

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

DAVID HART
Claimant

SWIFT PORK COMPANY
Employer

APPEAL 21A-UI-10570-DB-T
**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 01/17/21
Claimant: Respondent (2)

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

STATEMENT OF THE CASE:

The employer/appellant filed an appeal from the March 22, 2021 (reference 01) unemployment insurance decision that allowed unemployment insurance benefits based upon claimant's discharge from work. The parties were properly notified of the hearing. A telephone hearing was held on June 30, 2021. The claimant participated personally. The employer participated through witness Patty Taylor. Employer's Exhibit 1 was admitted. The administrative law judge took official notice of the claimant's unemployment insurance benefits records.

ISSUES:

Was the claimant discharged for disqualifying job-related misconduct?
Has the claimant been overpaid any regular unemployment insurance benefits, and if so, can the repayment of those benefits to the agency be waived?
Can any charges to the employer's account be waived?
Has the claimant been overpaid FPUC benefits and must those FPUC benefits be repaid?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was first employed with this employer on or about January 11, 2015. Claimant worked full-time as a general laborer at the employer's production plant. In December of 2020, the claimant was suspended and then reinstated effective December 23, 2020. His last day physically worked on the job was January 9, 2021. He was discharged from employment on January 20, 2021 and notified of the discharge via telephone.

On January 8, 2021, the claimant and Tyrese Montgomery engaged in a physical altercation at a Casey's convenience store. Claimant had left work and was waiting in his vehicle for another co-worker to end their shift so he could give the co-worker a ride home. Mr. Montgomery worked as a USDA inspector and was a third party vendor who frequented the production line where the claimant worked. Mr. Montgomery approached the claimant's vehicle, which was parked near the guard shack of the employer while he was waiting for his co-worker, and began calling the claimant profane names. See Exhibit 1. Claimant told Mr. Montgomery to go to

Casey's store and they could handle it off of work property. See Exhibit 1. The two met at Casey's and engaged in a physical altercation where each of them were hitting or kicking the other. See Exhibit 1. The altercation eventually ended when a bystander, who knew the claimant, told him to stop. Claimant then left Casey's and drove back to the employer's premises to pick up the co-worker he was driving home.

The next day the claimant gave the employer a statement about the incident. See Exhibit 1. Mr. Montgomery had reported the incident to his employer. Claimant was told that he was suspended pending an investigation into the incident. See Exhibit 1. Claimant was notified on January 20, 2021, following the employer's investigation, that he was discharged from employment.

The employer has a written policy prohibiting violence or threats of violence in the workplace. Claimant was aware of the policy and was most recently trained on the policy on March 10, 2020. The employer does not have a written policy regarding off-duty conduct.

Claimant has received unemployment insurance benefits funded by the State of Iowa in the amount of \$10,137.00 from January 17, 2021 through June 26, 2021. Claimant has also received FPUC benefits in the amount of \$6,300.00 from January 17, 2021 through June 12, 2021. The employer did not participate in the fact-finding interview held with the claimant and the Iowa Workforce Development interviewer. No information regarding whether the employer participated in the fact-finding interview at another time was provided by the employer's witness during the hearing. No fact-finding documents are available in the administrative record as of the date of the hearing.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes as follows:

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).

Iowa Admin. Code r. 871-24.32(4) provides:

(4) Report required. The claimant's statement and employer's statement must give detailed facts as to the specific reason for the claimant's discharge. 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. In cases where a suspension or disciplinary layoff exists, the claimant is considered as discharged, and the issue of misconduct shall be resolved.

The employer has the burden of proof in establishing disqualifying job-related misconduct. *Cosper v. Iowa Dep't 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 Dep't of Job Serv.*, 364 N.W.2d 262 (Iowa Ct. App. 1984). What constitutes misconduct justifying termination of an employee and what misconduct warrants denial of unemployment insurance benefits are two separate decisions. *Pierce v. Iowa Dep't of Job Serv.*, 425 N.W.2d 679 (Iowa Ct. App. 1988). Misconduct serious enough to warrant discharge is not necessarily serious enough to warrant a denial of job insurance benefits. Such misconduct must be "substantial." *Newman v. Iowa Dep't of Job Serv.*, 351 N.W.2d 806 (Iowa Ct. App. 1984). Misconduct must be substantial in nature to support a disqualification from unemployment benefits. *Gimbel v. Employment Appeal Bd.*, 489 N.W.2d 36, 39 (Iowa Ct. App. 1992). The focus is on deliberate, intentional, or culpable acts by the employee. *Id.*

