IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

AARON J STOREY
Claimant

JJ'S @THE LAKES INC
Employer

APPEAL NO: 15A-UI-01342-ET

ADMINISTRATIVE LAW JUDGE DECISION

OC: 01/04/15
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 22, 2015, 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 February 25, 2015. The claimant did not respond to the hearing notice by providing a phone number where he could be reached at the date and time of the hearing as evidenced by the absence of his name and phone number on the Clear2There screen showing whether the parties have called in for the hearing as instructed by the hearing notice. The claimant did not participate in the hearing or request a postponement of the hearing as required by the hearing notice. Debra Kohlhaase, Owner, participated in the hearing on behalf of the employer. The administrative law judge takes official notice of the administrative file for the purpose of corroborating the employer's testimony regarding its participation in the fact-finding interview.

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 person-in-charge for JJ's At The Lakes from October 23, 2012 to January 5, 2015. He was discharged for using marijuana at work, reporting for work under the influence, and offering a 14-year-old co-worker marijuana several times.

In November 2014 the employer noticed the claimant's performance and attitude toward the job started declining. On November 21, 2014 the claimant was pulled over by law enforcement on his way to work and a drug dog was called but the claimant did not have anything illegal in his possession and was allowed to continue to work. He was 17 minutes late and angry when he arrived. He kicked a mop bucket which hit the wall and broke some tiles.

On November 25, 2014 the claimant and another employee were caught by a third employee smoking marijuana in the employer's walk-in cooler. The employee in the cooler with the claimant wrote a statement admitting he was smoking marijuana in the cooler with the claimant. The claimant received a verbal warning for that incident after it was reported to the employer.

On December 31, 2014 the claimant arrived for his 3:00 p.m. shift slurring his words and with bloodshot eyes and his demeanor appeared "happier" to the employer than usual. Co-owner Debra Kohlhaase did not confront the claimant but told co-owner Krystal Dewall about the situation and she contacted a local hospital to inquire about whether it could perform a drug test on the claimant but was told because the employer did not have a contract with the health care facility they could not do the testing.

On January 1, 2015 the claimant was scheduled to open the restaurant at 7:00 a.m. but was not there by 8:00 a.m. Ms. Kohlhaase called him at 8:30 a.m. and he did not arrive until 9:21 a.m. Because he was two hours and 21 minutes late, and was the only employee scheduled to open, the employer did not have bread ready for customers and lost sales.

On January 2, 2015 Ms. Dewall was at the store and believed the claimant was under the influence of illegal drugs. Because of the New Year's holiday she had not been able to set up an account with the hospital to perform drug testing and she made continued attempts to do so January 2, 2015 but did not have time to complete the process that day.

Later in the day on January 2, 2015 a 14-year-old employee's mother called the employer to report the claimant had offered her son marijuana while at work on several occasions. The employer talked to the minor employee and he confirmed what his mother stated.

On January 3, 2015 the employer was obligated to accommodate a corporate visit and consequently let the claimant work. While Ms. Dewall was in the store she received a call from a customer stating when the claimant was working at the counter taking orders that day he was slurring his words and "seemed high."

The claimant was not scheduled to work January 4, 2015 and the employer terminated his employment January 5, 2015. The claimant had received several verbal warnings and three written warnings. His first written warning was issued April 4, 2013 for excessive cell phone use after being verbally warned to stay off his phone; the second written warning was issued December 17, 2013 for smoking marijuana in the walk-in freezer and the claimant signed the warning; and his third written warning was issued January 13, 2014 when he was observed giving sandwiches to two of his friends without charging them.

The claimant has claimed and received unemployment insurance benefits in the amount of $1320 since his separation from this employer.

The employer personally participated in the fact-finding interview through the statements of co-Owner Debra Kohlhaase.

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:
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> 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.
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> 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.
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> 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).

Between November 21, 2014 and January 3, 2015 the claimant was involved in seven incidents counter to the employer's interests. He was caught smoking marijuana in the walk-in cooler with another employee November 25, 2014 and the other employee wrote a statement admitting he and the claimant were in the walk-in cooler smoking marijuana when caught by another employee.

Five of the incidents occurred between December 31, 2014 and January 3, 2015. The claimant appeared to be under the influence December 31, 2014, January 2 and January 3, 2015. He also failed to open the store on time January 1, 2015 and arrived two hours and 21 minutes late, which impacted the employer's bread sales.

The employer, who was quite lenient with the claimant's antics until the last five incidents occurred in a time frame of four days, made the decision to terminate the claimant's employment after receiving the phone call from the 14-year-old employee's mother stating the claimant had offered her son marijuana at work on several occasions. The employer talked to the 14-year-old employee who confirmed what his mother said and that was the final straw for the employer.

The fact that the claimant was caught smoking marijuana at work on two occasions made the 14-year-old employee's statements more credible and the employer found his statements persuasive. While the employer had given the claimant numerous "second chances" it could not turn a blind eye when it became clear he was offering a minor employee marijuana while at work and the complaints about him appearing under the influence were becoming an everyday occurrence.

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.
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> (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.

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 Co-Owner Debra Kohlhaase. Consequently, the claimant's overpayment of benefits cannot be waived and he is overpaid benefits in the amount of $1320.

DECISION:

The January 22, 2015, 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 did personally participate in the fact-finding interview within the meaning of the law. Therefore, the claimant is overpaid benefits in the amount of $1320.

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Julie Elder
Administrative Law Judge

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Decision Dated and Mailed

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