

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

DAVID T HUBBARD
Claimant

KMB PROPERTY MANAGEMENT II LLC
Employer

APPEAL 16A-UI-12018-LJ-T
**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 11/08/15
Claimant: Respondent (1)

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 3, 2016, (reference 06) unemployment insurance decision that allowed benefits based upon a determination that claimant was discharged from employment for properly reported and excused absences. The parties were properly notified of the hearing. A telephone hearing was held on November 28, 2016. The claimant, David Hubbard, participated. The employer, KMB Property Management II, L.L.C., participated through Mitch King, owner/manager.

ISSUES:

Was the claimant discharged for disqualifying job-related misconduct?

Has the claimant been overpaid unemployment insurance benefits, and if so, can the repayment of those benefits to the agency be waived?

Can 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 part time, most recently as a maintenance technician, from January 28, 2016, until October 12, 2016, when he was discharged for allegedly filing a false report to workers' compensation about a possible retaliatory demotion. King testified that claimant sustained a work-related injury at the onset of his employment. According to King, as of August 2, 2016, claimant was cleared to return to work 100%.

On September 29, 2016, claimant was demoted from a full-time position to a part-time position. In claimant's new position, he only worked Mondays and Wednesdays from 8:00 a.m. until 5:00 p.m. King testified that claimant was demoted because he missed six days of work in September 2016. These six absences included two three-day periods: September 5, 6, and 7; and September 19, 20, and 21. Claimant did not call in and report his absence on the first day

of either three-day absence. On the second day of each three-day absence, claimant called and reported that he was ill. King does not believe these absences were at all related to claimant's work-related injury.

During the first week of claimant's part-time position, King received a telephone call from an employee with Iowa Worker's Compensation informing him that claimant reported he had been demoted because of his worker's compensation-qualifying injury. Claimant admits contacting work comp about his demotion. Claimant testified that at the time of his demotion, he was still under a doctor's care due to medical issues connected to his work-related injury. Once claimant was discharged, work comp stopped paying for his doctor's appointments. He believes he may have been demoted because of his absences for his work-related injury. Claimant testified that King told him he was being demoted for absenteeism in general, not for the six September absences specifically.

The administrative record reflects that claimant has received unemployment benefits in the amount of \$722.00, since filing a claim with an original effective date of November 8, 2015, until the week ending November 19, 2016. Following his original effective date of November 8, 2015, claimant reopened his claim with an effective date of October 16, 2016, and then he filed a new claim for the new benefit year with an effective date of November 6, 2016. The administrative record also establishes that the employer did participate in the fact-finding interview.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes claimant was discharged from employment for no disqualifying reason. Benefits are allowed.

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).

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. A determination as to whether an employee's act is misconduct does not rest solely on the interpretation or application of the employer's policy or rule. A violation is not necessarily disqualifying misconduct even if the employer was fully within its rights to impose discipline up to or including discharge for the incident under its policy.

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.*

After assessing the credibility of the witnesses who testified during the hearing, considering the applicable factors listed above, and using her own common sense and experience, the administrative law judge finds claimant credibly testified regarding his report to worker's compensation. The administrative law judge believes claimant's testimony that the employer told him that he was demoted due to absenteeism, leading claimant to contact worker's compensation, as some of his absenteeism was attributable to his work-related injury.

King may believe that claimant should not have contacted worker's compensation after he was demoted. However, the employer did not provide sufficient evidence to show that claimant acted in willful disregard of the employer's interest in making that call. The employer did not meet its burden to establish claimant was discharged for disqualifying misconduct. Benefits are allowed. As claimant's separation from employment entitles him to receive unemployment benefits provided he is otherwise eligible, the issues of overpayment, repayment, and chargeability are moot.

DECISION:

The November 3, 2016, (reference 06) unemployment insurance decision is affirmed. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided he is otherwise eligible. Any benefits claimed and withheld on this basis shall be paid. The issues of overpayment, repayment, and chargeability are moot.

Elizabeth A. Johnson
Administrative Law Judge

Decision Dated and Mailed

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