

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

CIARA M DELEVER
Claimant

APPEAL NO. 14A-UI-13128-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

ALLSTEEL INC
Employer

OC: 11/30/14
Claimant: Respondent (2)

Iowa Code section 96.5(2)(a) – Discharge for Misconduct
Iowa Code section 96.3(7) – Overpayment

STATEMENT OF THE CASE:

The employer filed a timely appeal from the December 12, 2014, reference 01, decision that allowed benefits to the claimant, provided she was otherwise eligible, and that held the employer's account could be charged for benefits; based on an Agency conclusion that the claimant had been discharged for no disqualifying reason. After due notice was issued, a hearing was held on January 16, 2015. Claimant Ciara Delever participated. Steven Zaks, of Employers' Edge, represented the employer and presented testimony through Jon Mumma and Steve Wilson. The administrative law judge took official notice of the Agency's record of benefits disbursed to the claimant and received Exhibits One, Two, and Three into evidence. The administrative law judge took official notice of the Agency's administrative record of the December 11, 2014 fact-finding interview for the limited purposes of determining whether the employer participated and whether the claimant engaged in fraud or dishonesty.

ISSUES:

Whether Ms. Delever was discharged for misconduct in connection with the employment that disqualifies the claimant for unemployment insurance benefits.

Whether Ms. Delever was overpaid benefits.

Whether Ms. Delever must repay benefits.

Whether the employer's account may be charged for benefits.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Ciara Delever was employed by Allsteel, Inc. as a full-time production worker until November 26, 2014 when the employer discharged her for engaging in inappropriate and offensive conduct of a sexual nature on the production floor. On November 19, 2014 a female coworker complained to the employer that Ms. Delever had been engaging in conduct directed that the employee that amounted to sexual harassment. Ms. Delever had been groping the coworker's breasts and buttocks on the production floor. Ms. Delever had been making sexually

explicit comments to the coworker about how attractive the coworker was and sex acts Ms. Delever would like to perform on the coworker. Ms. Delever had been using a water bottle or some other object to simulate an erection and had poked the coworker with the object. Ms. Delever engaged in this conduct in the presence of other employees. The employer had a written policy that prohibited harassment. Ms. Delever was aware of the policy. Ms. Delever acknowledged the conduct during a meeting with the employer but asserted that she had just been joking with the coworker and would have stopped if the coworker had asked her to.

Ms. Delever established a claim for benefits that was effective November 30, 2014 and received \$1313 in benefits for the five-week period of December 7, 2014 through January 10, 2015.

On December 11, 2014 a Workforce Development Claims Deputy held a fact-finding interview to address Ms. Delever's separation from the employment. Ms. Delever participated and provided a candid statement about her conduct in the workplace and her separation from the employment. The employer had appropriate notice of the fact-finding interview. No one participated in the fact-finding interview on behalf of the employer. Instead, the third-party employer representative submitted a cursory statement that said the claimant had been discharged for inappropriate conduct in the workplace without any particulars about what that conduct had been.

REASONING AND CONCLUSIONS OF LAW:

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 this matter. See Iowa Code section 96.6(2). Misconduct must be substantial in order to justify a denial of unemployment benefits. Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of unemployment benefits. See Lee v. Employment Appeal Board, 616 N.W.2d 661 (Iowa 2000). The focus is on deliberate, intentional, or culpable acts by the employee. See Gimbel v. Employment Appeal Board, 489 N.W.2d 36, 39 (Iowa Ct. App. 1992).

Ms. Delever was discharged for misconduct in connection with the employment. An employer had the right to expect decency and civility from its employees. See Henecke v. Iowa Department of Job Service, 533 N.W.2d 573 (Iowa App. 1995). Ms. Delever's vulgar comments and conduct in the workplace were inexcusable. They demonstrated both a willful and wanton disregard for the employer's interests in maintaining an orderly work environment and a willful and wanton disregard of her coworkers' rights to work in an environment free of inappropriate conduct. Ms. Delever is disqualified for benefits until 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 unemployment insurance law requires that 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.

Iowa Administrative Code rule 817 IAC24.10(1) defines employer participation in fact-finding interviews as follows:

Employer and employer representative participation in fact-finding interviews.
24.10(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.

Ms. Delever received benefits but has been denied benefits as a result of this decision. The \$1313 in benefits that Ms. Delever received for the five-week period of December 7, 2014 through January 10, 2015 constitutes and overpayment of benefits.

The employer failed to participate in the fact-finding interview within the meaning of the law. The employer had no one present for the fact-finding interview. The employer representative's cursory, vague written statement was insufficient to establish misconduct in connection with the employment, even in the absence of rebuttal evidence. Ms. Delever provided a candid statement at the time of the fact-finding interview and did not engage in fraud or misrepresentation. Ms. Delever is not required to repay the benefits she had received. The employer's account may be charged for the benefits already paid to Ms. Delever, but will not be charged for benefits paid for the period after the entry date of this decision.

DECISION:

The December 12, 2014, reference 01, decision is reversed. The claimant was discharged for misconduct. The claimant is disqualified for unemployment benefits until she has worked in and paid wages for insured work equal to ten times her weekly benefit allowance, provided she meets all other eligibility requirements. The claimant is overpaid \$1313 in benefits for the five-week period of December 7, 2014 through January 10, 2015. The claimant is not required to repay the benefits. The benefits already paid to the claimant may be assessed to the employer's account. The employer's account will not be charged for benefits paid to the claimant for the period after the entry date of this decision.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

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