**IOWA WORKFORCE DEVELOPMENT**
**UNEMPLOYMENT INSURANCE APPEALS**

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

**THOMAS J ALATORRE**
Claimant

**KRYGER GLASS COMPANY**
Employer

**APPEAL NO. 17A-UI-03107-TNT**

**ADMINISTRATIVE LAW JUDGE DECISION**

**OC: 01/29/17**
**Claimant: Respondent (2)**

Iowa Code § 96.5(2)a -- Discharge
Iowa Code § 96.3(7) -- Benefit Over-payment

**STATEMENT OF THE CASE:**

Kryger Glass Company, the employer, filed a timely appeal from the representative's decision dated February 21, 2017, reference 01, which held claimant eligible to receive unemployment insurance benefits. After due notice was provided, a telephone hearing was held on April 13, 2017. Claimant participated. A potential witness for the claimant, Mr. Han Lee, was added to the call; subsequently Mr. Lee disconnected. A message was left for the witness with a return telephone number, however Mr. Lee did not respond. Employer participated by Mr. Richard Lopez, Director of Sales and Operations. Employers Exhibits A through I were admitted in the hearing record.

**ISSUE:**

At issue in this matter is whether the claimant was discharged for misconduct sufficient to warrant the denial of unemployment insurance benefits and whether the claimant has been overpaid unemployment insurance benefits.

**FINDINGS OF FACT:**

The administrative law judge, having considered all of the evidence in the record, finds: Thomas Alatorre began employment with Kryger Glass Company on July 8, 2015. Mr. Alatorre was hired to work as a full-time glass technician and was paid by the hour. His immediate supervisor was Mr. Richard Lopez. Mr. Alatorre was discharged on February 2, 2017, based upon the employer's reasonable belief that the claimant had violated company policy and a non-compete agreement on January 14, 2017. On Saturday, January 14, 2017, the claimant contacted Richard Lopez requesting permission to go into the employer's facility to obtain a battery charger for a drill. The claimant stated that he needed the charger to help a friend on a "house". The following week Mr. Lopez received a number of calls and text messages from individuals bringing Mr. Lopez's attention to a Facebook entry that had been posted on Saturday, January 14, 2017, that depicted Mr. Alatorre at what appeared to be a commercial location where large flat glass panels had been, or were being installed. The pictures showed Mr. Alatorre in the background on a ladder at the installation site.

Mr. Lopez recognized the picture depicted as a location owned by Han Lee, a customer of Kryger Glass Company. The company had previously performed glass services for Mr. Lee, and the company had recently bid a flat glass installation at the location depicted on the Facebook entry. Mr. Lopez went to the location to verify that it was in fact the location depicted in the Facebook entry. Because Mr. Lopez suspected Mr. Alatorre's presence at that location might be a violation of the company's conflict of interest rules, he carefully investigated and conferred with other management before discharging Mr. Alatorre. The claimant's professional skills and experience were valued by the company and it appears that the employer wished to carefully consider the matter before discharging the claimant.

Mr. Lopez, the Company's Director of Sales and Operations, had interviewed Mr. Alatorre for the position that the claimant held with Kryger Glass Company. Mr. Lopez emphasized the importance to the company of the agreements not to compete with the company and not to directly or in-directly divulge any information to others concerning the employer's business or how it was conducted. Mr. Alatorre attempted to negotiate some changes to the non-compete agreement, however the employer was unwilling to vary the requirements of the non-compete agreement. The claimant signed acknowledgements that he had received the company rules and the covenant not to compete at the time of hire. The company's strict interpretation on the application of the covenant not to compete was reviewed with all company employees in a meeting that was held on August 1, 2016 and was attended by Mr. Alatorre.

When Mr. Alatorre was initially questioned about the January 14, 2017 Facebook entry by his employer, the claimant first denied that he was at the business location depicted. After being shown the Facebook entry and the picture that depicted that Mr. Alatorre, the claimant then agreed that he had been at the location. Later, Mr. Alatorre stated that he was "just helping" the owner by inspecting the new glass installation after another company did not show up to install the commercial flat glass.

In making his decision the terminate Mr. Alatorre, the employer had considered the fact that Mr. Lee had been a company customer and that Kryger Glass had recently submitted a bid proposal to Mr. Lee the same for work at the same location where the claimant was depicted. Mr. Lee had declined to accept Kryger Glass's bid on the flat glass project and considered Mr. Alatorre's presence on Mr. Lee's property where the while flat glass was being installed to be a violation of the prohibition against performing the same or similar work performed by Kryger Glass as part of its business.

