

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

68-0157 (9-06) - 3091078 - EI

LARRY MOFFATT
Claimant

APPEAL NO: 14A-UI-13254-ET

**ADMINISTRATIVE LAW JUDGE
DECISION**

CONSUMERS SUPPLY DISTRIBUTING LLC
Employer

**OC: 11/23/14
Claimant: Respondent (2)**

Section 96.5-2-a – Discharge/Misconduct
Section 96.3-7 – Recovery of Benefit Overpayment

STATEMENT OF THE CASE:

The employer filed a timely appeal from the December 16, 2014, reference 01, decision that allowed benefits to the claimant. After due notice was issued, a hearing was held by telephone conference call before Administrative Law Judge Julie Elder on January 21, 2015. The claimant participated in the hearing. Cecily Johnston, Human Resources Manager, participated in the hearing on behalf of the employer.

ISSUE:

The issue is whether the employer discharged the claimant for work-connected misconduct.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed as a full-time over-the-road truck driver for Consumers Supply Distributing from August 22, 2011 to November 17, 2014. He was discharged after having two accidents in less than one week.

On November 7, 2014, the claimant rear-ended an SUV in Yankton, South Dakota. When he hit the vehicle in front of him, his truck pushed the SUV into another truck and an individual in the SUV was taken to the hospital. The claimant received a ticket from law enforcement for following too close.

On November 13, 2014, the claimant was in Sioux City and hit another vehicle when he swung out into the left hand lane to make a right hand turn. He was not cited for his actions but the employer found he failed to properly execute a right hand turn because he did not check to see if he could make a wider turn.

The claimant received a written warning September 19, 2013, after an accident in Forest City where he was making a right hand turn and struck another vehicle. The employer determined the accident was preventable and had the claimant watch a video on right hand turns. The warning issued to the claimant stated any future violations could result in disciplinary action up to and including termination.

At the time of the claimant's last two accidents he did not follow the employer's policy of completing an accident report form and take a full roll of pictures of the accident scene as stated in the driver's handbook. The claimant received an updated copy of the driver's handbook October 17, 2014.

After reviewing the final two accidents and considering that two of his last three accidents involved right hand turns the employer terminated the claimant's employment November 17, 2014, because it had safety concerns about his continuing to drive for the employer.

The claimant has claimed and received unemployment insurance benefits in the amount of \$3,328.00 since his separation from this employer.

The employer received the notice of the fact-finding interview when it picked up its mail December 15, 2014, at 10:00 a.m. The notice stated the fact-finding interview was to be held at 9:10 a.m. December 15, 2014, so by the time the employer received the notice the fact-finding interview was over. The employer tried calling the number listed on the hearing notice and was placed on hold for over 30 minutes. She also tried to call the Sioux City Workforce office but could never reach the fact-finder in time to participate in the interview.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment for disqualifying job 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.

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 proving disqualifying misconduct. *Cosper v. Iowa Department of Job Service*, 321 N.W.2d 6 (Iowa 1982). A claimant is not qualified to receive unemployment insurance benefits if an employer has discharged him for reasons constituting work-connected misconduct. Iowa Code section 96.5-2-a. Misconduct that disqualifies an individual from receiving unemployment insurance benefits occurs when there are deliberate acts of omissions that constitute a material breach of the worker's duties and obligations to the employer. See 871 IAC 24.32(1).

The claimant was an experienced, long-term professional over-the-road truck driver. As such, it was not unreasonable for the employer to expect the claimant to be safety minded and able to perform his job without a spate of accidents. The claimant had two accidents in one week. He was ticketed for following too closely after the November 7, 2014, accident when he rear-ended a vehicle in front of him. He struck another vehicle when making a right-hand turn November 13, 2014. That was the second accident the claimant had while making a right-hand turn in a span of just over one year.

The employer's main concern is safety and it correctly believed the claimant was responsible for operating his truck safely and with an awareness of his surroundings. The claimant failed to do so during the last week of his employment. The claimant's actions resulted in a major safety concern for the employer and it could not in good conscience continue to employ the claimant as an over-the-road truck driver.

Under these circumstances, the administrative law judge concludes the claimant's conduct demonstrated a willful disregard of the standards of behavior the employer has the right to expect of employees and shows an intentional and substantial disregard of the employer's interests and the employee's duties and obligations to the employer. The employer has met its burden of proving disqualifying job misconduct. *Cosper v. IDJS*, 321 N.W.2d 6 (Iowa 1982). Therefore, benefits are denied.

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.

The unemployment insurance law requires benefits be recovered from a claimant who receives benefits and is later denied benefits even if the claimant acted in good faith and was not at fault. However, a claimant will not have to repay an overpayment when an initial decision to award benefits on an employment separation issue is reversed on appeal if two conditions are met: (1) the claimant did not receive the benefits due to fraud or willful misrepresentation, and (2) the employer failed to participate in the initial proceeding that awarded benefits. In addition, if a

claimant is not required to repay an overpayment because the employer failed to participate in the initial proceeding, the employer's account will be charged for the overpaid benefits. Iowa Code § 96.3-7-a, -b.

The claimant received benefits but has been denied benefits as a result of this decision. The claimant, therefore, was overpaid benefits.

Because the employer participated in the fact-finding interview, the claimant is required to repay the overpayment and the employer will not be charged for benefits paid.

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. In this case, the claimant has received benefits but was not eligible for those benefits. While there is no evidence the claimant received benefits due to fraud or willful misrepresentation, the employer had every intention of participating in the fact-finding interview but did not receive the notice until after the fact-finding interview had concluded. It still attempted to participate by calling different numbers listed for the Department but was unable to contact the fact-finder prior to the decision being entered. Due to the intent of the employer to participate in the fact-finding interview and the effort made by the employer to do so, the administrative law judge must conclude the claimant's actions meet the definition of participation. Consequently, the claimant's overpayment of benefits cannot be waived and he is overpaid benefits in the amount of \$3,328.00.

DECISION:

The December 16, 2014, 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 received benefits but was not eligible for those benefits. Therefore, the claimant is overpaid benefits in the amount of 3,328.00.

Julie Elder
Administrative Law Judge

Decision Dated and Mailed

je/pjs