IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

LOGAN M MYOTT Claimant **EMBRACE LIFE CHIROPRACTIC LLC** Employer	**APPEAL 20A-UI-00055-CL-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 07/28/19** **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:

On December 30, 2019, the employer filed an appeal from the December 23, 2019, (reference 03) unemployment insurance decision that allowed benefits based on a separation from employment. The parties were properly notified about the hearing. A telephone hearing was held on January 24, 2020. Claimant participated. Employer participated through office manager and co-owner Ariann Corpstein, chiropractic assistant Katie Ahrenholtz, chiropractic assistant Caitlin Kohlhaas, and Sally Drake. Dr. Drew Corpstein observed.

ISSUES:

Was the claimant discharged for disqualifying job-related misconduct?
Has the claimant been overpaid 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: Claimant began working for employer on August 12, 2019. Claimant last worked as a full-time outreach coordinator. Claimant was separated from employment on November 6, 2019, when he was terminated.

As an outreach coordinator, claimant was responsible for setting up for and conducting marketing events where employer tried to sign up new patients. Claimant was expected to generate 30 new patients per month at the events. Claimant was responsible for bringing necessary marketing materials to the events.

Employer has a policy stating that repeated tardiness can result in termination. The policy states that an outreach coordinator is the face and perception of the office and that it is imperative to arrive earlier than the scheduled start time to events. The policy states the

outreach coordinator will be warned in writing if repeatedly tardy and that three incidents of tardiness will result in termination.

Employer also has a policy prohibiting cell phone use during work hours.

Claimant was aware of the policies.

On August 23, 2019, claimant was late to a marketing event because the vendor employer was using to supply food was late in getting the food ready.

On August 28, 2019, claimant was late for a marketing event and the event started late as a result.

On September 7 2019, employer had a marketing stand at a chili cook-off. Claimant was late for the event for personal reasons. Chiropractic assistant Katie Ahrenholtz worked the event with claimant and reported his tardiness to office manager Ariann Corpstein.

On September 9, 2019, Corpstein verbally reprimanded claimant. Corpstein reminded claimant that his timely arrival to these events was imperative as the other employees could not do their jobs and start on time without the marketing materials. Claimant said it would not happen again.

Claimant worked events on September 21 and 22, 2019, with chiropractic assistant Caitlin Kohlhaas. Claimant was late on both days for personal reasons. Kohlhass reported claimant's tardiness to Ariann Corpstein.

On September 23, 2019, Ariann Corpstein spoke with claimant again about his tardiness. Corpstein told claimant it could impact his employment.

On October 28, 2019, claimant was working at a marketing event for employer. A current patient, Sally Drake, approached employer's booth with her friend who was not a current patient and interested in employer's services. Claimant was sitting down and looking at his phone when Drake approached the booth. Claimant seemed disinterested in speaking with Drake and her friend and did not try to market employer's services. Claimant made a poor impression on Drake. Drake reported this to Ariann Corpstein.

Ariann Corpstein confronted claimant about his behavior at the marketing event. Claimant stated that he was sitting down because he was doing paperwork. Later, claimant said he was sitting down because his back hurt.

On October 31, 2019, claimant was late to work because his wife's medical appointment lasted longer than expected.

On November 5, 2019, employer was participating in a marketing event. The event was scheduled to begin at 11:30 a.m. Employees were aware they were required to arrive at the event by 11:00 a.m. Claimant did not clock in until 11:04 a.m. and did not have the necessary marketing materials and other equipment to sign up new patients. Claimant had to go home to get the materials and another employee had to go back to the office.

That night, Ariann Corpstein and Dr. Drew Corpstein discussed claimant's behavior and the fact that he was not even close to meeting the sales goals for the position.

On November 6, 2019, employer terminated claimant's employment.

The administrative record reflects that claimant has received unemployment benefits in the amount of $2,300.00, since his separation from employment on November 6, 2019, for five weeks until the week ending January 18, 2020. The administrative record also establishes that the employer did 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 § 96.5(2)a provides:

> An individual shall be disqualified for benefits, regardless of the source of the individual's wage credits:
>
> 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.
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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 employer has the burden to prove the claimant was discharged for job-related misconduct. *Cosper v. Iowa Dep't of Job Serv.*, 321 N.W.2d 6 (Iowa 1982). The question is not whether the employer made the correct decision in ending claimant's employment, but whether the claimant is entitled to unemployment insurance benefits. *Infante v. Iowa Dep't of Job Serv.*, 364 N.W.2d 262 (Iowa Ct. App. 1984). Misconduct justifying termination of an employee and misconduct warranting denial of unemployment insurance benefits are two different things. *Pierce v. Iowa Dep't of Job Serv.*, 425 N.W.2d 679 (Iowa Ct. App. 1988).

Misconduct must be "substantial" to warrant a denial of job insurance benefits. *Newman v. Iowa Dep't of Job Serv.*, 351 N.W.2d 806 (Iowa Ct. App. 1984). When based on carelessness, the

carelessness must actually indicate a "wrongful intent" to be disqualifying in nature. *Id.* Negligence is not misconduct unless recurrent in nature; a single act is not disqualifying unless indicative of a deliberate disregard of the employer's interests. *Henry v. Iowa Dep't of Job Serv.,* 391 N.W.2d 731 (Iowa Ct. App. 1986). Poor work performance is not misconduct in the absence of evidence of intent. *Miller v. Emp't Appeal Bd.*, 423 N.W.2d 211 (Iowa Ct. App. 1988).

In this case, claimant was repeatedly tardy for marketing events. Employer verbally warned claimant regarding his tardiness on two occasions. Even though claimant was not given any written warning for his tardiness, it should have been obvious to him how important it was to arrive early to the marketing events and be set up on time. Claimant should have known his repeated tardiness would result in his termination. Additionally, claimant used his cell phone, sat down, and did not attempt to market to potential patients during an event on October 28, 2019. Finally, in addition to being late to the marketing event on November 5, 2019, claimant did not bring the materials necessary to successfully run the event. Taken as a whole, claimant's actions were in deliberate disregard of employer's interests in generating new business. Employer established it terminated claimant for misconduct.

The next issue is whether claimant was overpaid benefits and should have to repay those benefits. 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.
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> (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 § 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 § 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 § 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 § 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 § 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.

Because the claimant's separation was disqualifying, benefits were paid to which he was not entitled. 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 they 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. Since the employer did participate in the fact-finding interview the claimant is obligated to repay to the agency the benefits he received and the employer's account shall not be charged.

DECISION:

The December 23, 2019, (reference 03) unemployment insurance 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 unemployment insurance benefits in the amount of $2,300.00 and is obligated to repay the agency those benefits. The employer did participate in the fact-finding interview and its account shall not be charged.

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January 28, 2020
Decision Dated and Mailed

cal/scn