IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

SUZANNE RENINGER
Claimant

HARVEYS BR MANAGEMENT CO INC
Employer

APPEAL NO: 16A-UI-05018-JE-T

ADMINISTRATIVE LAW JUDGE DECISION

OC: 04/03/16
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 22, 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 13, 2016. The claimant participated in the hearing with her husband/witness, Jim Reninger. Chris Von Minden, EVS Supervisor; Vicki Broussard, Senior Human Resources Generalist; and Caroline Semer, Employer Representative, participated in the hearing on behalf of the employer.

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 lead environmental services employee for Harvey's BR Management from December 9, 2015 to April 7, 2016. She was discharged for failing to follow instruction after being warned.

The claimant and EVS Supervisor Chris Von Minden worked together on the weekly schedule of what needed to be done. Each night the specific assignments of who was to clean what area were written on a whiteboard. If something unusual happens after the tasks are assigned on the whiteboard the employees will be verbally told of what needed to be done. On April 2, 2016, Mr. Von Minden emailed the claimant to make sure the Whiskey Roadhouse room was cleaned over the weekend and throughout the week because the employer was hosting a poker tournament. The claimant had the choice of cleaning the room herself or assigning the task to another employee. On April 3, 2016, Mr. Von Minden saw the claimant and verbally instructed her to insure the room was scheduled and cleaned. Mr. Von Minden was off work until April 5, 2016, and when he returned he found another employee cleaning the room. That employee indicated he noticed the room needed attention and cleaned it. When questioned by Mr. Von Minden the employee stated the claimant did not instruct him to clean the room but he took it upon himself after observing the room needed to be cleaned.

On February 5, 2016, the claimant received a documented verbal warning regarding the project of cleaning the chandeliers. That task needed to be completed by a certain time and Mr. Von Minden sent the claimant an email and verbally told her to make sure the project was completed but the claimant failed to do so. She never assigned the task to the employees and her inaction put that project behind schedule. The claimant refused to sign the warning.

On March 1, 2016, the claimant received a written warning after the shift was shorthanded February 25, 2016, and she scheduled one employee with a workload that was impossible to complete. Mr. Von Minden learned of the situation after the employee complained to another lead about her workload. Mr. Von Minden then instructed the claimant to complete the workload she assigned to the employee by herself but instead of doing so she delegated several of those duties to another employee in direct violation of Mr. Von Minden's instructions.

On March 18, 2016, the claimant received a final written warning after Mr. Von Minden spent a few hours with the claimant on the employer's "get me" guide, which is used by the employer to help managers better connect with their crew and learn how best to work together. The program has managers ask questions of employees such as listing three fun facts about themselves; how best do the employees learn new tasks; how do they like to be recognized; what did they like to do; and their career goals and aspirations. After completing the guide with the claimant Mr. Von Minden instructed the claimant to perform the exercise with all the employees on her shift and follow up with Mr. Von Minden. When Mr. Von Minden met with the claimant she indicated she had employees do the guide, asking and answering the questions, with each other rather than with the claimant. The claimant's actions "completely defeated the purpose" of the manager learning about her employees and vice versa.

Mr. Von Minden also received complaints from employees that the claimant was "not around" and was not helping them clean. Mr. Von Minden also noted that when he came in early and asked the claimant what had been done on her shift she could not tell him and would say she needed to call the guys on the crew to find out what they did. When the claimant began her employment she provided detailed recaps and was involved in planning new projects until March 2016. When Mr. Von Minden would ask her specific questions she could not answer them.

Following the Whiskey Room incident Mr. Von Minden interviewed the employees she supervised and learned she never scheduled the cleaning of the room Sunday, Monday or Tuesday, and three employees wrote statements to that effect.

After reviewing the claimant's pattern of failing to follow Mr. Von Linden's clear instructions, the employer terminated the claimant's employment April 7, 2016.

The claimant has claimed and received unemployment insurance benefits in the amount of $1,036.00 for the five weeks ending May 7, 2016.

The employer personally participated in the fact-finding interview through the statements of Chris Von Minden, EVS Supervisor and Vicki Broussard, Senior Human Resources Generalist.

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).

Mr. Von Minden was very specific in his expectations and directions to the claimant but she repeatedly failed to do as he instructed, instead choosing to do what she wanted rather than what he told her to do as her supervisor. The employer issued her a documented verbal warning, written warning, and a final written warning prior to the termination. All the warnings

were of a similar nature and involved the claimant's failure to do as Mr. Von Minden told her. Additionally, when Mr. Von Minden talked to her about the accumulating incidents she refused to accept responsibility and accused him of harassment. The human resources department investigated her allegation but concluded Mr. Von Minden was simply managing her, not harassing her.

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 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.

Because the employer participated in the fact-finding interview, the claimant is required to repay the overpayment and the employer will not be charged for benefits paid.

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 Chris Von Minden, EVS Supervisor and Vicki Broussard, Senior Human Resources Generalist. Consequently, the claimant's overpayment of benefits cannot be waived and she is overpaid benefits in the amount of $1,036.00 for the five weeks ending May 7, 2016.

DECISION:

The April 22, 2016, reference 01, decision is reversed. The claimant was discharged from employment due to job-related misconduct. Benefits are withheld until such time as she has worked in and been paid wages for insured work equal to ten times her weekly benefit amount, provided she 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 $1,036.00 for the five weeks ending May 7, 2016.

_____
Julie Elder
Administrative Law Judge

_____
Decision Dated and Mailed

je/pjs