

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

**JACOB R STEPP**

Claimant

**DOLGENCORP LLC**

Employer

**APPEAL 21A-UI-19592-DZ-T**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**OC: 05/16/21**

**Claimant: Respondent (2)**

Iowa Code § 96.5(2)a – Discharge for Misconduct  
Iowa Code § 96.5(1) – Voluntary Quit  
Iowa Admin. Code r. 871-24.10 – Employer Participation in Fact-Finding Interview  
Iowa Code § 96.3(7) – Recovery of Benefit Overpayment  
PL 116-136, Sec. 2104 – Federal Pandemic Unemployment Compensation

**STATEMENT OF THE CASE:**

Dolgencorp LLC., the employer/appellant, filed an appeal from the August 24, 2021, (reference 02) unemployment insurance decision that allowed benefits. The parties were properly notified of the hearing. A telephone hearing was held on October 26, 2021. The employer participated through Nikki Everheart, store manager. Mr. Stepp did not register for the hearing and did not participate. The administrative law judge took official notice of the administrative record. Employer's Exhibit 1 was admitted as evidence.

**ISSUE:**

Was Mr. Stepp discharged for disqualifying job-related misconduct?

Was Mr. Stepp overpaid benefits?

If so, should he repay the benefits?

**FINDINGS OF FACT:**

Having reviewed all of the evidence in the record, the administrative law judge finds: Mr. Stepp began working for the employer, a Dollar General store in Fayette, Iowa, on December 7, 2020. He worked as a part-time sale associate. His last day working was March 28, 2021. His employment ended on April 1, 2021.

Mr. Stepp worked part-time and wanted more hours. He spoke with Ms. Everheart about getting more hours. On April 1, Mr. Stepp sent Ms. Everheart a text message asking why he was scheduled for only one day the next weekend, and asking why his hours are being reduced. Mr. Stepp also told Ms. Everheart that, despite what she had heard, he is a hard worker and he gets his job done in a professional manner. Mr. Stepp ended his text with the following:

“Idk what you want from me or want me to do to prove to you I want this job, I I didn't want to have to ask this but are you cutting my hours because u want something sexual?? U

wouldn't be the first boss I had to fuck to get more hours, had to do the same thing when I worked at [another employer]. I'm serious Nikki ill do whatever it take to get at least 3 days a week. Just name what you want and ill do it."

Ms. Everheart did not respond to Mr. Stepp's text. She sent the text to the district manager.

The employer's policy prohibits harassment, including "unwelcome sexual advances...unwelcome sexually suggestive [] texts...[and] comments or remarks that are sexually suggestive." Employer's Exhibit 1. The policy further provides that employees who violate the policy are subject to discipline, up to and including termination of employment, even for the first offense. Mr. Stepp acknowledged receiving the policy on December 8, 2020.

Ms. Everheart completed termination paperwork and asked Mr. Stepp to come in and sign the document. Mr. Stepp chose not to come in to sign the document. The employer terminated Mr. Stepp's employment that day.

Mr. Stepp has received \$590.00 in REGULAR unemployment insurance (UI) benefits between May 16, 2021 and June 19, 2021. Mr. Stepp has received \$1,200.00 in Federal Pandemic Unemployment Compensation (FPUC) benefits between May 30, 2021 and June 12, 2021. The administrative record (KFFV screen) shows the employer did not participate in the fact-finding interview.

#### **REASONING AND CONCLUSIONS OF LAW:**

For the reasons that follow, the administrative law judge concludes Mr. Stepp was discharged from employment due to job-related misconduct.

Iowa Code section 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.

871 IAC 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 Department of Job Service*, 275 N.W.2d 445, 448 (Iowa 1979).

