IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

TERENCE HOWELL
Claimant

ECKHART & WITTROCK PLC
Employer

APPEAL NO: 16A-UI-04854-JE-T

ADMINISTRATIVE LAW JUDGE DECISION

OC: 03/2716
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 April 12, 2016, 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 May 10, 2016 and continued on May 25, 2016. The claimant participated in the hearing. Dr. Kristina Wittrock, Optometrist/Managing Member, and Dr. Heath Eckhart, Co-Owner/Managing Member, participated in the hearing on behalf of the employer. Employer's Exhibit One and Claimant's Exhibit A 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: A representative's decision allowing benefits to the claimant was mailed to the employer's last-known address of record on April 12, 2016. The decision contained a warning that an appeal must be postmarked or received by the Appeals Section by April 22, 2016. The appeal was not filed until April 26, 2016, which is after the date noticed on the disqualification decision. On April 27, 2016, the employer called the Department to inquire as to the representative's decision and learned a decision had been entered allowing benefits to the claimant. The Department representative provided the employer with information regarding how to file an appeal and the employer submitted its appeal that afternoon. Under these circumstances, the administrative law judge concludes the employer's appeal is timely.

The claimant was employed as a full-time optician for Eckhart & Wittrock PLC from August 24, 2015 to January 4, 2016. He was discharged for failing to perform his job to the employer's expectations despite having the apparent ability to do so, and for not being forthcoming during his interview and on his resume.

When the employer was going through the hiring process for the job it eventually hired the claimant to perform, it emphasized the importance of experience and continuity of that experience as the optometry field is ever changing. It also discussed the fact that Thursday

evenings and Saturdays were its busiest times of the week and it needed a commitment from the claimant that he was available on those days, and the claimant agreed he would be available for those shifts. The claimant was in school when he was hired by the employer and it worked around his school schedule until he completed school.

On October 1, 2015, Dr. Heath Eckhart met with the claimant to discuss areas of improvement needed. Those areas included better follow through with the lab and making or returning phone calls to patients, being more helpful and assertive on the sales floor rather than hanging back or spending too much time in the back, and the claimant's requests for time off on Thursdays and Saturdays in addition to the employer working around the claimant's school schedule on Monday, Tuesday, and Wednesday.

On October 26, 2015, Dr. Eckhart again met with the claimant to discuss areas of concern the employer had with the claimant's performance. The conversation, based on notes taken by Dr. Eckhart, discussed the claimant's failure to return patient calls regarding whether their glasses were ready or where the product was in the process, which often necessitated contacting the lab and then updating the patient. Dr. Eckhart talked to the claimant about failing to process orders the same day they are received without being reminded and entering the fee slips at the time of purchase or service. Dr. Eckhart also reiterated his concerns about the claimant hanging back on the sales floor or staying in the back room rather than actively helping patients with their selection of glasses, sales, and order entry. Lastly, Dr. Eckhart noted the claimant took frequent breaks to use the restroom and that he was often in the restroom a long time. Dr. Eckhart asked the claimant if there was a medical reason for his number of breaks and reminded the claimant that if he was using that time for phone calls or other non-work related activities that was unacceptable.

On November 9, 2015, the employer held a performance assessment meeting with the claimant with both Dr. Eckhart and Dr. Wittrock in attendance. The employer told the claimant he was the "main person/employee in charge of tracking jobs," and he was failing to perform that task consistently and accurately (Employer's Exhibit One). The employer also told the claimant he was not spending enough time on the sales floor "interacting with patients," was starting with the lower priced product instead of higher priced product, he needed to learn the products and pricing so he could explain it to patients, and that he needed to improve his sales immediately. The employer told him the front office where frame sales are made was the priority rather than the back room where the claimant preferred to spend his time (Employer's Exhibit One). The employer also talked to the claimant about his speed and the fact his regular tasks were taking too long to complete in the back room which prevented him from going to the front to help with patients and sales. The employer also told the claimant he needed to improve his product knowledge. The claimant indicated he "had the knowledge" but was not comfortable yet and needed more time. The employer responded that he should not need more time as he stated he had 22 years of experience at the time of hire. The employer told him it expected him to "learn about frame lines and companies, lens options," labs, and be able to present that information to patients immediately (Employer's Exhibit One). The employer informed the claimant he was taking "way too long to perform all office tasks – patient check-in, pre-testing, check-out, lab duties…" (Employer's Exhibit One). Finally, the employer discussed the claimant's lack of accuracy and stated information was "consistently missing and/or incorrect" (Employer's Exhibit One). The employer told the claimant he needed to enter all information correctly and to have the proper documentation, including adding notes to job trays (Employer's Exhibit One). The claimant stated he wanted more hours. The employer explained he was not receiving as many hours because he was incapable of opening or closing by himself which resulted in him being the "second person" and other employees' hours had to be adjusted to compensate (Employer's Exhibit One). The employer stated the claimant had been insubordinate to Dr. Wittrock after she directed him to order a pair of lenses from the lab and instead the claimant called the lab and asked its advice on the lenses rather than ordering what Dr. Wittrock instructed him to order. The claimant's actions caused Dr. Wittrock to feel the

claimant did not respect her education and the employer questioned whether the claimant had an issue working for a woman and had less respect for her than for Dr. Eckhart (Employer's Exhibit One). The employer mentioned the claimant did not interact with other employees very often and stayed in the back but then complained he was not included (Employer's Exhibit One). The employer told him he needed to be out front more often and suggested he join in conversations to feel more included (Employer's Exhibit One). The employer concluded by talking to the claimant again about the number and length of his restroom breaks. The claimant did not indicate he had any medical conditions that would require him to use the restroom frequently.

