IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

KARI L DODSON
Claimant

ESA MANAGEMENT LLC
Employer

APPEAL NO. 15A-UI-07158-TN-T

ADMINISTRATIVE LAW JUDGE DECISION

OC: 05/24/15
Claimant: Respondent (2)

Section 96.5(2)a – Discharge
Section 96.3(7) – Benefit Overpayment

STATEMENT OF THE CASE:

The employer filed a timely appeal from a representative's decision dated June 10, 2015, reference 01, which held the claimant eligible to receive unemployment insurance benefits. After due notice was provided, a telephone hearing was held on July 28, 2015. Claimant participated. The employer participated by Mr. David Moehle, Hearing Representative, and Ms. Suzy Chaboneau, General Manager. Employer's Exhibits A through E were admitted into the record.

ISSUE:

The issue is whether the claimant was discharged for misconduct sufficient to warrant the denial of unemployment insurance benefits and whether the claimant has been overpaid unemployment insurance benefits.

FINDINGS OF FACT:

Having considered all the evidence in the record, the administrative law judge finds: Kari Dodson was employed by the captioned employer, doing business as Extended Stay Hotels, from December 26, 2007 until February 23, 2015 when she was discharged from employment. Ms. Dodson officially held the position of full-time front desk clerk and was paid by the hour. Her immediate supervisor was Ms. Chaboneau.

Ms. Dodson was discharged from employment based upon a final incident that had taken place on February 19, 2015, as well as a number of other incidents that had taken place that month. On the morning of February 19, 2015, Ms. Dodson was on duty at the facility's front desk. Ms. Charboneau, the general manager, had instructed the claimant not to "sell" the only remaining room left to be rented in the facility, unless it was rented for a minimum of two nights, or to get authorization before letting the room out. Although the directive remained in effect and the general manager was present, Ms. Dodson did not request any authorization to vary from the directive. Ms. Dodson "sold" the room without charge for only one night to a contractor who

did business with the company. When the contractor was doing work for the company, the staff had generally been authorized to let the contractor to stay without charge.

Because Ms. Dodson had not followed the directive to have the room rented for a minimum of two days in a row to be profitable, the general manager rescinded the sale. Ms. Dodson angrily disagreed. Ms. Charboneau considered the claimant's failure to follow the specific directive and her angry verbal responses to be insubordinate.

The other incidents that month that had caused the claimant to be warned occurred when the claimant had refused to sell a room that was available to a patron because it was too early, the claimant's attitude and statements to a vendor, and a negative comment that the claimant had made about a manager earlier that month.

Prior to the claimant's discharge, she had been issued a performance improvement plan for attitude, behavior and attendance on October 10, 2014, a performance improvement plan on November 4, 2014 for performance issues, insubordination and demeanor. Ms. Dodson was given verbal warnings for insubordination and behavior on February 3, February 4 and February 19, 2015.

Ms. Dodson generally denies any wrongdoing in the incidents alleged by the employer. It is the claimant's position that she attempted to follow company rules to the best of her ability but that she, at times, received conflicting instructions.

REASONING AND CONCLUSIONS OF LAW:

The question before the administrative law judge is whether the evidence in the record establishes misconduct sufficient to warrant the denial of unemployment insurance benefits. It does.

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 discharge cases the employer has the burden of proof to establish disqualifying conduct on the part of a claimant. See Iowa Code section 96.6(2). Misconduct must be substantial in order to justify a denial of unemployment insurance benefits. Misconduct that may be serious enough to warrant the discharge of an employee may not necessarily be serious enough to warrant the denial of unemployment insurance benefits. See Lee v. Employment Appeal Board, 616 N.W.2d 661 (Iowa 2000). 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. of Appeals 1992).

While past acts and warnings can be used to determine the magnitude of a current act of misconduct, a discharge for misconduct cannot be based upon such past acts. The termination of employment must be based on a current act. See 871 IAC 24.32(8).

In the case at hand, the evidence in the record establishes that Ms. Dodson had been warned both verbally and in writing about her attitude, behavior and demeanor at work. The claimant's attitude and willingness to take instructions had also been issues in performance improvement plans that had been given to Ms. Dodson in an effort to retain the claimant as an employee. On February 18, 2015, the claimant was rude to a potential guest and refused to sell the guest a room although rooms were available. The claimant's conduct was observed by Ms. Charboneau, the manager, and was warned on that date that she was expected to be polite and to sell rooms to guests when available.

Because of limited rooms available for sale on the night of February 19, 2015, Ms. Charboneau instructed the claimant that there was a two-night minimum on a remaining room that night. Ms. Charboneau further instructed the claimant that if any regular patron or any other potential patron wanted to rent the room for less than the two-night minimum, the authorization must be obtained through Ms. Charboneau before the room could be rented or any discount in price. In spite of the previous warning and the work directives that were given to her, Ms. Dodson provided the remaining room without charge and for one night to a contractor who was coming to the location to perform work. When Ms. Charboneau attempted to question the claimant about violating the directive without her authorization, the claimant angrily disputed the management decision.

The claimant's conduct disregarded specific directives that had been given to her by the general manager and her arguing with the general manager about the matter constituted misconduct in connection with her employment. Accordingly, the claimant is disqualified for unemployment insurance benefits until she has worked in and been paid wages for insured work equal to ten times her weekly benefit amount, and is otherwise eligible.

Because the claimant has been deemed ineligible for benefits, any benefits that claimant has received could constitute an overpayment. The administrative record reflects that claimant has

received unemployment insurance benefits in the amount of $3504 since filing a claim with an effective date of May 24, 2015, for the week ending dates May 30, 2015 through August 15, 2015. The administrative record also reflects that the employer did participate in the fact-finding interview.

Iowa Code § 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.
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> 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.
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> (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 she 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 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 proceedings to award benefits. The employer will not be charged for benefits if it is determined that they did participate in the fact-finding interview. Iowa Code section 96.3(7). In this case the claimant has received benefits but was not eligible for those benefits. Since the employer did participate in the fact-finding interview, the claimant is obligated to repay to the agency the benefits she received and the employer's account shall not be charged.

DECISION:

The representative's decision dated June 10, 2015, reference 01, is reversed. The claimant was discharged for misconduct in connection with her work. Unemployment insurance benefits are withheld until the claimant has worked in and been paid wages for insured work equal to ten times her weekly benefit amount and is otherwise eligible. The claimant has been overpaid unemployment insurance benefits in the amount of $3504 and is liable to repay that amount. The employer's account shall not be charged because the employer participated in the fact-finding interview in this matter.

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Terence P. Nice
Administrative Law Judge

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Decision Dated and Mailed

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