IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

JAMAAL LONG
Claimant

G & K SERVICES COMPANY
Employer

APPEAL NO: 13A-UI-09462-ET

ADMINISTRATIVE LAW JUDGE DECISION

OC: 12/09/12
Claimant: Respondent (2)

Section 96.5-2-a – Discharge/Misconduct
Section 96.3-7 and 96.3-7-a. b – Recovery of Benefit Overpayment

STATEMENT OF THE CASE:

The employer filed a timely appeal from the August 5, 2013, reference 08, 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 September 16, 2013. The claimant participated in the hearing. Brian Christner, Plant Manager; Michael Ryan, Maintenance Manager; Marie Smith, Employee Relations Manager; and Brandi Henry, TALX Representative, participated in the hearing as witnesses 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 janitor for G & K Services Company from February 12, 2013 to July 11, 2013. He was discharged for performance and attendance issues.

On May 1 and May 30, 2013, the claimant received verbal warnings for attendance and was told he needed to arrive for work and be in his position with his personal protective equipment on by his shift start time at 2:30 p.m. On June 18, 2013, the claimant received a written warning for attendance because he was tardy on approximately four dates in June 10, 2013, after receiving the verbal warning less than three weeks earlier. The employer forgave two of his June 2013 incidents of tardiness because he was covering for another employee who was on a vacation. The claimant's tardiness improved dramatically after the warning.

On July 2, 2013, the employer gave the claimant's department and others a "hit list" of tasks needing attention by July 8, 2013, because the corporate office was visiting the plant July 9, 2013. The employer gave the claimant a reminder list of items that still needed to be completed, including many details remaining from the first list not done by the claimant, before July 8, 2013. The employer made a night shift schedule giving guidance to the claimant on how to get everything done. The schedule was based on the amount of time it took past employees in the claimant's position to complete the same type of task. The employer included a schedule of breaks and lunch periods, which were usually done on the honor system, because the

claimant's breaks were exceeding the time allowed, and he was also cleaning the break room and men's restroom during other employees' break times when those areas were most busy. Despite the schedule, the claimant was unable to complete most of the tasks required. The claimant's failure to meet the employer's expectations was impacting his team and the employer was forced to assign some of his duties to the Maintenance Department. The employer emphasized that the claimant needed to give his immediate attention to improve his performance.

The employer issued the claimant a final written warning July 9, 2013, stating the claimant's duties needed to be completed in a timely manner as the claimant was not successfully finishing his work in the time allotted based on how long it had taken other employees in that position to do the work after being employed the same length of time as the claimant. The employer indicated the claimant failed to do his regular duties such as removing trash and debris from outside the plant, replacing light bulbs and maintaining cupboards and sinks in the break room. The employer told the claimant he needed to take "ownership" of his job and needed to take the "initiative" to get tasks done without having someone directly supervise him and tell him what to do.

On July 10, 2013, the claimant hit and damaged a chain link gate while driving a forklift. He did not report the incident to the employer, which left the employer's security vulnerable. The claimant had attended on-going training and was aware of the written policy requiring employees to inform supervisory personnel of any accidents or suspected hazards. On July 11, 2013, the employer met with the claimant about the incident and the claimant admitted hitting and damaging the gate after the employer brought it up in the meeting. The employer determined the claimant was negligent because he knew or should have known he had to report the situation to the employer as it was a safety issue. Additionally, because this was a work-related accident, and the employer had many reports of the claimant seeming to be under the influence, it required him to take a post-accident drug test. The employer took the claimant to its after-hours testing facility but the claimant could not produce enough urine for the lab to test. He was given water and time to be able to provide the sample but could still not do so and consequently the employer had to consider the test positive. After considering the claimant's attendance, failure to meet the employer's work expectations, failure to report hitting the gate and damaging it, and failing the drug test, the employer made the decision to terminate the claimant's employment July 11, 2013.

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

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.
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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.

The claimant was trained on how to perform the essential functions of his job and was given numerous verbal coaching sessions and a verbal warning, a written warning and a final written warning before his employment was terminated. Additionally, he had tardiness issues, and received coaching sessions before a formal verbal warning was issued, even though the employer disregarded two of the four incidents of tardiness that occurred in June 2013.

On July 2, 2013, the employer gave the claimant and his department several tasks to complete by July 8, 2013, because corporate was visiting the plant July 9, 2013, but the claimant failed to complete numerous projects listed by the employer in preparation for the corporate visit, even though the employer prompted him again on more than one occasion. The employer allowed him the same amount of time required by previous janitors at the same stage of their employment as the claimant but even though the tasks were not complicated the claimant simply failed to do what was needed even though he was given adequate time to do so. The claimant was also observed taking excessively long breaks and the employer was forced to schedule his lunch and break periods to insure he would comply with the allowed length of lunch and break times and then was cleaning the break room and lunch room while other employees were taking their breaks and needed to use both of those facilities.

The day after receiving the final written warning the claimant hit and damaged a gate at the plant while driving a forklift and neglected to report the situation to the employer, even though the damage to the gate posed a security threat to the facility. The claimant knew, or should have known, he was required to notify the employer about that incident but chose not to follow his training on the employer's policy, which covered what to do in that type of situation. When the employer learned of the accident the following day it took the claimant for a post-accident drug screen but the claimant did not produce enough urine to be tested and his test was therefore deemed positive.

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.

The remaining issues are whether the employer participated in the fact-finding interview and whether the claimant shall be required to repay the unemployment insurance benefits he has received to date or if the repayment amount shall be waived and the employer's account charged.

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.

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.
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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.

In this case, the employer's TALX representative testified she sent her name and number to the fact finder prior to the August 2, 2013, fact-finding interview but the fact finder did not call her. The fact-finder's notes indicate a call was placed to her at 2:43 p.m. on August 2, 2013. The first line of the letter the employer sent states, "The company does not want to participate in this fact-finding interview." It did not participate personally in the interview and was not available at the time of the phone call and therefore its account is chargeable. It did provide the claimant's hire and separation dates and that he was separated for, "Violation of safety rules." That cannot be considered "meaningful participation" under the meaning of the law. There were no details provided that would allow the fact finder to render an informed decision. Consequently, the administrative law judge concludes the employer did not participate in the fact-finding interview and the employer's account is chargeable.

DECISION:

The August 5, 2013, reference 08, 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 employer did not meaningfully participate in the fact-finding hearing and therefore the claimant's overpayment of benefits is waived and the employer's account shall be charged.

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Julie Elder
Administrative Law Judge

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Decision Dated and Mailed

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