

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

NICOLE M ECKLEY
Claimant

SAFELITE SOLUTIONS LLC
Employer

APPEAL 17A-UI-11846-JCT
**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 10/22/17
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 November 8, 2017, (reference 01) unemployment insurance decision that allowed benefits. The parties were properly notified about the hearing. A telephone hearing was held on December 7, 2017. The claimant did not respond to the notice of hearing to furnish a phone number with the Appeals Bureau and did not participate in the hearing. The employer participated through Patricia Baldwin. Employer witnesses included Annette Kohl, Carla Heath, and Allison Todd. Stephanie Festog, claims specialist for ADP unemployment claims, testified on the issue of fact-finding participation only. Employer Exhibit 1 was admitted 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 customer services representative and was separated from employment on October 24, 2017, when she was discharged for unprofessional conduct.

The employer has written rules and procedures, which the claimant received upon hire. These include acting with professionalism. At the time of discharge the claimant had received written warnings on June 24, 2016 and April 7, 2017 related to unprofessional conduct, with regard to both her language and actions in the workplace (Employer Exhibit 1). The employer also verbally counseled but did not discharge the claimant after an incident on October 19, 2017, when the claimant screamed and yelled profanities in response to the employer not paying the claimant bereavement pay to attend her biological mom's boyfriend's funeral (Employer Exhibit

1). The employer did permit the claimant to take the time off she requested to be with her family but explained it would not lie to payroll to code her absence to allow her to receive pay based upon definitions within the bereavement policy (Employer Exhibit 1). The employer stated it did not fire the claimant immediately because it was trying to extend compassion, recognizing the claimant was very upset.

The final incident occurred on October 24, 2017, when it was discovered the claimant was away from her work station for a period of over twenty minutes. The employer required employees to log off and also notify management on the floor if they were unable to accept inbound calls or needed to temporarily leave their work station during their shift. The claimant did not make management aware that she wanted to handle a personal call. When she was found by Carla Heath in a side conference room, the claimant got upset and yelled at Ms. Heath. She also told Ms. Heath she did not care, and was not returning to the phones and instructed her to count the claimant's absence as a valid absence or accommodation due the Americans with Disability Act (ADA). The claimant had been approved for ADA accommodation pertaining to migraines but it did not include taking personal phone calls related to utility companies. Based upon the claimant's pattern of unprofessional conduct, the employer initiated discharge.

The administrative record reflects that claimant has received unemployment benefits in the amount of \$1,973.00, since filing a claim with an effective date of October 22, 2017. The administrative record also establishes that the employer did not participate in the fact-finding interview or make a witness with direct knowledge available for rebuttal. Prior to the fact-finding interview, the employer, through its third party vendor, ADP, sent in a written response containing only a copy of the claim protest and an acknowledgement of the claimant receiving the employer handbook. The employer's protest contained a check mark in the box representing the claimant was discharged, with an effective date of October 24, 2017, and under the remarks section, was "discharged for violating ethics policy. Mc. Eckley asked member of the management team to report time off the phone inappropriately." No applicable policy, details of the final incident or warning was provided.

Stephanie Festog, claims specialist at ADP, submitted the written documentation for the fact-finding interview, but was unavailable when called and did not respond to any voicemail. Nor was any witness contact information furnished by ADP or the employer for rebuttal if needed.

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).

In an at-will employment environment, an employer may discharge an employee for any number of reasons or no reason at all if it is not contrary to public policy, but if it fails to meet its burden of proof to establish job related misconduct as the reason for the separation, it incurs potential liability for unemployment insurance benefits related to that separation. 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 issue is not whether the employer made a correct decision in separating claimant, but whether the claimant is entitled to unemployment insurance benefits. *Infante v. IDJS*, 364 N.W.2d 262 (Iowa App. 1984). What constitutes misconduct justifying termination of an employee and what misconduct warrants denial of unemployment insurance benefits are two separate decisions. *Pierce v. IDJS*, 425 N.W.2d 679 (Iowa App. 1988). Misconduct serious enough to warrant discharge is not necessarily serious enough to warrant a denial of job insurance benefits. Such misconduct must be "substantial." *Newman v. Iowa Department of Job Service*, 351 N.W.2d 806 (Iowa App. 1984). 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).

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.

Generally, continued refusal to follow reasonable instructions constitutes misconduct. *Gilliam v. Atlantic Bottling Co.*, 453 N.W.2d 230 (Iowa Ct. App. 1990). In this case, the employer has a reasonable policy which requires professionalism in the workplace. The undisputed evidence is the history had a pattern of behavior in which she was unprofessional, both in her words and her conduct, which resulted in warnings on April 7, 2017, and June 24, 2016 (Employer exhibit 1).

In addition, the claimant was warned again verbally after yelling and using profanity in response to the employer not paying her bereavement pay in response to her mother's boyfriend's death (Employer exhibit 1). The claimant knew or should have known her job was in jeopardy if she had future incidents of yelling in the workplace or acting unprofessional.

The claimant's conduct on October 24, 2017, when she removed herself from the work station without permission for a period of twenty minutes to handle a personal call and then yelled at her manager, Carla Heath, was contrary to reasonable expectations an employer has the right to expect of its employees. The employer has established the claimant's conduct leading to discharge was disqualifying and meets the definition of job related misconduct under Iowa law. Accordingly, benefits are denied.

The next issue is whether the claimant must repay the benefits she received but was not entitled, and whether the employer's account may be relieved of charges associated with the claim.

Because the claimant's separation was disqualifying, benefits were paid to which she was not entitled. The claimant has been overpaid benefits in the amount of \$1,973.00. 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*.

Iowa Admin. Code r. 871-24.10 defines employer participation as follows:

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.

The employer in this case did not participate live in the scheduled fact-finding interview, and was unresponsive to the call and voicemail provided to ADP representative, Stephanie Festog, at the time of the fact-finding interview. Iowa Admin. Code r. 871-24.10 requires that if a party

does not provide live testimony, the name and telephone number of an employee with firsthand information who may be contacted, if necessary, for rebuttal. The employer, nor its vendor, ADP, provided such contact information.

Further, Iowa Admin. Code r. 871-24.10 requires that if an employer participates in writing, that it “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 this case, the employer, through its vendor representative, furnished a copy of the notice of protest which contained only that the claimant was discharged on October 24, 2017, and that she was “discharged for violating ethics policy. Mc. Eckley asked member of the management team to report time off the phone inappropriately.” The employer did not provide any narrative of the final incident, written statements of witness, or specific dates, prior warnings, or even the applicable policy at hand. For these reasons, the administrative law judge concludes the employer did not satisfactorily participate in the fact-finding interview.

Therefore, based on the evidence presented in this case, the administrative law judge concludes the claimant has received benefits but was not eligible for those benefits. The employer did not satisfactorily participate in the scheduled fact-finding interview. Since the employer did not participate in the fact-finding interview, the claimant is not obligated to repay the benefits she received and the employer’s account shall be charged.

DECISION:

The November 8, 2017, (reference 01) decision is reversed. The claimant was discharged from employment due to job-related misconduct. Benefits are withheld until such time as she has worked in and been paid wages for insured work equal to ten times her weekly benefit amount, provided she is otherwise eligible. The claimant has been overpaid benefits in the amount of \$1,973.00 and is not obligated to repay the benefits. The employer’s account is not relieved of charges associated with the claim.

Jennifer L. Beckman
Administrative Law Judge

Decision Dated and Mailed

jlb/scn