IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

ROBERT A ZARN
Claimant

CENTRAL IOWA ELECTRONIC CIGARETTE
Employer

APPEAL NO: 18A-UI-09307-JC-T

ADMINISTRATIVE LAW JUDGE DECISION

OC: 08/12/18
Claimant: Respondent (2)

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Code § 96.3(7) – Recovery of Benefit Overpayment
Iowa Admin. Code r. 871-24.10 – Employer/Representative Participation Fact-finding Interview

STATEMENT OF THE CASE:

The employer filed an appeal from the September 4, 2018, (reference 01) unemployment insurance decision that allowed benefits. The parties were properly notified about the hearing. A telephone hearing was held on September 25, 2018. The claimant participated personally. The employer participated through Monica Reynolds, vice president. Nathan Walker, regional manager, also testified. Department Exhibit A (Fact-finding documents) and Employer Exhibit 1 was received into evidence. The administrative law judge took official notice of the administrative records including the fact-finding documents. Based on the evidence, the arguments presented, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUES:

Was the claimant discharged for disqualifying job-related misconduct?
Has the claimant been overpaid any unemployment insurance benefits, and if so, can the repayment of those benefits to the agency be waived?
Can any charges to the employer's account be waived?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed full-time as a store manager and was separated from employment on August 17, 2018, when he was discharged for "conduct unbecoming of a manager". Prior to separation, he was unaware his job was in jeopardy.

When the claimant was hired, he was trained on employer rules and procedures. In addition, as a store manager, the claimant was expected to enforce policies amongst employees. Specifically, the employer had policies during the claimant's employment including: Disciplinary action may be based on, but not limited to any of the following reasons: …unauthorized use or abuse of company property… conduct which adversely affects the employee's job performance or CIEC/CIV…" (Department Exhibit A).

In addition, the employer had an extensive social media policy which prohibits staff from posting defamatory comments or those which could create a hostile work environment, as well as:

> i. Social media use shouldn't interfere with staff's responsibilities at CIEC. CIEC's computer systems are to be used for business purposes only. When using CIEC's computer systems use of social media for business purposes is allowed but personal use of social media networks or personal online content is discouraged and could result in disciplinary action up to and including discharge
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> j. Subject to applicable law, after-hours online activity that violates CIEC's policies may subject an employee to disciplinary action up to and including discharge (Department exhibit A.)

On July 22, 2018, the employer's Facebook page received a customer review which indicated that the manager, Rob, (the claimant) was rude and disrespectful to staff (Department Exhibit A). The claimant was not disciplined for the comments made within the review. On July 22, 2018, the claimant's girlfriend, using a fake name/profile, posted a review on the employer's website as well, to counter the review against the claimant (Department Exhibit A). The comments contained within the review were not just positive about the claimant but also negative against the claimant's co-worker, D.C. (The post was later deleted.) It was common knowledge at the store that the claimant and D.C. did not get along well.

The claimant stated he attempted to discourage his girlfriend from making the post, and had called her to tell her not to do it. He could not cite to the date or time or present phone records that reflected a call was made to her prior to the post. Once the post was made, the claimant did not take any steps to ask she remove it or alternately, self-report the incident to the employer and let them know he had discouraged his girlfriend from creating such a post.

Instead, on August 14, 2018, while Mr. Walker was performing a review of the claimant's store, he saw on the store issued laptop, that the claimant had logged onto his personal Facebook page. Personal use of social media while clocked in is against employer policy. Pulled up on the Facebook page for Mr. Walker to see was an exchange of messages between the claimant and his girlfriend about the post she had made:

Jessica (girlfriend): LMAO. My review is done. Love you hun.

Claimant: Love you too.

Jessica: You read it?

Claimant: I just got home

Jessica: Ah. I'm still waiting on supper. Got moms (sp) necklace done though.

Claimant: I just read it. Part of me likes what you said about dc. But I think it's to (sp) much like the bad review about me. I don't know how corporate will take it. Love you vary (sp) much.

Jessica: Who knows. Like I said… Fake profile completely set to private so they won't be able to figure out its (sp) me.

Mr. Walker took a screenshot of the posts with his phone and sent it to Ms. Reynolds for investigation. He did not confront the claimant about the posts or use of the employer laptop for

personal use. Upon review of the incident, which began on July 22, 2018 and was discovered through Mr. Walker's store visit on August 14, 2018, the employer discharged the claimant on August 17, 2018.

The administrative record reflects that claimant has received unemployment benefits in the amount of $882.00, since filing a claim with an effective date of August 12, 2018. The administrative record also establishes that the employer did participate in the fact-finding interview or make a witness with direct knowledge available for rebuttal. Monica Reynolds attended.

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, regardless of the source of the individual's wage credits:
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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 disqualification shall continue 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).

It is the duty of the administrative law judge as the trier of fact in this case, to determine the credibility of witnesses, weigh the evidence and decide the facts in issue. *Arndt v. City of LeClaire*, 728 N.W.2d 389, 394-395 (Iowa 2007). The administrative law judge may believe all,

part or none of any witness's testimony. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996). In assessing the credibility of witnesses, the administrative law judge should consider the evidence using his or her own observations, common sense and experience. *Id.* In determining the facts, and deciding what testimony to believe, the fact finder may consider the following factors: whether the testimony is reasonable and consistent with other believable evidence; whether a witness has made inconsistent statements; the witness's appearance, conduct, age, intelligence, memory and knowledge of the facts; and the witness's interest in the trial, their motive, candor, bias and prejudice. *Id*. Assessing the credibility of the witnesses and reliability of the evidence in conjunction with the applicable burden of proof, as shown in the factual conclusions reached in the above-noted findings of fact, the administrative law judge concludes that the employer has satisfied its burden to establish by a preponderance of the evidence that the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law.

