IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

REBECCA BRITTAIN
Claimant

CARE INITIATIVES
Employer

APPEAL NO: 15A-UI-06255-JE-T

ADMINISTRATIVE LAW JUDGE DECISION

OC: 04/19/15
Claimant: Respondent (2)

Section 96.5-2-a – Discharge/Misconduct
Section 96.3-7 – Recovery of Benefit Overpayment

STATEMENT OF THE CASE:

The employer filed a timely appeal from the May 19, 2015, reference 01, decision that allowed benefits to the claimant. After due notice was issued, a hearing was held by telephone conference call before Administrative Law Judge Julie Elder on July 10, 2015. The claimant participated in the hearing. Denise Bower, Assistant DON; Connie Elswick, Restorative Aide; Rachel Gooden, Administrator; Phyllis Farrell, Unemployment Insurance Consultant; and Alyce Smolsky, Employer Representative; participated in the hearing on behalf of the employer. Employer's Exhibits One through Three were admitted into evidence.

ISSUE:

The issue is whether the employer discharged the claimant for work-connected misconduct.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed as a full-time CNA for Care Initiatives from April 2, 2014 to April 22, 2015. She was discharged for using profanity in front of a resident.

On April 21, 2015, Restorative Aide Connie Elswick reported to Assistant DON that the claimant entered the restorative or therapy room and said to her, "That fucking resident makes me so fucking mad. Whatever I do, she bitches." In addition to Ms. Elswick, a resident was present, working on an exercise machine just inside the door, and a maintenance man. Ms. Elswick directed the claimant to go to the break room and speak to Ms. Bower about the situation.

Ms. Bower investigated the incident by interviewing Ms. Elswick, the maintenance man, the resident and the claimant. When she asked the claimant what happened the claimant said she was frustrated and went to vent to Ms. Elswick and stated she did not see the resident in the room. She did admit to saying, "No matter what I do, she bitches," but said she did not recall making the other statement about the resident. Ms. Elswick told Ms. Bower she found it extremely unlikely the claimant did not see the resident in the restorative room as she had to

walk past her on her way into the room. The claimant's actions violated the employer's policy which states the use of profanity in front of residents can be considered abuse.

On November 11, 2014, the claimant received a verbal warning in writing after she was witnessed pushing a resident in a wheelchair without foot pedals which resulted in the resident falling out of the chair. The resident was not injured and the claimant signed the verbal warning.

On March 23, 2015, the claimant received a written warning for transferring a resident, whose care plan required the use of a gait belt, without using a gait belt. The claimant was in the process of transferring the resident without a gait belt until she saw the charge nurse watching her at which time she retrieved the gait belt and put it on the resident.

On April 3, 2015, the claimant received a final written warning after a nurse noticed her in the break room when she was expected to be in the dining room assisting residents (Employer's Exhibit Two). The nurse told the claimant to go to the dining room several times but the claimant did not do so even though she was not on break. When the nurse returned the final time to tell the claimant to go help in the dining room and the claimant said, "This is fucking bullshit. You have been on my ass all day" (Employer's Exhibit Two). The claimant did admit making that statement before signing the final written warning, which also stated that subsequent violations may be subject to further discipline up to and including termination.

After reviewing the claimant's previous warns and noting where she was in the progressive disciplinary process, the employer terminated the claimant's employment April 22, 2015 (Employer's Exhibit One).

The claimant has claimed and received unemployment insurance benefits in the amount of $4,308.00 for the 11 weeks ending July 4, 2015.

The employer personally participated in the fact-finding interview through the statements of Unemployment Insurance Consultant Phyllis Farrell. The employer also submitted written documentation prior to 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 for disqualifying job misconduct.

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 proving disqualifying misconduct. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). A claimant is not qualified to receive unemployment insurance benefits if an employer has discharged him for reasons constituting work-connected misconduct. Iowa Code section 96.5-2-a. Misconduct that disqualifies an individual from receiving unemployment insurance benefits occurs when there are deliberate acts or omissions that constitute a material breach of the worker's duties and obligations to the employer. See 871 IAC 24.32(1).

The claimant received a final written warning April 3, 2015, for using profanity in anger toward a nurse. Despite receiving that warning 17 days prior to the final incident, she repeated her behavior, this time using profanity in front of a resident. The fact that the final incident occurred so close in proximity to the final written warning leads to the conclusion that the claimant did not take that warning seriously and did not take any steps to modify her language and behavior to meet the employer's expectations.

While the claimant did not know the second written warning was a final written warning, the employer's handbook sets out the progressive disciplinary policy and she either knew, or should have known, her job was in jeopardy whether she received a second written warning or a final written warning.

Under these circumstances, the administrative law judge concludes the claimant's conduct demonstrated a willful disregard of the standards of behavior the employer has the right to expect of employees and shows an intentional and substantial disregard of the employer's interests and the employee's duties and obligations to the employer. The employer has met its burden of proving disqualifying job misconduct. Cosper v. IDJS, 321 N.W.2d 6 (Iowa 1982). Therefore, benefits are denied.

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.

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 § 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.

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. In this case, the claimant has received benefits but was not eligible for those benefits. While there is no evidence the claimant received benefits due to fraud or willful misrepresentation, the employer participated in the fact-finding interview personally through the statements of Unemployment Insurance Consultant Phyllis Farrell. Consequently, the claimant's overpayment of benefits cannot be waived and she is overpaid benefits in the amount of $4,308.00.

DECISION:

The May 19, 2015, 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 received benefits but was not eligible for those benefits. The employer personally participated in the fact-finding interview within the meaning of the law. Therefore, the claimant is overpaid benefits in the amount of $4,308.00.

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Julie Elder
Administrative Law Judge

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Decision Dated and Mailed

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