It is Mr. Alatorre's position that he had been unexpectedly called by Mr. Lee on the morning of January 14, 2017 and requested by Mr. Lee to "look over" the flat glass installation that had been performed by another company or by Mr. Lee himself. Mr. Alatorre maintains that he performed no work and was not paid, and that he had agreed to "look over" the installation of the flat glass panels as a "personal courtesy" to Mr. Lee to enhance the possibility Mr. Lee might again do business with Kryger Glass Company in the future.

**REASONING AND CONCLUSIONS OF LAW:**

The question for the administrative law judge is whether the evidence in the record establishes misconduct on the part of the claimant sufficient to warrant denial of unemployment insurance benefits. It does.

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 proof in establishing disqualifying job misconduct. *Cosper v. Iowa Dep't of Job Serv.*, 321 N.W.2d 6 (Iowa 1982). Misconduct "must be substantial" to justify the denial of unemployment benefits. "Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of unemployment benefits." See *Lee v. Employment Appeal Board*, 616 N.W.2d 661 (Iowa 2000). 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).

In the case at hand, the claimant was discharged based upon the employer's reasonable belief that he had violated the terms of an agreement not to compete with his employer either directly or in-directly in any manner or by performing work similar to work performed in the employer's business.

At the time he was hired by the company, Mr. Alatorre agreed to abide by a covenant not to compete while employed by the company and for a two-year period after his employment with the company ends. The importance of the non-compete agreement and related agreements was emphasized to the claimant at the time of hire and the policy was later reviewed during a meeting of all company employee's.

The evidence in the record establishes that Mr. Alatorre violated the terms of the agreements of not to compete or divulge proprietary information. On January 14, 2017 when he went to a

business location of a former company client and assisted the former company client by inspecting the client's flat glass installations for errors, using the professional skills and knowledge that Kryger Glass had paid Mr. Alatorre for their benefit and in violation of the agreement not to provide the benefit of his work skills to others in competition with Kryger Glass's business interests.

The administrative law judge is mindful of the claimant's position that he was at Mr. Lee's business location only as a courtesy to Mr. Lee and that Mr. Lee had requested his presence to determine whether the flat glass had been installed properly. Even when taken in its best light, Mr. Alatorre knew or should have known that even in circumstances he would be using the same professional skills and knowledge that he used for the work that he performed for Kryger Glass Company, for the benefit of another. In other words, he was using the knowledge and skills that he had agreed to use only for the benefit of Kryger Glass Company to benefit Mr. Lee, or whoever had installed the glass flatware at Mr. Lee's location. Because he was using his skills to further the completion of a flat glass installation that the company had bid, but had not been given to Kryger Glass Company, he knew or should have known he would be performing a service the same work performed by Kryger Glass, to benefit a competitor of Kryger Glass, in the business of installing glass flatware. The claimant's conduct constitutes misconduct in connection with his employment with Kryger Glass Company. Accordingly, the claimant is disqualified for unemployment insurance benefits until he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount and is otherwise eligible. Since the claimant has been deemed ineligible for benefits, any benefits the claimant has received could constitute an overpayment. The administrative record reflects that the claimant has received unemployment insurance benefits in the amount of $3,024.00 since opening his claim for benefits with an effective date of January 29, 2017 with the benefits weeks ending February 11, 2017 through April 8, 2017. The administrative record also establishes that the employer did participate in the fact-finding interview.

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.

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.

**DECISION:**

The representative's decision dated February 21, 2017, reference 01, is reversed. The claimant was discharged for misconduct in connection with his work. Unemployment insurance benefits are withheld until the claimant has worked in and been paid wages for insured work equal to ten times his weekly benefit amount and is otherwise eligible. The claimant has been overpaid unemployment insurance benefits in the amount of $3,024.00 for the benefits weeks ending February 11, 2017 through April 8, 2017 and is liable to re-pay this amount. (In addition to any

previous overpayment amounts owed by the claimant to Iowa Workforce Development). The employer's account shall not be charged for benefits based upon the employer's participation in the fact-finding.

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Terry P. Nice
Administrative Law Judge

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Decision Dated and Mailed

scn/scn