**IOWA WORKFORCE DEVELOPMENT**
**UNEMPLOYMENT INSURANCE APPEALS**

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| **CEDRIC STINES**<br>Claimant<br><br>**LUTHER CARE SERVICES / HOMES FOR**<br>Employer | **APPEAL 21A-UI-05218-SN-T**<br><br>**ADMINISTRATIVE LAW JUDGE DECISION**<br><br>**OC: 03/15/20**<br>**Claimant: Respondent (2)** |

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Admin. Code r. 871-24.32(1)a – Discharge for Misconduct
Iowa Code § 96.3(7) – Recovery of Benefit Overpayment

**STATEMENT OF THE CASE:**

The employer filed an appeal from the February 8, 2021, (reference 01) unemployment insurance decision that allowed benefits based upon the finding the claimant did not engage in willful misconduct. The parties were properly notified of the hearing. A telephone hearing was held on April 21, 2021. The claimant participated and testified. The employer participated through Human Resources Generalist Kristen Anderson and Dietary Manager Kris Gilman. Exhibits 1, 2 and 3 were admitted into the record.

**ISSUE:**

Was the claimant discharged for disqualifying job-related misconduct?

**FINDINGS OF FACT:**

Having reviewed all of the evidence in the record, the administrative law judge finds:

The claimant was employed full-time as an executive chef for the employer, Luther Care Services, from March 31, 2020, and was separated from employment on October 22, 2020, when he was discharged.

On August 13, 2020, the claimant received his 90-day performance review. In nearly every category, Dietary Manager Kris Gilman expressed her optimism about the claimant's performance and professionalism. In the areas of the performance review Ms. Gilman expressed criticism, she expressed this criticism generally to the whole operation or with the conclusion that the claimant's changes had not yet changed the culture of his team. The employer provided a copy of the claimant's 90-day performance review. (Exhibit 3)

After the claimant received his 90-day performance review, his performance fell considerably.

On September 29, 2020, Ms. Gilman outlined her dissatisfaction with seven different areas of the claimant's on a written warning. First, she observed he was not ordering sufficient food and

supplies. Second, she noted kitchen audits regarding cleanliness were not being performed. Third, she said the claimant had not performed staff training as he was supposed to by October 30, 2020. Fourth, she observed the claimant was not conducting regular meetings with staff. Fifth, she noted that the claimant did not have the confidence from peer departments. Sixth, the claimant had not developed a different menu for the fall / winter seasons yet despite it being due on October 19, 2020. Finally, Ms. Gilman reminded the claimant that he needed to keep his staff apprised of any changes to his schedule. Ms. Gilman gave the overall impression the claimant had stepped back from his duties in the kitchen. The employer provided a copy of the claimant's written warning. (Exhibit 3)

On October 5, 2020, the claimant informed his staff that they would have daily meetings as he was instructed to do in his September 29, 2020 written warning. A morning meeting was conducted on that day, but the claimant did not conduct any additional meetings after that date. (Exhibit 1)

On October 9, 2020, Ms. Gilman discovered the kitchen did not have the proper amount of food supplies. It also determined the claimant had not been rotating products. (Exhibit 1)

On October 16, 2020, Ms. Gilman observed the claimant had ordered and improperly rotated vegetables which led to considerable waste. She also observed he had not ordered enough trash bags. Earlier that day, the claimant promised to be at the employer's premises to unload a truck within 20 minutes of it arriving. He did not arrive until 11:00 a.m. (Exhibit 1)

On October 19, 2020, Ms. Gilman determined the claimant had not conducted any kitchen audits as instructed in his written warning. When questioned about the records, the claimant admitted he had not performed the audits. This placed the employer's compliance at risk. (Exhibit 1)

On October 19, 2020 and October 20, 2020, the claimant was the chef on duty. Breakfast was not set up for a peer department. This resulted in many residents not receiving a meal that day. Ms. Gilman asked the claimant if was doing anything to address the situation. The claimant said he did not believe he had to do anything. These incidents in particular caused Ms. Gilman to decide the claimant's performance was too poor. (Exhibit 1)

As of October 21, 2020, the claimant had not developed the winter dining menu nor had he provided training to his staff as instructed on his written warning. (Exhibit 1)

On October 22, 2020, Ms. Gilman terminated the claimant's employment. The employer provided a copy of the termination notice she issued to the claimant. The termination gave examples of continued performance problems the claimant had in the month of October 2020, under each of the seven areas listed on the written warning he received on September 29, 2020. These infractions are outlined above in the findings of fact. (Exhibit 1)

The claimant filed for unemployment insurance benefits with an effective date of March 15, 2020. His weekly benefit amount was determined to be $369.00. The claimant received benefits of $369.00 per week from October 31, 2020, to the week ending March 13, 2021. This is a total of $7,380.00 in state unemployment insurance benefits after the separation from employment.

The claimant participated in fact finding. A representative from the employer was not on the line. The Iowa Workforce Development representative told the claimant they would call the employer

on another line. Ms. Gilman and Ms. Anderson did not participate at fact finding. The employer did not have any record it received notice of fact finding.

**REASONING AND CONCLUSIONS OF LAW:**

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment due to job-related misconduct.

