IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

LARRY ROPER
Claimant

AUDUBON FOOD LAND CORPORATION
Employer

APPEAL NO: 17A-UI-01195-JE-T

ADMINISTRATIVE LAW JUDGE DECISION

OC: 12/25/16
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 January 25, 2017, reference 02, 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 February 23, 2017. The claimant participated in the hearing but hung up during the employer's testimony. The administrative law judge attempted to call him back and left a message indicating if he wished to participate further he needed to call the Appeals Section. The claimant did not call back. Dina Corbett and John Corbett, Owners, participated in the hearing on behalf of the employer. Employer's Exhibits 1 through 5 were admitted into evidence.

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 store manager for Audubon Food Land Corporation from September 1, 2015 to December 29, 2016. He was discharged for failing to follow the employer's instructions despite numerous conversations with the employer during which he was directed to do so.

The employer took issue with the claimant's performance in the areas of controlling overtime; clocking out; controlling inventory; and inappropriately texting underage high school employees after work hours and threatening their jobs.

The employer has four grocery stores and Owner Dina Corbett must rotate the stores she visited. Owner John Corbett visited the claimant's store at least once a week and varied the days he went in so he could get a more accurate picture of what was going on at the store by not allowing the employees to know which day he would be there.

Ms. Corbett told the claimant July 1, August 24, September 21 and October 1, 2016, that he needed to control overtime costs. With the exception of the deli department, the claimant wrote all of the schedules and consequently controlled the scheduling of employees for overtime. The claimant was over in overtime $600.00 to $1,100.00 per two weeks while the other stores were over less than $20.00 in overtime per two weeks. Notwithstanding the four conversations the employer had with the claimant regarding overtime, he failed to show any improvement in that area of concern (Employer's Exhibit 4).

While the claimant was a salaried employee, the employer still wanted him to clock in and out because its worker's compensation insurance carrier recommended it in case the claimant ever suffered an injury it would be clear if he was on the clock or not. The claimant always clocked in but refused to clock out and instead would email the employer with a list of his hours (Employer's Exhibit 2). The employer discussed this situation with the claimant August 24 and November 13, 2016, but his behavior did not change and he would not clock out as the employer directed (Employer's Exhibit 3).

Another continuing issue the employer had with the claimant's performance as store manager involved inventory control. Nearly every week when Mr. Corbett visited the store managed by the claimant he had a large amount of back stock and the back room was full. Mr. Corbett interviewed other employees about the overstock and was told the claimant gave the impression it did not matter as long as things looked good for the bi-annual inventory sessions. Mr. Corbett worked with the claimant extensively on inventory control and also worked with department managers on programs to put into place. The deli, bakery and meat department manager's all participated and had success with Mr. Corbett's programs but the claimant failed to implement even one of his suggestions. Because the claimant had too much inventory, the employer would have to put product that was nearly out of date on in-store specials and the price cuts hurt the employer's profits.

The final issue involved the claimant texting underage high school employees after work hours threatening their jobs. Two of the high school employees brought this concern to the employer's attention and shared the claimant's texts to them with the employer. One text stated, "You need to show up for work or you will be dismissed."

The claimant was allowed to donate no more than $100.00 worth of product to an individual or event and could not donate more than $200.00 per month total. Under the employer's policy he was not allowed to donate alcohol. On December 9, 2016, the claimant donated five 16 ounce six packs of beer; one non-alcoholic beer 12 pack; four 16 ounce eight packs of beer; a 12 pack of beer; and another six pack of beer.

After reviewing the claimant's performance and the fact that he refused to cooperate with the employer or address its concerns within the store, the employer notified the claimant through text message his employment was terminated December 29, 2016.

The claimant has claimed and received unemployment insurance benefits in the amount of $2,320.00 for the six weeks ending February 4, 2017.

The employer personally participated in the fact-finding interview through the statements of Owner Dina Corbett.

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 or 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 the store manager and as such was responsible for carrying out the employer's wishes as with four stores it could not be in every store all day every day. Despite that fact, the claimant failed to control overtime even though he set all the schedules except those of the deli employees. The other three stores were able to control the overtime through

scheduling but although the employer talked to the claimant at least four times about that issue the claimant refused to take steps to solve the overtime problem.

The employer also required that the claimant clock in and out even though he was a salaried employee and the employer had sound business reasons for that mandate. It was not an unreasonable requirement and whether the claimant agreed with the rule or not, he had a responsibility to follow the employer's policy. The only reason for not clocking out as required would be that the claimant was not working the agreed upon number of hours.

Mr. Corbett worked with the claimant and his department managers extensively on inventory control and policies to help in that area. While the department managers utilized Mr. Corbett's programs and had a great deal of success with inventory control as a result, the claimant refused to implement any of the programs Mr. Corbett showed him and consequently the grocery and produce areas of the store, for which the claimant was solely responsible, suffered in the area of inventory control. The claimant also displayed a poor attitude about inventory control and the consensus of the other manager's was that the claimant felt inventory control did not matter as long as the inventory looked good during the bi-annual inventory conducted by the employer.

The final issue cited by the employer was the claimant's after hours text messages to at least two underage high school employees of the store. Frankly, telling an employee, teenager or not, that she needed to show up for work or she would be dismissed is not inappropriate if the comment is made privately while the employee is at work, especially in the context of a verbal or written warning. It was unprofessional for the claimant to make that comment to an employee outside work hours.

The employer's practice when issuing a warning is to have another employee present but because Ms. Corbett usually was not at the claimant's store when she needed to give him a warning and therefore she could not have a second person present on the phone. As a result she began texting her warning messages to the claimant. She also told him several times between the summer of 2016 and Thanksgiving 2016 that his practices and failure to follow the employer's directions were "killing" his numbers and if he did not meet the goals set for overtime and inventory control he would not get a bonus and would place his job in jeopardy.

The claimant had the ability to perform the job to the employer's expectations but chose to disregard their directions.

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 section 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 participated in the fact-finding interview personally through the statements of Owner Dina Corbett. Consequently, the claimant's overpayment of benefits cannot be waived and he is overpaid benefits in the amount of $2,320.00 for the six weeks ending February 4, 2017.

DECISION:

The January 25, 2017, reference 02, 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. The employer personally participated in the fact-finding interview within the meaning of the law. Therefore, the claimant is overpaid benefits in the amount of $2,320.00 for the six weeks ending February 4, 2017.

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Julie Elder
Administrative Law Judge

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Decision Dated and Mailed

je/rvs