

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

JOSH ISLER
Claimant

CTE GLOBAL INC
Employer

APPEAL 18A-UI-08244-LJ-T
**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 07/08/18
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 July 23, 2018, (reference 01), unemployment insurance decision that allowed benefits based upon a determination that claimant was discharged and the employer did not establish willful or deliberate misconduct. The parties were properly notified of the hearing. A telephonic hearing was held on August 23, 2018. The claimant, Josh Isler, participated. The employer, CTE Global, Inc., participated through Alex Shifman, President and CEO; and Miriam Zaslavsky, Director of Operations; and Alexis Dominguez, Attorney at Law, represented the employer. Employer's Exhibits A through D were received and admitted into the record without objection. The administrative law judge took official notice of the administrative record.

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 full-time, most recently as a technical representative, from August 2013 until July 2, 2018, when he was discharged. In 2013, claimant became the subject of a federal investigation into alleged misappropriation of files from DuPont, his former employer. (Exhibit D) The employer issued claimant a memorandum dated December 24, 2013, in which it asked claimant to confirm that he had not taken, misappropriated, disclosed, used, or relied upon any documentation or information that was DuPont's confidential or proprietary information. (Exhibit A) Claimant signed this memorandum, confirming that he had not misappropriated any confidential or proprietary information. (Exhibit A)

On or about June 28, 2018, claimant was charged with stealing trade secrets and making false statements to the FBI. (Exhibits B and C) On June 29, claimant sent Shifman an email in which he notified the employer of the charges pending against him. (Exhibit B) In this email, claimant admits that he copied DuPont files in order to impress the employer and secure a position with the employer. (Exhibit B) He describes his actions as a mistake and a momentary lapse in judgment. (Exhibit B) Also around this time, Shifman began receiving calls from customers reporting that radio and newspapers were reporting claimant was being charged with crimes related to stealing DuPont's information. On July 2, 2018, the employer discharged claimant for his untruthfulness related to the DuPont investigation.

The administrative record reflects that claimant has received unemployment benefits in the amount of \$2,292.00, since filing a claim with an effective date of July 8, 2018, for the four weeks ending August 18, 2018. The administrative record also establishes that the employer did not participate in the fact-finding interview, make a first-hand witness available for rebuttal, or provide written documentation that, without rebuttal, would have resulted in disqualification. Zaslavsky received the notice of the fact-finding interview on the scheduled day for the interview. She tried to call and change the date of the interview so that the employer could have counsel present for it, but she was not successful. Zaslavsky answered when the fact-finder called her for the interview. When she requested a postponement to allow her to have counsel present, this request was denied. Zaslavsky then declined to participate in the interview.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes claimant was discharged from employment for disqualifying, job-related misconduct. Benefits are withheld.

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).

Misconduct must be "substantial" to warrant a denial of job insurance benefits. *Newman v. Iowa Dep't of Job Serv.*, 351 N.W.2d 806 (Iowa Ct. App. 1984). When based on carelessness, the carelessness must actually indicate a "wrongful intent" to be disqualifying in nature. *Id.* Negligence does not constitute misconduct unless recurrent in nature; a single act is not disqualifying unless indicative of a deliberate disregard of the employer's interests. *Henry v. Iowa Dep't of Job Serv.*, 391 N.W.2d 731 (Iowa Ct. App. 1986).

On June 29, claimant sent the employer an email in which he admitted to copying DuPont's files in order to impress the employer and secure a job with the company. Claimant admits this was a lapse in judgment. This email contradicts the statement he signed in December 2013 in which he assured the employer he had not taken or misappropriated DuPont's confidential information. Through the June 29 email, claimant also informed the employer he was being formally charged with "stealing trade secrets." After these charges were brought, the employer reasonably could no longer trust claimant as an employee. Claimant's own statements in the June 29 email indicate he had not been honest with the employer and would resort to stealing and dishonesty in order to woo or impress a competitor. Claimant's actions amount to a willful and deliberate disregard of the employer's interests. The employer has established that claimant was discharged from employment for disqualifying, job-related misconduct. Benefits are withheld.

The next issues to be determined are whether claimant has been overpaid benefits, whether the claimant must repay those benefits, and whether the employer's account will be charged. Iowa Code § 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 he 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 benefits were not received due to any fraud or willful misrepresentation by claimant. Additionally, the employer did not participate in the fact-finding interview. Thus, claimant is not obligated to repay to the agency the benefits he received.

The law also states that an employer is to be charged if "the employer failed to respond timely or adequately to the department's request for information relating to the payment of benefits. . ." Iowa Code § 96.3(7)(b)(1)(a). Here, the employer did not receive notice of the fact-finding interview until the day it was occurring. The employer asked multiple times to have the interview postponed so the employer could involve counsel, as this separation involved criminal charges. These requests were denied. Benefits were paid, but not because the employer failed to respond timely or adequately to the agency's request for information relating to the payment of benefits. Instead, benefits were paid because the employer received incredibly short notice for the fact-finding interview and was not allowed to involve its counsel. The administrative law judge finds that the employer thus cannot be charged. Since neither party is to be charged then the overpayment is absorbed by the fund.

DECISION:

The July 23, 2018, (reference 01), unemployment insurance 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. The claimant has been overpaid unemployment insurance benefits in the amount of \$2,292.00 and is not obligated to repay the agency those benefits. The employer did not participate in the fact-finding interview through no fault of its own and its account shall not be charged. The overpayment shall be absorbed by the fund.

Elizabeth A. Johnson
Administrative Law Judge

Decision Dated and Mailed

lj/scn