The employer also had concerns about the claimant's attendance as he was tardy on 19 occasions during the four months he was employed with this employer. The claimant testified that with the exception of two times he was always there on time but could not clock in until another employee finished using the computer. The employer countered there were three computers and only three employees, in addition to the two optometrists, and that should never have prevented the claimant from clocking in on time. Additionally, employees are allowed to clock in 10 to 15 minutes prior to the start of their shift but are expected to be on time for their shifts.

On December 19, 2015, the claimant left a note on top of the schedule for Dr. Wittrock stating "Kristi: My availability has changed. Going forward, I need to be off no later than 6 PM on Thursdays for praise and worship rehearsal. This has been discussed w/ Dannette and Austin. I am open for any hours on all other days. Also need Monday, January 18, 2015 off" (Employer's Exhibit One). The employer told the claimant throughout the interview process and at the time of hire that working Thursday evenings "until all patients were seen and office was closed (7:00 p.m. – 8:00 p.m.) was a condition of his employment" (Employer's Exhibit One). After the claimant told the employer he needed to be off no later than 6:00 p.m. on Thursdays, Dr. Wittrock reminded the claimant those hours were required and expected and if he did not want to work those hours he could submit his resignation. The employer also spoke to Dannette and Austin who denied saying they did not mind if the claimant's schedule was changed so he did not have to stay beyond 6:00 p.m. on Thursday evenings.

At 10:23 a.m. on Monday, December 21, 2015, the claimant sent Dr. Wittrock and Dr. Eckhart an email following the employer's denial of the claimant's request to be off work by 6:00 p.m. every Thursday. In the email the claimant criticized Dr. Wittrock's treatment of him regarding correcting him in front of co-workers and patients, not greeting him upon arrival or until the claimant greeted her first, lack of training, stating the claimant may be worth $12.00 per hour, referring to the claimant as lazy, calling him a prima donna, and saying he was not selling. He stated "I don't know if you feel you can talk to me the way you do because I'm black, or because you feel superior to me because of your education, but whatever the case, it is not acceptable…this disrespectful treatment has to end! In the future, any issues with me need to be discussed with me in private. No exceptions" (Employer's Exhibit One).

On December 21, 2015, the employer issued the claimant a written performance warning for "Failure to Perform Required Job Duties" (Employer's Exhibit One). The claimant was expected to check all lab trays twice per week (Employer's Exhibit One). On December 21, 2015, a patient called the employer to ask about his order and when it would be ready. There was no tray on the shelf but there was a job on order at the lab. The claimant did not notice the tray was missing or make the necessary corrections to the order (Employer's Exhibit One). Also on that date the claimant correctly noted a frame was on backorder but did not go ahead and order the frame. Because the claimant did not check on the frame status he did not know the frame was out for a clip and there was no frame on backorder. (Employer's Exhibit One). The claimant's records did not indicate a "proper knowledge of the job" (Employer's Exhibit One).

On December 22, 2015, the claimant received a written warning for tardiness after he was scheduled to begin his shift at 11:00 a.m. but did not clock in until 11:04 a.m. and did not notify the employer he was going to be late (Employer's Exhibit One).

The employer scheduled a follow-up meeting with the claimant following its receipt of his December 21, 2015 email, for December 28, 2015. The morning of the meeting the claimant sent the employer another email about the warnings he received, his tardiness, and his hours. During the meeting the claimant requested the December 22, 2015 written warning be removed and changed to a verbal warning and the employer agreed to that action. The employer also had the claimant's performance evaluation that was scheduled to be discussed with the claimant January 4, 2016 but the claimant chose to wait to go over that document until the employer reviewed all employees' evaluations with them January 4, 2016.

On January 4, 2016, the employer conducted the claimant's performance evaluation and indicated he needed improvement in seven of the 14 areas included on the review. The employer stated the claimant needed to make "major improvements" in the areas of "job efficiency, sales, and job accuracy" (Employer's Exhibit One). The employer detailed the specific issues in each of those areas and informed the claimant it would be reevaluating his improvements over the following two weeks.