Iowa Code section 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.

871 IAC 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 Department of Job Service*, 275 N.W.2d 445, 448 (Iowa 1979).

The employer has the burden of proof in establishing disqualifying job misconduct. *Cosper v. Iowa Dep't of Job Serv.*, 321 N.W.2d 6 (Iowa 1982). The issue is not whether the employer made a correct decision in separating claimant, but whether the claimant is entitled to unemployment insurance benefits. *Infante v. Iowa Dep't of Job Serv.*, 364 N.W.2d 262 (Iowa Ct. App. 1984). Misconduct must be "substantial" to warrant a denial of job insurance benefits. *Newman v. Iowa Dep't of Job Serv.*, 351 N.W.2d 806 (Iowa Ct. App. 1984). Poor work performance is not misconduct in the absence of evidence of intent. *Miller v. Emp't Appeal Bd.*, 423 N.W.2d 211 (Iowa Ct. App. 1988). The Iowa Court of Appeals found substantial evidence

of misconduct in testimony that the claimant worked slower than he was capable of working and would temporarily and briefly improve following oral reprimands. *Sellers v. Emp't Appeal Bd.*, 531 N.W.2d 645 (Iowa Ct. App. 1995).

In this case, the claimant performed within the employer's expectations for the first six months that he was on the job. After receiving his 90-day performance review, the claimant's performance suffered significantly. On September 29, 2020, Ms. Gilman issued the claimant with a written warning outlining concerns with seven different areas of his performance. Despite these warnings, claimant continued to engage in those areas. These performance concerns were not due to the claimant's lack of ability or incapacity. Instead, the poor performance shows a substantial disregard to his duties as a chef. This is disqualifying misconduct.

The next issue is whether claimant has been overpaid benefits. Iowa Code § 96.3(7)a-b, as amended in 2008, provides:

> 7. Recovery of overpayment of benefits.
>
> a. If an individual receives benefits for which the individual is subsequently determined to be ineligible, even though the individual acts in good faith and is not otherwise at fault, the benefits shall be recovered. The department in its discretion may recover the overpayment of benefits either by having a sum equal to the overpayment deducted from any future benefits payable to the individual or by having the individual pay to the department a sum equal to the overpayment.
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> b. (1) (a) If the department determines that an overpayment has been made, the charge for the overpayment against the employer's account shall be removed and the account shall be credited with an amount equal to the overpayment from the unemployment compensation trust fund and this credit shall include both contributory and reimbursable employers, notwithstanding section 96.8, subsection 5. The employer shall not be relieved of charges if benefits are paid because the employer or an agent of the employer failed to respond timely or adequately to the department's request for information relating to the payment of benefits. This prohibition against relief of charges shall apply to both contributory and reimbursable employers.
>
> (b) However, provided the benefits were not received as the result of fraud or willful misrepresentation by the individual, benefits shall not be recovered from an individual if the employer did not participate in the initial determination to award benefits pursuant to section 96.6, subsection 2, and an overpayment occurred because of a subsequent reversal on appeal regarding the issue of the individual's separation from employment.
>
> (2) An accounting firm, agent, unemployment insurance accounting firm, or other entity that represents an employer in unemployment claim matters and demonstrates a continuous pattern of failing to participate in the initial determinations to award benefits, as determined and defined by rule by the department, shall be denied permission by the department to represent any employers in unemployment insurance matters. This subparagraph does not apply to attorneys or counselors admitted to practice in the courts of this state pursuant to section 602.10101.

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.

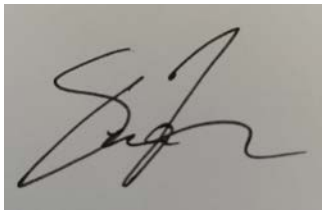
Because the claimant's separation was disqualifying, benefits were paid to which he was not entitled. The unemployment insurance law provides that benefits must be recovered from a claimant who receives benefits and is later determined to be ineligible for benefits, even though the claimant acted in 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. The benefits were not received due to any fraud or willful misrepresentation by claimant. Additionally, the employer did not participate in the fact-finding interview. Thus, claimant is not obligated to repay to the agency the benefits he received.

The law also states that an employer is to be charged if "the employer failed to respond timely or adequately to the department's request for information relating to the payment of benefits. . ." Iowa Code § 96.3(7)(b)(1)(a). Here, the employer had no notice of a fact-finding interview. By not giving notice to the employer, the employer did not have an opportunity to provide a valid telephone number to the fact-finder. Benefits were paid, but not because the employer failed to respond timely or adequately to the agency's request for information relating to the payment of benefits. Instead, benefits were paid because employer did not receive a call at a correct number from the agency. Employer thus cannot be charged. Since neither party is to be charged then the overpayment is absorbed by the fund.

**DECISION:**

The February 8, 2021, (reference 01) unemployment insurance 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 been overpaid unemployment insurance benefits in the amount of $7,380.00 but is not obligated to repay the agency those benefits. The employer did not participate in the fact-finding interview due to no fault of its own and its account shall not be charged. Rather, the overpayment should be charged to the fund.



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August 30, 2021
Decision Dated and Mailed

smn/scn