Under the definition of misconduct for purposes of unemployment benefit disqualification, the conduct in question must be "work-connected." *Diggs v. Emp't Appeal Bd.*, 478 N.W.2d 432 (Iowa Ct. App. 1991). Some off-duty conduct can have the requisite element of work connection. *Kleidosty v. Emp't Appeal Bd.*, 482 N.W.2d 416, 418 (Iowa 1992). Under similar definitions of misconduct, for an employer to show that the employee's off-duty activities rise to the level of misconduct in connection with the employment, the employer must show by a preponderance of the evidence that the employee's conduct (1) had some nexus with the work; (2) resulted in some harm to the employer's interest, and (3) was conduct which was (a) violative of some code of behavior impliedly contracted between employer and employee, and (b) done with intent or knowledge that the employer's interest would suffer. See also *Dray v. Director*, 930 S.W.2d 390 (Ark. Ct. App. 1996); *In re Kotrba*, 418 N.W.2d 313 (SD 1988), quoting *Nelson v. Dept of Emp't Security*, 655 P.2d 242 (WA 1982); 76 Am. Jur. 2d, Unemployment Compensation §§ 77-78.

In this case, the claimant's conduct clearly had a nexus with work because it involved a person who worked for a third party vendor on the production plant site with the claimant. The claimant's actions in fighting Mr. Montgomery was in public in front of bystanders, including a bystander who knew the claimant personally. His conduct also involved a person who worked for a third party vendor that the employer frequently engaged in workplace matters with. The claimant's actions in first prompting Mr. Montgomery to meet him in order to fight and then engaging in a physical altercation with him was in violation of the employer's policy against

violence; however, it simply just occurred off premises because the claimant instructed Mr. Montgomery to meet him off premises. Claimant's statements in prompting Mr. Montgomery to meet him off premises actually occurred on premises near the guard shack. Claimant's actions in engaging in a physical altercation with a USDA inspector was done with knowledge that the employer's interest would suffer. As such, claimant's actions on January 8, 2021 were work-connected. The employer has established that the claimant engaged in a current act of substantial job-related misconduct. Regular unemployment insurance benefits funded by the State of Iowa are denied. Because benefits are denied, the issues of overpayment and chargeability must be addressed.

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 the claimant 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 those 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 employer will not be charged for benefits if it is determined that they did participate in the fact-finding interview. Iowa Code § 96.3(7).

In this case, the claimant has received benefits but was not eligible for those benefits. Since the employer's witness at hearing did not provide information about whether the employer participated in the fact-finding interview and no fact-finding documents were available in the administrative record, the administrative law judge concludes that the employer did not sufficiently participate in the fact-finding interview. Therefore, the claimant is not obligated to repay to the agency the regular unemployment insurance benefits he received, \$10,137.00 from January 17, 2021 through June 26, 2021, in connection with this employer's account, and this employer's account may be charged for those regular unemployment insurance benefits paid.

The next issue is whether the claimant is overpaid FPUC benefits and must repay those benefits to the agency. The administrative law judge finds that he is overpaid FPUC benefits and must repay those FPUC benefits to the agency.

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...

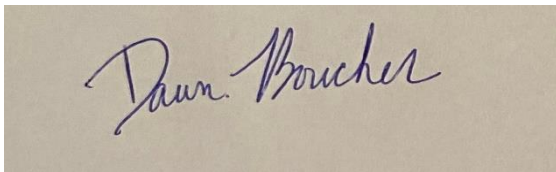
Because claimant is disqualified from receiving regular unemployment insurance benefits, he is also disqualified from receiving FPUC benefits. While Iowa law does not require a claimant to repay regular unemployment insurance benefits when the employer does not participate in the fact-finding interview, the Coronavirus Aid, Relief, and Economic Security Act ("Cares Act") makes no such exception for the repayment of FPUC. Therefore, the determination of whether the claimant must repay FPUC does not hinge on the employer's participation in the fact-finding interview. The administrative law judge concludes that claimant has been overpaid FPUC in the gross amount of \$6,300.00 from June 17, 2021 through June 12, 2021. Claimant must repay the agency the FPUC benefits he received.

DECISION:

The March 22, 2021 (reference 01) unemployment insurance decision is reversed. Claimant was discharged from employment on January 20, 2021 for a current act of substantial job-related misconduct. Unemployment insurance benefits funded by the State of Iowa are denied until the claimant has worked in and been paid wages for insured work equal to ten times his weekly benefit amount after his January 20, 2021 separation date, and provided he is otherwise eligible.

The claimant has been overpaid regular unemployment insurance benefits funded by the State of Iowa in the amount of \$10,137.00 between January 17, 2021 and June 26, 2021 but is not obligated to repay the agency those benefits because the employer did not sufficiently participate in the fact-finding interview. The employer's account may be charged for those benefits paid.

The claimant has been overpaid FPUC benefits of \$6,300.00 from January 17, 2021 through June 12, 2021 and he is required to repay the agency those FPUC benefits he received.

A rectangular area containing a handwritten signature in blue ink that reads "Dawn Boucher".

Dawn Boucher
Administrative Law Judge

July 14, 2021
Decision Dated and Mailed

db/mh