

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

NICOLE BENEFIELD
Claimant

ENLIVANT AID ES LLC
Employer

APPEAL 21A-UI-12157-LJ-T
**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 02/28/21
Claimant: Respondent (2)

Iowa Code § 96.5(2)a – Discharge from Employment
Iowa Code § 96.3(7) – Recovery of Benefit Overpayment
Iowa Admin. Code r. 871-24.10 – Employer Participation in Fact-Finding
PL 116-136, sec. 2104 – Federal Pandemic Unemployment Compensation
PL 116-136, sec. 2107 – Federal Pandemic Emergency Unemployment Compensation

STATEMENT OF THE CASE:

On May 3, 2021, the employer, Enlivant Aid Es, L.L.C., filed an appeal from the April 23, 2021 (reference 01) unemployment insurance decision that allowed benefits based upon a determination that claimant was discharged from employment and the employer failed to establish the discharge was for willful or deliberate misconduct. The parties were properly notified of the hearing. A telephonic hearing was held at 1:00 p.m. on Friday, July 23, 2021. The claimant, Nicole Benefield, did not register a telephone number at which to be reached and did not participate in the hearing. The employer, Enlivant Aid Es, L.L.C., participated through Paul Rieken, Executive Director. No exhibits were offered or admitted into the record. The administrative law judge took official notice of the administrative record.

ISSUES:

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

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed full time, most recently as a resident care partner, from June 3, 2020, until December 2, 2020, when she was discharged for violating the employer's handbook and COVID protocols.

The employer put strict protocols in place during the COVID-19 pandemic. Among them, the employer prohibited all non-essential personnel from being on premises. Additionally, the employer mandated that employees wear face masks at all times. The employer also maintains

an employee handbook. A policy within this handbook requires an employee to obtain permission before coming onto the property while they are off duty.

The final incident leading to claimant's discharge occurred on November 25, 2020. That day, claimant brought her ten-year-old daughter into the workplace with her so that she could do laundry using the employer's laundry facilities while off the clock. Neither claimant nor her daughter were wearing face masks, and claimant did not have approval to be on the premises. When Rieken was alerted to this incident, he immediately came to the property to address the issue. Claimant said she just needed to do laundry and did not want to leave her daughter home alone.

The employer suspended claimant on November 27, 2020, pending further investigation. She was discharged five days later. Claimant was trained on the employer's policies and COVID protocols, and she knew these infractions could result in her discharge from employment. Rieken explained that claimant bringing her unmasked minor child onto the premises and claimant's own failure to wear a face mask placed the health and safety of the vulnerable elderly residents of the facility in jeopardy.

The administrative record reflects that claimant has received unemployment benefits in the amount of \$1,809.43, since filing a claim with an effective date of February 28, 2021, for the ten weeks ending May 8, 2021. Claimant then received federal Pandemic Emergency Unemployment Compensation in the amount of \$920.00 for the five weeks ending June 12, 2021. Claimant also received Federal Pandemic Unemployment Compensation in the amount of \$4,500.00 for the fifteen weeks ending June 12, 2021. The administrative record also establishes that the employer did not participate in the fact-finding interview. There is no evidence in the administrative record that the agency contacted the employer to conduct a fact-finding telephone call or to request a fact-finding questionnaire be completed.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes claimant was discharged from employment for disqualifying, job-related misconduct. Benefits are withheld.

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).

Misconduct must be "substantial" to warrant a denial of job insurance benefits. *Newman v. Iowa Dep't of Job Serv.*, 351 N.W.2d 806 (Iowa Ct. App. 1984). When based on carelessness, the carelessness must actually indicate a "wrongful intent" to be disqualifying in nature. *Id.* Negligence does not constitute misconduct unless recurrent in nature; a single act is not disqualifying unless indicative of a deliberate disregard of the employer's interests. *Henry v. Iowa Dep't of Job Serv.*, 391 N.W.2d 731 (Iowa Ct. App. 1986). 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 evidence in the record shows claimant engaged in behavior that placed the health of all residents of the employer's care facility in jeopardy. Claimant brought her ten-year-old daughter into the facility during the COVID-19 pandemic, and neither claimant nor her daughter wore masks. There was nothing necessary about this visit; claimant was there for her own personal convenience. Claimant's decision to violate multiple employer policies was in deliberate disregard of the employer's interests and showed an intentional and substantial disregard of and disrespect for her duties and obligations to the employer and its residents. The employer has established that claimant was discharged for disqualifying, job-related misconduct. Benefits are withheld.

The next issues to be determined are whether claimant has been overpaid benefits, whether the claimant must repay those benefits, and whether the employer's account will be charged. 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.

...

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 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 benefits were not received due to any fraud or willful misrepresentation by claimant. Additionally, the employer did not participate in the fact-finding interview. Thus, claimant is not obligated to repay to the agency the benefits she received.

