IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

RAYMOND C MARTIN
Claimant

O'BRIEN AUTO REPAIR BEAVERDALE INC
Employer

APPEAL NO: 14A-UI-07930-ET

ADMINISTRATIVE LAW JUDGE DECISION

OC: 06/29/14
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 July 24, 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 August 25, 2014. The claimant participated in the hearing. Danny O'Brien, Owner, and Rick Owens, Installer, participated in the hearing on behalf of the employer and were represented by Attorney Thomas Duff.

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 installer for O'Brien Auto Repair Beaverdale from September 1, 2013 to July 2, 2014. He was discharged after engaging in a physical confrontation with the employer.

The employer has a strict policy prohibiting the use of cell phones at work. The claimant had violated the policy several times and then began hiding his cell phone under a shop rag whenever he saw the employer coming into the shop. The claimant and employer were at odds about that issue as well as the claimant bringing his computer from home to use during the workday. After the employer told the claimant he could not use his cell phone during work, the claimant was angry.

Around June 25, 2014 the claimant started taking pictures with his cell phone of what he considered safety violations in the shop. The employer issued the claimant a written warning June 25, 2014 about using his cell phone and computer at work and failure to perform certain aspects of his job that left customers vulnerable, in response the claimant threatened to contact OSHA about the safety violations he believed existed in the shop but had not complained about or reported prior to the parties discussions about the claimant's use of the cell phone and computer growing more intense. The claimant told the employer, "You are going to lay me off

and not dispute my unemployment or I will call OSHA." The employer told him to go ahead and call OSHA but he needed to get back to work. OSHA did conduct an inspection of the employer's shop July 1, 2014 and brought a few items to the employer's attention, which he promptly corrected and no fines or penalties were levied against the employer.

On July 2, 2014 the employer was walking in through the back overhead door and observed the claimant texting on his cell phone. The employer asked him what he was doing and the claimant stated he was charging his phone. The employer said he saw the claimant texting someone and the claimant began yelling he was not texting and the employer responded that he was going to write the claimant up for violating the cell phone policy. There was a three and one-half foot tall toolbox separating the men and after the employer walked around the toolbox, he lifted the rag on the toolbox to see if the claimant's phone was plugged in to his charger. The claimant reached the phone first and a physical altercation ensued. They grabbed each other by the throat and the claimant then spun the employer around so his back was to the claimant. He then used his free arm to pin the employer's arms and held his head up with his hand around the employer's throat so he could not head butt him. The other two shop employees broke up the fight and both the employer and the claimant called the police simultaneously. The police arrived five to ten minutes later but no charges were filed because the police could not determine which man was the aggressor and neither man had any visible marks resulting from the fight. The employer notified the claimant his employment was terminated while the police were still present and told him to gather his belongings and leave at which time the claimant exited the premises.

The claimant has claimed and received unemployment insurance benefits in the amount of $2,693.00 since his separation from this employer.

The employer participated personally through the statements of Owner Danny O'Brien.

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). Both parties behaved badly, especially with regard to the physical altercation, and none of the witnesses were particularly persuasive. The claimant was angry that the employer was enforcing its prohibition against the use of cell phones and bringing his personal computer to work. In retaliation, the claimant threatened to call OSHA if the employer did not lay him off and agree not to dispute his receipt of unemployment insurance benefits. If the claimant had safety concerns they should have surfaced much earlier in his employment instead of after he became angry with the employer following the written warning June 25, 2014 about the claimant's use of his cell phone in violation of the employer's policy. Because he waited, his complaint to OSHA appeared more retaliatory than concerned about safety. OSHA did go to the shop July 1, 2014 and did find some violations. However, the violations were such that the employer was not fined but simply had to make some corrections.

Both parties account of the physical altercation was self-serving and it is likely Mr. Owens did not witness the beginning of the fight. Both men were angry and one grabbed the other by the throat with the other quickly following suit. The employer grabbed for the claimant's phone to see if it actually was charging but the claimant was able to reach it first. They were both extremely angry and put their hands on each other's throat in rapid succession. Both the claimant and the employer engaged in inappropriate and unprofessional behavior. Consequently, following the fight and considering the bad blood between the parties, the employer decided to terminate the claimant's employment for using his cell phone excessively in violation of the employer's policy, threatening the employer with calling OSHA, and the physical altercation. While it is perfectly acceptable for an employee to contact OSHA with any concerns he might have, in this case the claimant did so in retaliation to the employer issuing him a written warning and rebuking him for using his cell phone and personal computer. The issues existed throughout the claimant's employment yet he felt no need to report the situation to OSHA until he became angry with the employer.

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 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 Danny O'Brien. Consequently, the claimant's overpayment of benefits cannot be waived and he is overpaid benefits in the amount of $2,693.00.

DECISION:

The July 24, 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 $2,693.00.

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Julie Elder
Administrative Law Judge

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Decision Dated and Mailed

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