

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

SCOTT R GILL
Claimant

APPEAL NO. 12A-UI-14201-L

**ADMINISTRATIVE LAW JUDGE
DECISION**

ACCESS 2 INDEPENDENCE OF THE EAST
Employer

OC: 10/07/12
Claimant: Respondent (2-R)

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Code § 96.3(7) – Recovery of Benefit Overpayment

STATEMENT OF THE CASE:

The employer filed a timely appeal from the November 19, 2012 (reference 02) decision that allowed benefits. After due notice was issued, a hearing was held on January 29, 2013 in Cedar Rapids, Iowa. Claimant participated. Employer participated through interim executive director Kate Jacobsen, acting board chair Shawn Zierke, and board treasurer (since October 1, 2012), attorney Bob Teig. Employer's Exhibits 1 through 12 were received. Claimant's Exhibit A was received.

ISSUES:

Was the claimant discharged for disqualifying job related misconduct?
Is the claimant overpaid benefits?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed as a full-time executive director from 2008 through October 5, 2012 when he was discharged. The organization provides a center for independent living for people with disabilities and is funded in part through the Department of Education and Iowa Vocational Rehabilitation Services (IVRS). More than 50 percent of the funds must be used to support services to clients. Claimant was fired for several reasons, including providing false information to the Social Security Administration on September 11, 2012 about part-time employee Abby Almeline-Banh's earnings. (Employer's Exhibit 3) He misdirected funds to help her avoid a SSA disability overpayment by making wage "donations" back to the "emergency fund" he created, which is not included in the budget. Gill knew the wages were earned because he billed the grant for it. Two consumers received \$500.00 each for personal assistance inappropriately authorized by Gill and Almeline-Banh. After dissolving the emergency fund, the board had to pay wages and back taxes for Almeline-Banh of \$1,500.00. Gill admitted signing the forms Marsh and Atkinson completed. Meeting recorded. (Employer's Exhibit 9)

Claimant misrepresented to Teig, when specifically asked, that he had not signed a lease for new office space. Gill signed a lease on August 27, 2012 without notice to or authorization by

the board. (Employer's Exhibit 11) Gill claimed it was "a gentleman's agreement" and there was "nothing formal." Teig discovered advance rent of \$8,500.00 due on the lease before the meeting on October 5, 2012. Claimant admitted he lied to Teig in the finance committee meeting about the lease to avoid the confrontation.

Teig and the board were also notified of cell phone overspending by \$1,100.00 and allowing misuse by Tammy Atkinson, a volunteer with the Iowa City office. He bought Atkinson a new Blackberry with portable hot spot wireless internet. She did not need one for her volunteer duties. The Verizon bill with claimant's phone number and Atkinson's e-mail account revealed five inappropriate pictures taken in Gill's office and sent from and stored on that phone. (Employer's Exhibit 7 and 8) Gill knowingly let Atkinson and her boyfriend use his office and the company phone to take intimate pictures and had let them do that before. Over 11,000 text messages and more than 700 pictures were sent and received in less than a month. The policy, which Gill received, is considered an inappropriate relationship between an employee and a subordinate employee and a misuse of the employer's resources. (Employer's Exhibit 12, pp. 30)

He overspent the budget by a significant amount and used the employer's credit card use for non-reimbursable personal food purchases locally while not on travel status. (Employer's Exhibit 5) Reimbursement for these purchases was not proper according to grant terms. Gill did not present a budget to the board by the end of the fiscal year September 30, 2012. (Employer's Exhibit 12, pp. 18) He did not keep invoices to support drawdowns from federal grants. The lack of records of drawdown amounts has caused a hold on funding since October 1, 2012 so the employer has had to liquidate assets and pay operating expenses and salaries from reserves. (Employer's Exhibit 6) At the time of separation, the board did not know details but did know he had severely overspent by \$39,400.00 on computers and related equipment. The budget authorized \$270,026.00 but Gill spent \$305,212.03 without additional authorization from the board. (Employer's Exhibit 4)

Claimant received unemployment benefits after the separation on a claim with an effective date of October 7, 2012.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes 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:

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.

871 IAC 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.

Employer has presented substantial and credible evidence that claimant lied to a board member about entering into a lease contract, lied to the SSA about an employee's wages, misspent the budget by nearly \$40,000.00, and allowed inappropriate personal use of the office and equipment by a volunteer and her boyfriend. This is disqualifying misconduct even without prior warning. Benefits are denied.

Iowa Code section 96.3-7, 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) 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. 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. The employer shall not be charged with the benefits.

(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.

Because claimant's separation was disqualifying, benefits were paid to which 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 whether or not the overpayment is recovered. Iowa Code § 96.3(7). In this case, claimant has received benefits but was not eligible for those benefits.

DECISION:

The November 19, 2012 (reference 02) decision is reversed. 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.

REMAND:

The matter of determining the amount of the potential overpayment and whether the overpayment should be recovered under Iowa Code § 96.3(7)b is remanded to the Agency.

Dévon M. Lewis
Administrative Law Judge

Decision Dated and Mailed

dml/pjs