

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

LARRY W LARGE
Claimant

APPEAL NO. 14R-UI-07386-NT

**ADMINISTRATIVE LAW JUDGE
DECISION**

DILLON AUTO SALES INC
Employer

OC: 04/20/14
Claimant: Respondent (2)

Section 96.5(2)a – Discharge
Section 96.37 – Benefit Overpayment

STATEMENT OF THE CASE:

Dillon Auto Sales, Inc. filed a timely appeal from a representative's decision dated May 9, 2014 (reference 02) which held the claimant eligible to receive unemployment insurance benefits. After due notice was provided, a telephone hearing was held on June 5, 2014. Claimant did not participate. The employer participated by Mr. Michael Dillon, Assistant Manager, and Mr. Steve Vitamvas, Sales Manager. Additional witnesses were Sheryl Ponte and Chris Dillon. On June 6, 2014 the administrative law judge's decision was entered reversing the adjudication and determination, finding that the claimant was discharged under disqualifying conditions and finding that the claimant had been overpaid unemployment insurance benefits in the amount of \$2,448.00 but finding the claimant not obligated to repay that amount concluding that the employer's account should be charged because the employer did not participated in the fact finding. Mr. Large filed an appeal with the Employment Appeal Board, by decision of the Employment Appeal Board dated July 18, 2014 the matter was remanded for a new hearing to provide the claimant an opportunity to participate and the administrative law judge was instructed to take testimony from the employer regarding whether the employer participate in the fact-finding interview. In compliance with the Employment Appeal Board's directive, a hearing was scheduled to be conducted by telephone conference call on Tuesday, August 12, 2014 at 8:00 a.m. The parties' were mailed notice of the August 12, 2014 hearing on July 23, 2014. Although provided notice of the hearing 20 days in advance, Mr. Large did not respond to the notice of hearing and did not participate in the August 12, 2014 hearing. The employer participated by Mr. Steve Vitamvas, Sales Manager; Mr. Mike Forstrom, Council Bluffs Finance Manager; and Ms. Sheryl Ponte, Controller/Human Resource Director.

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 job insurance benefits.

FINDINGS OF FACT:

Having considered all of the evidence in the record, the administrative law judge finds: Larry Large was employed by Dillon Auto Sales, Inc. in its Council Bluffs, Iowa location from August 12, 2014 until April 18, 2014 when he was discharged from employment. Mr. Large was employed as a full-time service manager and was paid by salary. His immediate supervisor was Mr. Steve Vitamvas.

Mr. Large was discharged on April 18, 2014 after the employer had learned the Mr. Large had made Facebook entries announcing the opening of his own repair business, in competition with his employer. The claimant's Facebook entries also made disparaging statements about his current employer, Dillon Auto Sales, Inc. Because the claimant was engaged in opening his own business in competition with his current employer and because of the nature of his disparaging statements made about Dillon Auto Sales, Inc. in his Facebook entries, the decision was made to terminate Mr. Large from his employment. The claimant did not deny that he had made the Facebook entries. Mr. Large explained that he was starting his own business to earn more money but did not provide a satisfactory explanation as to why he had made disparaging statements about his current employer.

Because the employer considered Mr. Large and his activities to be a direct conflict of interest and believed that his disparaging statements were intentional and damaging to the employer, a decision was made to proceed with Mr. Large's discharge from employment.

The employer did participate in the fact-finding call in this matter. It is the employer's belief that Mr. Large is currently operating his own automobile repair business.

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).

The employer has the burden of proof in this matter. 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).

The evidence in the record establishes that Mr. Large was discharged from his employment with Dillon Auto Sales, Inc. when the employer reasonably concluded that the claimant's announcement via Facebook that he was establishing his own business in competition with his employer was a direct conflict of interest. The employer was also reasonable in concluding that the disparaging statements made about Dillon Auto Sales, Inc. in the claimant's Facebook entries were contrary to the employer's interests and reasonable standards of behavior that the employer had a right to expect of its employees under the provisions of the Employment Security Law. Although the claimant was given an opportunity to explain his conduct, Mr. Large had no reasonable explanation and was discharged from employment.

For the reasons stated herein, the administrative law judge concludes that the employer has sustained its burden of proof in showing that the claimant's discharge took place under disqualifying conditions. Benefits are withheld until the claimant has worked in and been paid wages for insured work equal to ten times his weekly benefit amount and he is otherwise eligible.

Because the claimant has been deemed ineligible for benefits, any benefits the claimant has received could constitute an overpayment. The administrative record reflects that the claimant has received unemployment insurance benefits in the amount of \$2,448.00 since filing a claim with an effective date of April 28, 2014 for the weeks ending April 26, 2014 through May 31, 2014. Based upon the information available during the August 12, 2014 hearing in this matter, the administrative law judge finds 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.

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.

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.

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 he received and the employer's account shall not be charged.

DECISION:

The representative's decision dated May 9, 2014 (reference 02) is reversed. The claimant is disqualified. Unemployment insurance benefits are withheld until the claimant has worked in and been paid wages for insured work equal to ten times his weekly benefit amount and he is otherwise eligible. The claimant has been overpaid unemployment insurance benefits in the amount of \$2,448.00. The claimant is obligated to repay that amount to the Agency, as the employer did participate in the fact-finding interview in this matter.

Terence P. Nice
Administrative Law Judge

Decision Dated and Mailed

can/can