IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

CHRIS CUNDIFF
Claimant

DES MOINES IND COMMUNITY SCH DIST
Employer

APPEAL NO: 15A-UI-10660-JE-T

ADMINISTRATIVE LAW JUDGE DECISION

OC: 08/30/15
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 September 16, 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 October 7, 2015. The claimant participated in the hearing. Rhonda Wagoner, Benefits Specialist; Kevin Biggs, Principal of Roosevelt High School; and Brett Zeller, Internal Auditor for the Des Moines Public Schools participated in the hearing on behalf of the employer. Employer's Exhibits D through H 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 teacher/girls' basketball and soccer coach and assistant boys golf coach for Roosevelt High School from August 16, 2007 to June 2, 2015. The claimant resigned his position after a human resources representative told his union representative the employer was pushing for termination and the union representative told the claimant if he was discharged he would not be able to find another teaching job in Iowa.

In mid-April 2015, a parent contacted the Roosevelt activities office and asked several questions about a check she had written to support a girls' basketball free throw contest marathon held in November 2014. She wanted to know where the money went, where it was deposited and wanted to see evidence it was properly deposited with the bookkeeper. The activities director notified Principal Kevin Biggs and when the money could not be located Mr. Biggs called an internal auditor for the school district, Brett Zeller, and asked him to conduct an audit and investigation.

Mr. Zeller met with school officials April 23, 2015, to discuss its concerns. The parent who made the initial inquiry had a copy of her check and it was not deposited in the activities

department account or any school bank account. Mr. Zeller then compiled a list of questions for the claimant to see if there were any further concerns that should be addressed. When an auditor conducts an investigation he asks the subject of the investigation to open his school email account so he can look for any vendor emails and any outstanding invoices mailed to the subject that do not go to the district. Mr. Zeller noted the claimant had several emails relating to sports betting pools which violated the school district's computer policy prohibiting the personal use of email and any gambling on school property.

On May 13, 2015, Mr. Zeller met with the claimant and his union representative and asked the claimant questions related to where the check in question was located. Mr. Zeller learned the claimant had opened a separate personal bank account in the name of the claimant and "Rough Riders Basketball Camp/Rough Riders Basketball" June 10, 2013. The account was open and active until the claimant closed the account May 12, 2015, on the advice of his union representative, the day before the claimant's meeting with Mr. Zeller (Employer's Exhibit D). The employer's policy, Standard Two, prohibits coaches from opening outside personal bank accounts for the purpose of depositing camp or fundraising money (Employer's Exhibit H).

The claimant was paid to conduct a girls' basketball camp in June 2014 for children in grades three through nine. The clinic was put on by the Des Moines Public Schools (DMPS) Community Education Office and participants were expected to register for the camp online or with the DMPS Community Education Office to allow for records to be kept of who was taking part in the camp and that their fees were deposited in the correct account. If a parent did not register online he or she was to turn the registration and payment of the fee in to the instructor who was expected to forward those registrations and funds to the DMPS Community Education Office. On June 9 and June 10, 2014, the claimant deposited $365.00 and $65.00 into his personal outside bank account rather than forwarding that money to the school district's activities office. The claimant also failed to send some camp participant's registrations to the DMPS Community Education program. On June 10, 2014, the claimant did provide the registration for two of seven students participating in the camp to the community education department with a cash payment of $130.00. One parent, who paid for two students to participate in the camp, paid the claimant and gave him the registration but neither the money nor registration was forwarded to the school district. The audit noted, however, that the claimant withdrew $130.00 and then $300.00 from his account June 9, 2014. He explained to the auditor that the money was for cash and gift card giveaways at the camp used as prize money (Employer's Exhibit G). The audit department contacted one of the parents whose check was deposited in the claimant's personal account and she stated her daughters did attend the basketball camp conducted by the claimant. The employer subsequently learned through the attorney of a volunteer coach at the camp that three other students whose parents sent checks to the claimant did attend the camp sponsored by the DMPS Community Education program but the claimant did not send their registrations to DMPS Community Education. The employer's policy and Iowa Department of Education prohibit providing cash or gift cards to students under any circumstances.

The employer conducted a training session for coaches and activities personnel in August 2014. The training discussed how to handle funds from camps and booster clubs and stressed that checks made payable to the district must be paid to the district's account and if the check is intended for the booster club the donor needs to write a new check. The training also discussed that if a coach wished to hold a camp and keep the proceeds he needed to rent the facility from the school district. Otherwise, the coach is paid for his time by the district as the claimant was paid for conducting the June 2014 girls' basketball camp by the employer.

