

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

DANIEL I ALVARADO
Claimant

D OF C FOODS INC
Employer

APPEAL 18A-UI-08447-H2T

**ADMINISTRATIVE LAW JUDGE
DECISION**

**OC: 07/01/18
Claimant: Respondent (2)**

Iowa Code § 96.5(2)a – Discharge/Misconduct
Iowa Code § 96.3(7) - Recovery of Benefit Overpayment
871 IAC 24.10 – Employer Participation in the fact-finding Interview

STATEMENT OF THE CASE:

The employer filed an appeal from the July 30, 2018, (reference 01) unemployment insurance decision that allowed benefits. The parties were properly notified about the hearing. A telephone hearing was held on August 29, 2018. Claimant did not participate in the hearing until 11:56 a.m. when he called to join the hearing. Employer participated in the entire hearing through, Donny Thepvong, General Manager; Falon Erbe, Human Resources Director; Jon Buns, Shift Manager and was represented by Abigail Brown, attorney at law. Employer's Exhibits A through J were admitted into the record.

ISSUE:

Was the claimant discharged due to job-connected 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: Claimant was employed full-time as a shift manager beginning on March 29, 2017 through July 2, 2018, when he was discharged.

The claimant was promoted from crew member to a shift manager after about three months into his employment. His duties and powers as a shift manager remained constant no matter which store he was assigned to work at.

The claimant had been given a copy of the employer's handbook and knew that not only was he required to comply with the rules; as a shift manager he was to enforce the rules for those employees he supervised. Employer's Exhibit B illustrates the numerous warnings given to the claimant about his attendance. On February 25, the claimant left work early without permission.

He was given a written warning, that he signed, that put him on notice that another similar occurrence would lead to his discharge.

On June 22, the claimant was scheduled to work from 4:00 p.m. until at least midnight when the restaurant closed as the shift manager. He would be the manager in charge of the restaurant at that time. At the shift change around 5:00 p.m. one teenage male employee asked the claimant what job he was being assigned to for the night. The claimant told him he would be a presenter. (The presenter is a person who hands food to customers at the drive through window.) When the teenage boy was told he was to be the presenter he said to the claimant, "I'll present this c**k to your wife." The comment made by the teenage employee was inappropriate, rude and a violation of the employer's policies. The claimant did not say anything to the crew member. As the manager in charge claimant had the option of sending the crew member home immediately at that time or disciplining the crew member. He did not do so.

The claimant could have sought assistance from Jon Buns who was also a shift manager and was working that night. He did not do so. The claimant could have sought assistance from the general manager, Donny Thepvong, via phone call or text. He did not do so. The claimant could have sought assistance from human resources director, Falon Erbe, via phone call or text. He did not do so. Instead at about 5:24 p.m. the claimant wrote the note found at employer's Exhibit C, took between three and five guest cards for free food, put them in his pocket, and left the restaurant through an alarmed emergency exit. When the claimant left via the alarmed emergency exit, Mr. Buns heard the alarm going off and went to investigate. He disabled the alarm that was going off, opened that back door and saw the claimant walking off the property. The claimant never returned to work that night. When the claimant had not come back, by the time Mr. Buns shift was to end at around 7:35 p.m. he called Mr. Thepvong to tell him the claimant had left. Mr. Thepvong answered his phone when called by Mr. Buns. Mr. Buns ended up having to stay to cover the rest of the claimant's work shift.

The claimant did not have permission to leave work early, nor did he tell anyone he was leaving work early, other than writing the note found at employer's Exhibit C.