The employer has the burden of proof in establishing disqualifying job misconduct. *Cosper v. Iowa Department of Job Service*, 321 N.W.2d 6 (Iowa 1982). The focus is on deliberate, intentional, or culpable acts by the employee. See *Gimbel v. Employment Appeal Board*, 489 N.W.2d 36, 39 (Iowa Ct. App. 1992). Under the definition of misconduct for purposes of unemployment benefit disqualification, the conduct in question must be "work-connected." *Diggs v. Emp't Appeal Bd*., 478 N.W.2d 432(Iowa Ct. App. 1991). The court has concluded that some off-duty conduct can have the requisite element of work connection. *Kleidosty v. Emp't Appeal Bd.*, 482 N.W.2d 416, 418(Iowa 1992). Under similar definitions of misconduct, for an employer to show that the employee's off-duty activities rise to the level of misconduct in connection with the employment, the employer must show by a preponderance of the evidence that the employee's conduct (1)had some nexus with the work; (2) resulted in some harm to the employer's interest, and (3)was conduct which was (a) violative of some code of behavior impliedly contracted between employer and employee, and (b) done with intent or knowledge that the employer's interest would suffer. See also, *Dray v. Director*, 930 S.W.2d 390 (Ark. Ct. App. 1996); *In re Kotrba*, 418 N.W.2d 313 (SD 1988), quoting *Nelson v. Dept of Emp't Security*, 655 P.2d 242 (WA 1982); 76 Am. Jur. 2d, Unemployment Compensation §§ 77–78.

At issue here is essentially two combined incidents related to a review posted on the employer's Facebook page. The first issue on July 17, 2018, occurred while the claimant was off-duty. The claimant, through his girlfriend (who created a fake profile), at a minimum was aware, and possibly encouraged her to ghostwrite a review, posing as a customer, to counter a negative review about the claimant. In doing so, disparaging comments were also made about the claimant's co-worker, D.C. The administrative law judge recognizes the claimant cannot be held responsible for the decisions his girlfriend, a non-employee makes, in terms of posting on social media. The claimant's testimony that he called her to discourage her not to do so was not credible. However, the administrative law judge is persuaded the claimant knew the post would be made and that it was a fake customer post, made to help boost his image. The administrative law judge is persuaded based upon the messages exchanged with his girlfriend that he was an active participant, but for the fact she typed and posted the review. The claimant's girlfriend would have no reasonable reason to post negative comments about D.C. without the claimant sharing with her his dislike.

The administrative law judge is persuaded the claimant's conduct, assisted by his girlfriend, while off-duty, has a reasonable nexus to the workplace. The conduct occurred through posting on the employer's social media page, resulted in a fake review, and also negative comments to be made about D.C. Further, the claimant as a manager would have reasonably been expected to set a positive example for his co-workers, accepting responsibility for negative posts and not attempting to inflate reviews with a fake positive post about him, which was also negative about

his co-worker. The administrative law judge is persuaded the claimant knew or should have known his conduct could result in some harm to the employer or its image.

Later, on August 14, 2018, the claimant accessed his personal Facebook page on the work laptop, while clocked into work, which violated employer policy of using personal social media websites while at the workplace, using employer computers (Department Exhibit A). Consequently, when Mr. Walker was checking employer computers, he saw the series of messages between the claimant and his girlfriend about the Facebook post, which revealed the claimant was aware of the fake review post.

Based on the evidence presented, the administrative law judge is persuaded the claimant knew or should have known his conduct was contrary to the best interests of the employer. The claimant purposefully encouraged or assisted in the creation and of a false review being posted on social media, which was fraudulent, but also disparaged his co-worker. The purpose of the post was to boost the claimant's image after he received a negative review, even though it was not an honest customer review. Based on the evidence presented, the administrative law judge concludes the claimant was discharged for misconduct, even without prior warning. Benefits are denied.

The next issue is whether the claimant has to repay benefits he received.

Iowa Code § 96.3(7)a-b provides:

> 7. Recovery of overpayment of benefits.
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> 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 § 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.
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> (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 § 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 states pursuant to § 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 claimant has been overpaid benefits in the amount of $882. 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 employer will not be charged for benefits if it is determined that it did participate in the fact-finding interview. Iowa Code § 96.3(7), Iowa Admin. Code r. 871-24.10.

In this case, the claimant has received benefits but was not eligible for those benefits. The employer satisfactorily participated in the scheduled fact-finding interview by way of Monica Reynolds. Since the employer did participate in the fact-finding interview, the claimant is obligated to repay the benefits he received and the employer's account shall not be charged.

DECISION:

The September 4, 2018, (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 been overpaid benefits in the amount of $882.00, which must be repaid. The employer's account is relieved of charges.

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Jennifer L. Beckman
Administrative Law Judge

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Decision Dated and Mailed

jlb/scn