During the audit the employer discovered the claimant had deposited three checks made out to "Roosevelt Girls Basketball" into his personal account in November and December 2014 (Employer's Exhibit F). The claimant conducted a free throw shooting marathon fundraiser for the girls' basketball team in November 2014 so they could purchase shooting shirts and travel suits. The claimant ordered both items but failed to pay the $2,100.00 for the shooting shirts because there was not enough money raised during the free throw marathon. Consequently, when Mr. Zeller discovered the invoices for the shooting shirts in the claimant's school email account the school district had to pay for them. The claimant also made deposits from checks made out to Roosevelt Girls Basketball to his personal bank account in the amount of $277.20 in November and December 2014.

Upon receiving this information Mr. Zeller met with the claimant again on June 2, 2015. A human resources representative told the claimant's union representative the employer planned to "push for termination" and the union representative told the claimant it would be very difficult if not impossible for him to secure another teaching job in Iowa if his employment was terminated. Consequently, the claimant submitted his resignation effective June 2, 2015, in lieu of discharge.

The claimant has claimed and received unemployment insurance benefits in the amount of $2,062.00 for the five weeks ending October 3, 2015.

The employer did not participate in the fact-finding interview through personal or written statements.

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 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.

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).

While the employer maintains the claimant voluntarily quit his job and it has not yet completed its investigation of his activities, the claimant believed his employment was about to be terminated and he voluntarily quit as a direct result of that belief. A human resources representative told the claimant's union representative the employer was "pushing" for termination. The claimant's union representative advised him that it would be difficult for him to obtain another teaching job in the state if his employment was terminated. Consequently, armed with that information and believing he was about to be discharged, the claimant voluntarily quit June 2, 2015. Therefore, this case will be analyzed as a termination from employment.

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 made several poor decisions prior to the August 2014 training session regarding financial issues affecting coaches and activities personnel. He opened a separate bank account listing himself and the "Rough Riders Basketball Camp/Rough Riders Basketball" on the account and co-mingled funds for the camp with that of his youth basketball team. He also disbursed cash payments and gift cards to players at his basketball camp as awards and paid himself for the camp at the same time he was being paid for that activity by the school district. Both of those acts violated the employer's policies and procedures and the cash/gift card handouts violated the State Department of Education policy as well.

Given that those issues occurred before the August 2014 training, however, the administrative law judge could overlook those specific situations had the claimant stopped those practices immediately upon completion of the training session. Instead, the claimant received at least three checks made out to Roosevelt Girls Basketball in November and December 2014 and proceeded to deposit those checks in his personal account, again co-mingling money from the free throw shooting marathon that should have gone to the school district for the shooting shirts with that of his youth basketball team. The claimant also maintained his separate account until May 12, 2015, when his union representative advised him to close it the day before their meeting with Mr. Zeller.

The claimant might argue his actions were not a current act of misconduct as is required by Iowa law before benefits will be denied. This was an ongoing act, however, as the claimant maintained the separate, personal checking account until May 12, 2015, and that account contained co-mingled funds. The employer first became aware there might be an issue in

mid-April when a parent demanded to know where her check was deposited as well as an accounting. The Roosevelt principal met with Mr. Zeller April 23, 2015, and after investigating the situation Mr. Zeller met with the claimant for the first time May 13, 2015. Mr. Zeller had prepared a number of questions for the claimant and after that meeting Mr. Zeller continued his investigation and met with the claimant for additional questioning June 2, 2015. At that time the claimant resigned his position, believing his employment was about to be terminated. The employer's investigation remains ongoing and involves the State Auditor's office. Because the employer acted immediately upon learning of the potential issues involved and was still in the process of investigating and determining the magnitude of the problem in combination with the fact the claimant did not close his personal account with co-mingled funds until May 12, 2015, the administrative law judge finds the claimant's conduct was a current act of misconduct as that term is defined by Iowa law.

While the administrative law judge is not convinced the claimant set out to intentionally take money from the school district that was the effect of his actions. Even if he were simply careless he was careless repeatedly and the fact remains that following the training in August 2014 the claimant either knew or should have known that his actions were unacceptable and a violation of the school district's policies and procedures. The claimant has not established a good-cause reason for co-mingling the funds for the Roosevelt girls' basketball program with that of his youth basketball team in a personal bank account.

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.

871 IAC 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 claimant did not receive benefits due to fraud or willful misrepresentation and employer failed to participate in the finding interview, the claimant is not required to repay the overpayment and the employer remains subject to charge for the overpaid benefits.

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. There is no evidence the claimant received benefits due to fraud or willful misrepresentation. However, the employer did not participate in the fact-finding interview personally or through written statements. Consequently, the claimant's overpayment of benefits is waived and his overpayment of benefits in the amount of $2,062.00 to date, shall be charged to the employer's account.

DECISION:

The September 16, 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 not participate in the fact-finding interview within the meaning of the law. Therefore, the claimant's overpayment of benefits in the amount of $2,062.00 to date is waived and shall be charged to the employer's account.

_____
Julie Elder
Administrative Law Judge

_____
Decision Dated and Mailed

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