IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

CHRISTINE H REX
Claimant

WAL-MART STORES INC
Employer

APPEAL NO: 14A-UI-10102-ET

ADMINISTRATIVE LAW JUDGE DECISION

OC: 08/24/14
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 17, 2014, 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 17, 2014. The claimant participated in the hearing. Brandi Carlton, Fresh Assistant Manager, 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 part-time café associate for Wal-Mart (Sam's Club) from September 25, 2013 to August 29, 2014. She was discharged for accumulating her fourth written warning in less than four months.

On May 5, 2014 the claimant received a first written warning for accumulating two member (customer) complaints for poor member services. Customers reported the claimant was engaged in a personal conversation with another member for a long period of time (20 minutes) and failed to assist other members while there were lines in the café. Employees are not required to sign first written warnings. The claimant testified she disagreed with that warning.

On May 23, 2014 the claimant received a second written warning for job performance after she told a member if he 'thought he could do her job so easily he could come back and do it himself.' The claimant signed the written warning and wrote an action plan which stated she "needed to speak nicer to the members." The second warning stated that the consequences of further disciplinary issues were a third written warning, up to and including termination.

On June 1, 2014 the claimant received a third written warning for failing to take break and meal periods. On May 24, 2014 the claimant did not take her required lunch break after working six hours and six minutes. She had five other meal exceptions during the preceding six month period where she worked over six hours without taking a meal break or failed to take the required full 30-minute break, in violation of federal law. The claimant testified she believed it was her manager's responsibility to make sure she took her required lunch break. The warning stated that the next level of disciplinary action would be termination.

On August 24, 2014 the claimant failed to take the café cook temperatures as required. Employees must check the temperature of three items being cooked and three items in the hot holding cases as part of the employer's Spark program dealing with proper food handling guidelines. The temperature of food being cooked, and food in the hot holding cases, must be taken three times between 11:00 a.m. and 3:00 p.m. The claimant did not do so. She testified she rarely performed that required task because she could not get her password to work for the electronic device that gauges the temperatures and she was doing other tasks. She stated everyone was supposed to do it and she knew others were taking the temperatures of the food so she worked on other jobs within the café. She testified checking the food temperature was not a priority throughout her tenure with the employer.

The employer relies on peer training for the Spark proper food handling guidelines and there is no formal training or training documents regarding checking the food temperatures. The employer talked to the claimant in the past about failing to follow the Spark program and had observed the claimant perform the temperature checks routinely in the past but the claimant disputes that testimony.

The employer terminated the claimant's employment August 29, 2014 for the food handling violation and for accumulating her fourth written warning in less than one year.

The claimant has claimed and received unemployment insurance benefits in the amount of $1127.00 since her separation from this employer.

The employer did not participate in the fact-finding interview in this case.

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:
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> 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.

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). The claimant received written warnings after two customer's complained she neglected her job duties while having a personal conversation with another customer while the café line grew, told another customer he could come back and do her job if he thought it was easy, and repeatedly failed to take her lunch break as required by federal law. Under the employer's policy, four written warnings within a 12-month period is grounds for termination.

The last incident involved the claimant's failure to take required food temperatures under the employer's Spark program which insures café employees' compliance with food handling procedures and guidelines. The claimant admits she rarely took the food temperatures even though she was aware she was required to do so. She said her password did not work but she did not take sufficient steps to correct that problem as was her responsibility. While the claimant denies knowing her job was in jeopardy, it is not reasonable to believe an employee can receive an unlimited number of written warnings without a resulting discharge at some point. The claimant's warnings were received in a period of less than four months and she knew, or should have known, that her job was in jeopardy as a result of those warnings. All of the warnings were issued about behaviors the claimant had complete control over, from talking to a customer while the line lengthened at the café, to speaking disrespectfully to a customer, to failing to take the required meal breaks. Even if the claimant previously worked as an independent contractor, she knew she was no longer working in that capacity and had a responsibility to follow the employer's policies and procedures, including, and especially, the safe food handling procedures.

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.
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> (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.
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> (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 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, and the employer failed to participate in the fact-finding interview. The documents it submitted were not sufficient to meet the standard of participation as that term is defined. Consequently, the claimant's overpayment of benefits is waived and the employer's account shall be charged $1127.00, the amount of benefits the claimant has received to date.

DECISION:

The September 17, 2014, 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. However, the employer did not participate in the fact-finding interview. Therefore, the claimant's overpayment of benefits is waived and the benefits she has received to date in the amount of $1127.00 will be charged to the employer's account.

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Julie Elder
Administrative Law Judge

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Decision Dated and Mailed

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