduled to work on Tuesday, October 20, 2015; however, he called in absent as he was still in pain. Moliterno visited the location that day to discuss the situation with the participants and review the written statements. Moliterno decided that Bradley and Lemke's version of events was more credible. The claimant was discharged the following day.

The employer has workplace violence policies. The claimant was aware of the policy through his employment in the operation division. His understanding of the policy was that there was no touching allowed between team members.

The administrative record reflects that claimant has received unemployment benefits in the amount of \$4,232.00 since filing a claim with an effective date of November 15, 2015, for the eight weeks ending January 9, 2016. The administrative record also establishes that the employer did participate in the fact-finding 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. Benefits are denied.

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).

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). 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). 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). 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).

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.*

After assessing the credibility of the witnesses who testified during the hearing, considering the applicable factors listed above, and using her own common sense and experience, the administrative law judge finds the employer's version of events to be more credible. The conduct of the individuals involved after the incident lends credibility to Bradley and the employer's version of events. Bradley was upset after the incident and left work. The claimant remained on premises and, even though he claimed to be injured, did not seek medical treatment or report the incident to anyone else in management, even though he had access to their phone numbers.

The employer has an interest in maintaining the safety of its employees. The claimant had knowledge of the employer's policy regarding violence in the workplace. While Bradley physically touched the claimant first, the claimant's response to push him with enough force to send him across the floor towards the lift was excessive and was outside the scope of reasonable conduct expected from a manager or manager in training. The claimant's conduct was a deliberate disregard of the employer's best interest and constitutes misconduct without prior warning.

Iowa Code § 96.7 provides, in pertinent part:

7. Recover 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.

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 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), Iowa Admin. Code r. 871-24.10. In this case, the claimant has received benefits but was not eligible for those benefits. Since 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 December 4, 2015 (reference 01) unemployment insurance decision is affirmed. 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 \$4,232.00 and is obligated to repay the Agency those benefits. The employer did participate in the fact-finding interview and its account shall be charged.

Stephanie R. Callahan
Administrative Law Judge

Decision Dated and Mailed

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