The law also states that an employer is to be charged if “the employer failed to respond timely or adequately to the department’s request for information relating to the payment of benefits. . .” Iowa Code § 96.3(7)(b)(1)(a). Here, there is no evidence in the administrative record that the department ever requested information from the employer. Benefits were paid, but not because the employer failed to respond timely or adequately to the agency’s request for information relating to the payment of benefits. Instead, benefits were paid because employer did not receive a call or information request from the agency. Employer thus cannot be charged. Since neither party is to be charged then the overpayment is absorbed by the fund.

The final questions are whether claimant is eligible for and must repay the FPUC and PEUC benefits she received.

PL 116-136, 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, except that the State agency may waive such repayment if it determines that—

(A) the payment of such Federal Pandemic Unemployment Compensation was without fault on the part of any such individual; and

(B) such repayment would be contrary to equity and good conscience.

Section 203 of the Continued Assistance for Unemployed Workers Act of 2020 provides in pertinent part:

(a) IN GENERAL. – Section 2104(e) of the CARES Act (15 U.S.C. 9023(e)) is amended to read as follows: . . .

“(e) APPLICABILITY. – An agreement entered into under this section shall apply –

(1) to weeks of unemployment beginning after the date on which such agreement is entered into and ending on or before July 31, 2020; and

(2) to weeks of unemployment beginning after December 26, 2020 (or, if later, the date on which such agreement is entered into), and ending on or before March 14, 2021.”.

(b) AMOUNT.-

(1) IN GENERAL. – Section 2104(b) of the CARES Act (15 U.S.C. 9023(b)) is amended –

(A) in paragraph (1)(B), by striking “of \$600” and inserting “equal to the amount specified in paragraph (3)”; and

(B) by adding at the end of the following new paragraph:

“(3) AMOUNT OF FEDERAL PANDEMIC UNEMPLOYMENT COMPENSATION.-

“(A) IN GENERAL. – The amount specified in this paragraph is the following amount:

“(i) For weeks of unemployment beginning after the date on which an agreement is entered into under this section and ending on or before July 31, 2020, \$600.

“(ii) For weeks of unemployment beginning after December 26, 2020 (or, if later, the date on which such agreement is entered into), and ending on or before March 14, 2021, \$300.”.

PL 116-136 Sec 2107 provides in pertinent part:

PANDEMIC EMERGENCY UNEMPLOYMENT COMPENSATION.

(2) PROVISIONS OF AGREEMENT. —

Any agreement under paragraph (1) shall provide that the State agency of the State will make payments of pandemic emergency unemployment compensation to individuals who—

(A) have exhausted all rights to regular compensation under the State law or under Federal law with respect to a benefit year (excluding any benefit year that ended before July 1, 2019);

(B) have no rights to regular compensation with respect to a week under such law or any other State unemployment compensation law or to compensation under any other Federal law;

(C) are not receiving compensation with respect to such week under the unemployment compensation law of Canada; and

(D) are able to work, available to work, and actively seeking work.

(emphasis added).

(e) FRAUD AND OVERPAYMENTS.—

...

(2) REPAYMENT.—In the case of individuals who have received amounts of pandemic emergency unemployment compensation under this section to which they were not entitled, the State shall require such individuals to repay the amounts of such pandemic emergency unemployment compensation to the State agency, except that the State agency may waive such repayment if it determines that—

(A) the payment of such pandemic emergency unemployment compensation was without fault on the part of any such individual; and

(B) such repayment would be contrary to equity and good conscience.

Because claimant is disqualified from receiving unemployment insurance benefits, they are also disqualified from receiving both FPUC and PEUC benefits. While Iowa law does not require a claimant to repay regular unemployment insurance benefits in this situation, the CARES Act makes no such exception for the repayment of FPUC and PEUC. Therefore, the determination of whether the claimant must repay FPUC and PEUC 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 \$4,500.00 for the 15 weeks ending June 12, 2021, and claimant has been overpaid PEUC in the gross amount of \$920.00 for the five weeks ending June 12, 2021. Claimant must repay these benefits.

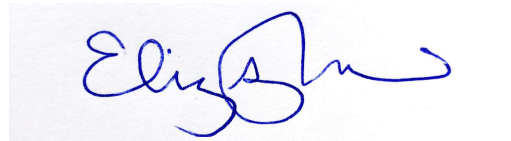
DECISION:

The April 23, 2021 (reference 01) unemployment insurance decision is reversed. Claimant was discharged from employment due to job-related misconduct. Benefits are withheld until such time as she has worked in and been paid wages for insured work equal to ten times her weekly benefit amount, provided she is otherwise eligible.

The claimant has been overpaid unemployment insurance benefits in the amount of \$1,809.43 and is not obligated to repay the agency those benefits. The employer did not participate in the fact-finding interview through no fault of its own and its account shall not be charged. The overpayment shall be absorbed by the fund.

The claimant has been overpaid FPUC benefits in the amount of \$4,500.00 and is obligated to repay the agency those benefits.

The claimant has been overpaid PEUC benefits in the amount of \$920.00 and is obligated to repay the agency those benefits.



Elizabeth A. Johnson
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July 29, 2021
Decision Dated and Mailed

lj/kmj