

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

DOUG K MCLEY
Claimant

COMES INVESTMENTS INC
Employer

APPEAL NO. 20A-UI-08983-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 5/17/20
Claimant: Respondent (2/R)

Iowa Code Section 96.5(2)(a) – Discharge for Misconduct
Iowa Code Section 96.3(7) – Recovery of Overpaid Benefits
Public Law 116-136, Section 2104(b) – Federal Pandemic Unemployment Compensation

STATEMENT OF THE CASE:

The employer filed a timely appeal from the July 23, 2020, reference 03, decision that allowed benefits to the claimant provided he met all other eligibility requirements and that held the employer's account could be charged for benefits, based on the deputy's conclusion that the claimant was discharged on May 17, 2020 for no disqualifying reason. After due notice was issued, a hearing was held on September 14, 2020. Claimant Doug McLey did not provide a telephone number for the appeal hearing and did not participate. Missy Stoos, Payroll Manager, represented the employer. Exhibits 1 through 5 were received into evidence. The administrative law judge took official notice of the Agency's administrative record of benefits paid to the claimant (DBRO and KPYX). The administrative law judge took official notice of the fact-finding interview for the purpose of documenting the employer's participating in the fact-finding interview process.

ISSUES:

Whether the claimant was discharged for misconduct in connection with the employment that disqualifies the claimant for unemployment insurance benefits.

Whether the employer's account may be charged.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Douglas McLey was employed by Comes Investments, Inc., doing business as Pizza Hut, as a production member and shift manager at the Pizza Hut in Perry. Maeci Eyer, Restaurant General Manager, was Mr. McLey's immediate supervisor. Mr. McLey began the employment on March 17, 2020 and was discharged for attendance on April 29, 2020. The attendance policy that Mr. McLey acknowledged at the start of his employment required him to contact Ms. Eyer prior to the start of his shift if he needed to be absent.

The final absence that triggered the discharge occurred on April 29, 2020, when Mr. McLey was absent without notice to the employer. Mr. McLey had also been absent without notice on April 27 and 28, 2020. These absences followed earlier attendance matters. On March 29, 2020, Mr. McLey was three hours late for work for personal reasons and did not notify the employer until an hour after the scheduled start of his shift. That absence prompted a written reprimand that included a warning that future attendance issues could lead to discharge from the employment. On April 1, 2020, Mr. McLey was 39 minutes late for work for personal reasons. The late arrival prompted a second written reprimand and a warning that the next incident would lead to discharge from the employment.

Ms. McLey established an original claim for benefits that was effective May 17, 2020. Iowa Workforce Development set his weekly benefit amount for regular benefits at \$115.00. Comes Investments, Inc. is not a base period employer in connection with the claim. Mr. McLey received \$1,610.00 in regular benefits for the period of May 17, 2020 through August 22, 2020. Mr. McLey also received \$6,000.00 in Federal Pandemic Unemployment Compensation (FPUC) for the 10 weeks between May 17, 2020 and July 25, 2020. Mr. McLey also received \$1,200 in Lost Wage Assistance (LWA) program benefits for the four weeks ending September 4, 2020.

The employer participated through Missy Stoos, Payroll Manager, in the written, electronic fact-finding interview that preceded the July 23, 2020, reference 03, decision.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code section 96.5(2)(a) provides:

An individual shall be disqualified for benefits, regardless of the source of the individual's wage credits:

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 disqualification shall continue 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 benefits. Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of unemployment 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. App. 1992).

While past acts and warnings can be used to determine the magnitude of the current act of misconduct, a discharge for misconduct cannot be based on such past act(s). The termination of employment must be based on a current act. See 871 IAC 24.32(8). In determining whether the conduct that prompted the discharge constituted a "current act," the administrative law judge considers the date on which the conduct came to the attention of the employer and the date on which the employer notified the claimant that the conduct subjected the claimant to possible discharge. See also *Greene v. EAB*, 426 N.W.2d 659, 662 (Iowa App. 1988).

Allegations of misconduct or dishonesty without additional evidence shall not be sufficient to result in disqualification. If the employer is unwilling to furnish available evidence to corroborate the allegation, misconduct cannot be established. See 871 IAC 24.32(4).

In order for a claimant's absences to constitute misconduct that would disqualify the claimant from receiving unemployment insurance benefits, the evidence must establish that the claimant's *unexcused* absences were excessive. See Iowa Administrative Code rule 871-24.32(7). The determination of whether absenteeism is excessive necessarily requires consideration of past acts and warnings. However, the evidence must first establish that the most recent absence that prompted the decision to discharge the employee was unexcused. See Iowa Administrative Code rule 871-24.32(8). Absences related to issues of personal responsibility such as transportation and oversleeping are considered unexcused. On the other hand, absences related to illness are considered excused, provided the employee has complied with the employer's policy regarding notifying the employer of the absence. Tardiness is a form of absence. See *Higgins v. Iowa Department of Job Service*, 350 N.W.2d 187 (Iowa 1984). Employers may not graft on additional requirements to what is an excused absence under the law. See *Gaborit v. Employment Appeal Board*, 743 N.W.2d 554 (Iowa Ct. App. 2007). For example, an employee's failure to provide a doctor's note in connection with an absence that was due to illness properly reported to the employer will not alter the fact that such an illness would be an excused absence under the law. *Gaborit*, 743 N.W.2d at 557.