The employer has the burden of proof in establishing disqualifying job misconduct. *Cosper v. Iowa Dept of Job Serv.*, 321 N.W.2d 6 (Iowa 1982). The issue is not whether the employer made a correct decision in separating claimant, but whether the claimant is entitled to unemployment insurance benefits. *Infante v. Iowa Dept of Job Serv.*, 364 N.W.2d 262 (Iowa Ct. App. 1984). The Iowa Court of Appeals found substantial evidence of misconduct in testimony that the claimant worked slower than he was capable of working and would temporarily and briefly improve following oral reprimands. *Sellers v. Emp't Appeal Bd.*, 531 N.W.2d 645 (Iowa Ct. App. 1995). Generally, continued refusal to follow reasonable instructions constitutes misconduct. *Gilliam v. Atlantic Bottling Co.*, 453 N.W.2d 230 (Iowa Ct. App. 1990). Misconduct must be "substantial" to warrant a denial of job insurance benefits. *Newman v. Iowa Dept of Job Serv.*, 351 N.W.2d 806 (Iowa Ct. App. 1984). Poor work performance is not misconduct in the absence of evidence of intent. *Miller v. Emp't Appeal Bd.*, 423 N.W.2d 211 (Iowa Ct. App. 1988).

The employer is entitled to establish reasonable work rules and expect employees to abide by them. The employer has presented credible evidence that Mr. Stepp sexually harassed Ms. Everheart, in clear violation of the employer's policy. Mr. Stepp's April 1 text message was basic – offering sex in exchange for being scheduled at least three days per week – sexist<sup>1</sup> and disqualifying misconduct. Benefits are denied.

The administrative law judge further concludes Mr. Stepp has been overpaid REGULAR UI benefits in the amount of \$590.00, and he has been overpaid FPUC benefits in the amount of \$1,200.00.

Iowa Code §96.3(7) provides, in pertinent part:

*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

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<sup>1</sup> Aimie Picchi, *Women in Leadership Roles Sexually Harassed More Than Other Women*, CBS News (January 16, 2020, 1:29 PM) <https://www.cbsnews.com/news/women-in-leadership-are-harassed-more-than-other-female-employees/>

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.

(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.

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.

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...

Mr. Stepp has been overpaid REGULAR UI benefits in the amount of \$590.00 as he is not qualified and/or is ineligible to receive REGULAR UI benefits. Since the employer did not participate in the fact-finding interview, Mr. Stepp is not required to repay these benefits.

Because Mr. Stepp is disqualified from receiving regular UI benefits, he is also disqualified from receiving FPUC benefits. While Iowa law does not require a claimant to repay regular UI benefits when the employer does not participate in the fact-finding interview, the CARES Act makes no such exception for the repayment of FPUC benefits. Therefore, the determination of whether Mr. Stepp must repay FPUC does not hinge on the employer's participation in the fact-

finding interview. The administrative law judge concludes that Mr. Stepp has been overpaid FPUC benefits in the gross amount of \$1,200.00.

**DECISION:**

The August 24, 2021, (reference 02) unemployment insurance decision is reversed. Mr. Stepp 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.

Mr. Stepp has been overpaid REGULAR UI benefits in the amount of \$590.00. Since the employer did not participate in the fact-finding interview, Mr. Stepp is not required to repay these benefits

Mr. Stepp has been overpaid FPUC benefits in the amount of \$1,200.00, which must be repaid.



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Daniel Zeno  
Administrative Law Judge  
Iowa Workforce Development  
Unemployment Insurance Appeals Bureau  
1000 East Grand Avenue  
Des Moines, Iowa 50319-0209  
Fax 515-478-3528

November 9, 2021  
Decision Dated and Mailed

dz/scn

**NOTE TO MR. STEPP:**

- This decision determines you have been overpaid FPUC benefits. 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.
- **You may also request a waiver of this overpayment either 1) online, OR 2) in writing by mail.**
- The **online request form** is available on the Iowa Workforce Development website at: <https://www.iowaworkforcedevelopment.gov/federal-unemployment-insurance-overpayment-recovery>
- The **written request** must include the following information:
  - Your name & address.
  - Decision number/date of decision.
  - Dollar amount of overpayment requested for waiver.
  - Relevant facts that you feel would justify a waiver.
- The request should be sent to:

Iowa Workforce Development  
Overpayment waiver request  
1000 East Grand Avenue  
Des Moines, IA 50319
- If this decision becomes final and you are not eligible for a waiver, you will have to repay the benefits you received.