The employer had received some customer complaints during the claimant's tenure with the employer and a few customers asked if the employer had conducted a background check on the claimant. Over the Christmas holiday, the employer looked the claimant up on Google and discovered he had a criminal record and a history of incarceration. The record itself was not an issue and the employer did not ask the claimant whether he had a criminal record at the time of hire. The employer was concerned, however, about the lack of knowledge demonstrated by the claimant during his employment. During the interview process the employer emphasized it wanted an employee with a long history of experience in the optometry field as the industry is rapidly changing. Relying on the claimant's resume, which indicated a continuous optometric employment history since May 2002, in addition to the claimant's verbal statements that he had worked in the field for 22 years, which tipped the scales in the claimant's favor, the employer hired him from several qualified candidates. Actually, the claimant was in prison after May 2002 and consequently the employer determined he falsified his resume and at the least mislead it with regard to his qualifications at the time of hire.

On January 4, 2016, the employer gave all employees a product knowledge test and the claimant scored 55 percent. After reviewing the claimant's performance and attendance and after concluding he misrepresented his qualifications on his resume and during the interview process, the employer terminated the claimant's employment January 4, 2016.

The claimant has claimed and received unemployment insurance benefits in the amount of $3,348.00 for the eight weeks ending May 21, 2016.

The employer personally participated in the fact-finding interview through the statements of Optometrist/Managing Member Kristina Wittrock. The employer also submitted written documentation prior to 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 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 had difficulty completing the tasks assigned and performing the essential functions of his job in a timely manner. After four months it was still taking him much longer to complete assignments such as checking in patients; pre-testing; glasses measurements; lens options; pricing; check-out; and job and tray tracking than it did the other opticians. Additionally, he was not spending enough time at the front of the practice selling product as the employer expected but instead tended to stay in the back room. While obviously there is a learning curve with every new position, the claimant was there for four months and the employer reasonably expected he would be much more proficient in performing his job assignments and selling glasses and contacts to customers.

The claimant was also tardy on 19 occasions. Rather than accept responsibility for his tardiness, however, the claimant states he was there on time, with the exception of two incidents when he was late but could not clock in because another employee was on the computer. The employer effectively refuted his statement as it has three computers and three employees (including the claimant) besides the two optometrists which meant there was always an open computer to clock in on. The employer had a reasonable expectation that employees would be on time for their shift and also allowed employees to clock in 10 to 15 minutes early. Had the claimant taken advantage of that opportunity his tardiness would not have been an issue.

The claimant was frustrated with Dr. Wittrock and his frustration came to a head December 21, 2015, when he became unhappy with her response to his note saying he could no longer work Thursdays until 7:00 p.m. He sent Dr. Wittrock an email December 21, 2015 and copied Dr. Eckhart, expressing his frustrations with her. The employer found the tone of the claimant's email disrespectful and it was quite confrontational and demanding, accusing Dr. Wittrock of creating a hostile work environment and questioning whether she treated him differently because he is African-American. It concluded by saying he was "willing to close on some Thursdays, but certainly not every Thursday as I have been." The employer told the claimant at the time of hire it needed him to work Thursday evenings until 7:00 p.m. It did work around his school schedule but could not allow him to leave at 6:00 p.m. on Thursdays as that and Saturdays were the employer's busiest days and it would not have been fair to the other employees to grant the claimant Thursday evenings off work.

While the claimant's email was very critical of the employer, it does appear the employer retaliated against him by issuing the written warnings December 21 and 22, 2015. The claimant did make errors that were referenced in the December 21, 2015 warning but they were not errors the claimant had not made previously which makes the employer's timing suspicious. The following day it issued the claimant a written warning for tardiness. The claimant had been tardy on 18 prior occasions making the decision to issue him a written warning December 22, 2015, suspect. While the claimant may well have earned the warnings, the fact he never received a written warning before putting his complaints about Dr. Wittrock in an email, makes the timing of the warnings questionable.

The claimant led the employer to believe at the time of hire he had 22 continuous years of optometry experience. The employer was specifically looking for an experienced employee who was well-versed in the rapidly changing field of optometry. The claimant omitted the fact he had been incarcerated during a period of time covered by his resume and a few years preceding the May 2002 date. While it is refreshing that the employer does not ask applicants about their criminal background or use that as an event that automatically eliminates an individual as a potential employee, the claimant misled the employer about his relevant experience and knowledge. That action directly impacted the claimant's job performance as he was unable to complete routine tasks in a timely manner or follow-up on all tasks required by his job.

There was obviously a conflict between the claimant and Dr. Wittrock. The conflict was primarily caused by the claimant's failure to perform his job to the employer's expectations, which were not unreasonable given he possessed the apparent experience and ability to do so, the claimant's tardiness, and the claimant's unwillingness to work Thursday evenings

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.
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> (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.
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> 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.

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 Dr. Kristi Wittrock. Consequently, the claimant's overpayment of benefits cannot be waived and he is overpaid benefits in the amount of $3,348.00 for the eight weeks ending May 21, 2016.

DECISION:

The April 12, 2016, 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. 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 $3,348.00 for the eight weeks ending May 21, 2016.

_____
Julie Elder
Administrative Law Judge

_____
Decision Dated and Mailed

je/can