The evidence in the record establishes an April 29, 2020 discharge for misconduct in connection with the employment. The discharge was based on excessive unexcused absences. Each of the three consecutive no-call/no-show absences that preceded the discharge was an unexcused absence under the applicable law. The late arrival on March 29 with the late notice to the employer was an unexcused absence under the applicable law. The late arrival for personal reasons on April 1, 2020 was an unexcused absence under the applicable law. The final three no-call/no-show absences follow two written reprimands where the employer warned Mr. McLey that he faced discharge from the employment if the attendance issues continued. The unexcused absences were excessive and demonstrated an intentional and substantial disregard for the employer's interests. Mr. McLey is disqualified for benefits until he has worked

in and been paid wages for insured work equal to 10 times his weekly benefit amount. Mr. McLey must meet all other eligibility requirements.

The unemployment insurance law requires that benefits be recovered from a claimant who receives benefits and is later deemed ineligible for benefits even if the claimant acted in good faith and was not at fault. However, a claimant will not have to repay an overpayment when an initial decision to award benefits on an employment separation issue is reversed on appeal if two conditions are met: (1) the claimant did not receive the benefits due to fraud or willful misrepresentation, and (2) the employer failed to participate in the initial proceeding that awarded benefits. In addition, if a claimant is not required to repay an overpayment because the base period employer failed to participate in the initial proceeding, the base period employer's account will be charged for the overpaid benefits. Iowa Code § 96.3(7)(a) and (b).

Mr. McLey received \$1,610.00 in regular benefits for the period of May 17, 2020 through August 22, 2020, but this decision disqualifies him for those benefits. Accordingly, the benefits Mr. McLey received constitute an overpayment of benefits. Because the employer participated in the fact-finding interview, Mr. McLey is required to repay the overpaid benefits. The employer's account will not be charged for benefits.

PL116-136, Sec. 2104 provides, in pertinent part:

(b) Provisions of Agreement

(1) Federal pandemic unemployment compensation.--Any agreement under this section shall provide that the State agency of the State will make payments of regular compensation to individuals in amounts and to the extent that they would be determined if the State law of the State were applied, with respect to any week for which the individual is (disregarding this section) otherwise entitled under the State law to receive regular compensation, as if such State law had been modified in a manner such that the amount of regular compensation (including dependents' allowances) payable for any week shall be equal to

(A) the amount determined under the State law (before the application of this paragraph), plus

(B) an additional amount of \$600 (in this section referred to as "Federal Pandemic Unemployment Compensation").

....

(f) Fraud and Overpayments

(2) Repayment.--In the case of individuals who have received amounts of Federal Pandemic Unemployment Compensation to which they were not entitled, the State shall require such individuals to repay the amounts of such Federal Pandemic Unemployment Compensation to the State agency...

Because the claimant is disqualified from receiving regular unemployment insurance (UI) benefits, the claimant is also disqualified from receiving Federal Pandemic Unemployment Compensation (FPUC). The \$6,000.00 in FPUC benefits the claimant received for the 10 weeks between May 17, 2020 and July 25, 2020 is an overpayment of benefits that the claimant must repay.

This matter will be remanded for entry of an overpayment decision regarding the \$1,200.00 in LWA benefits the claimant received for the four-week period that ended on September 4, 2020.

DECISION:

The July 23, 2020, reference 03, decision is reversed. The claimant was discharged for misconduct. The discharge was effective April 29, 2020. The claimant is disqualified for unemployment benefits until he has worked in and been paid wages for insured work equal to 10 times his weekly benefit amount. The claimant must meet all other eligibility requirements. The employer's account will not be charged. The claimant is overpaid \$1,610.00 in regular benefits for the period of May 17, 2020 through August 22, 2020. The claimant is overpaid \$6,000.00 in FPUC benefits for the period of May 17, 2020 through July 25, 2020. The claimant must repay the overpaid regular and FPUC benefits.

This matter is remanded to the Benefits Bureau for entry of an overpayment decision regarding the \$1,200.00 in LWA benefits the claimant received for the four-week period that ended on September 4, 2020.



James E. Timberland
Administrative Law Judge

September 17, 2020
Decision Dated and Mailed

jet/sam

NOTE TO CLAIMANT:

- This decision determines you are not eligible for regular unemployment insurance benefits under state law. If you disagree with this decision you may file an appeal to the Employment Appeal Board by following the instructions on the first page of this decision.
- If you do not qualify for regular unemployment insurance benefits under state law and are currently unemployed for reasons related to COVID-19, you may qualify for Pandemic Unemployment Assistance (PUA). **You will need to apply for PUA to determine your eligibility under the program.** For more information on how to apply for PUA, go to <https://www.iowaworkforcedevelopment.gov/pua-information>. **If you do not apply for and are not approved for PUA, you will be required to repay the benefits you have received.**