On June 23, the claimant sent a text to Ms. Erbe asking to meet with her to discuss "something" on Monday. Ms. Erbe offered to meet with the claimant on Monday June 25 at the office at 10:00 a.m. The claimant did not show up for the meeting or respond to Ms. Erbe's text at 10:10 asking if they were still meeting that morning. Ms. Erbe attempted to call the claimant and he did not answer the telephone. On June 26, Ms. Erbe sent the claimant another text telling him she still wanted to meet with him and asking him to contact her as soon as possible. The claimant texted Ms. Erbe back telling her that he was having maintenance issues at his house. She did not hear from him again until June 29. The claimant appeared for a meeting with Ms. Erbe on June 29. At that time neither she nor anyone else knew what had occurred on June 22. From June 22 onward the claimant did not show up or call in for any of his work shifts that he missed.

During the meeting on June 29, the claimant told Ms. Erbe what had occurred with the crew member. She had the operations supervisor investigate and eventually disciplined the crew member for his inappropriate vulgar comment. The employer acted immediately upon learning what had occurred. During the meeting on June 29, the claimant did not return the cards for free food that he had removed from the restaurant on June 22.

After meeting with the claimant on June 29, Ms. Erbe considered that the claimant had once before left without permission from his shift and had failed to even seek help or tell the other shift manager he was leaving the store. The claimant had also been a no-call/no-show for all of his work shifts after June 22. Claimant was discharged for taking guest cards that he did not distribute to customers and for abandoning his shift without proper permission or notification to the employer.

The claimant has received unemployment benefits after the separation on a claim with an effective date of July 1, 2018.

The employer did participate personally in the fact-finding interview through Ms. Erbe, who provided the fact-finder with the same information provided at the appeal hearing.

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:

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 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.

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).

Generally, continued refusal to follow reasonable instructions constitutes misconduct. *Gilliam v. Atlantic Bottling Company*, 453 N.W.2d 230 (Iowa App. 1990). It is not unreasonable for the employer to expect their managers to not walk off the job without permission.

The claimant had been specifically warned that he was not to leave work without permission from his supervisor. "Good cause" for leaving employment must be that which is reasonable to the average person, not the overly sensitive individual or the claimant in particular. *Uniweld Products v. Indus. Relations Comm'n*, 277 So.2d 827 (Fla. Dist. Ct. App. 1973). While it is clear

that the teenage employee made a rude, inappropriate remark to the claimant, the administrative law judge cannot conclude that one comment gave the claimant authority to walk off the job. The claimant had other options besides walking off the job. The claimant was in charge of all employees and as the manager; he could have sent the offending employee home on the spot. The claimant could have sought assistance from other managers. The claimant chose not to do anything but walk off the job without even telling the employer he was leaving. His actions are not in the employer's best interests.

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 Ct. 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. *State v. Holtz*, 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. *State v. Holtz*, Id.

Despite the claimant's allegations that he tried to call Mr. Thepvong and Ms. Erbe on June 22, he is not a credible witness. Mr. Thepvong answered his phone when Mr. Buns called him only two hours after the claimant had left the store. Mr. Thepvong had given the claimant another chance after he was repeatedly a no-call/no-show for work by letting him work on June 22. Ms. Erbe responded immediately to the claimant's text on June 23. The claimant did not seek any assistance from either Mr. Thepvong or Ms. Erbe before walking off the job on June 22. The employer's evidence establishes that the claimant had been warned about walking off the job on at least one prior occasion. The claimant's actions amount to repeated job-related misconduct that is sufficient to disqualify him from unemployment insurance benefits. Benefits are denied.

Iowa Code section 96.3(7)a-b, as amended in 2008, provides:

7. Recovery of overpayment of benefits.

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.

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 section 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.

(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

section 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 state pursuant to section 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 the claimant 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). In this case, the claimant has received benefits but was not eligible for those benefits. Since the employer participated in the fact-finding interview the claimant is obligated to repay the benefits he received to the agency and the employer's account shall not be charged.

DECISION:

The July 30, 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 unemployment insurance benefits in the amount of \$1,385.00 and he is obligated to repay the agency those benefits. The employer did participate in the fact-finding interview and their account shall not be charged.

Teresa K. Hillary
Administrative Law Judge

Decision Dated and Mailed

tkh/rvs