

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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

MITZI E EHLERS
Claimant

APPEAL NO. 19A-UI-06576-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

OS RESTAURANT SERVICES INC
Employer

OC: 07/07/19
Claimant: Respondent (2)

Iowa Code Section 96.5(1) – Voluntary Quit
Iowa Code Section 96.5(11) – Separation Due to Incarceration
Iowa Code Section 96.3(7) - Overpayment

STATEMENT OF THE CASE:

The employer filed a timely appeal from the August 8, 2019, reference 01, decision that allowed benefits to the claimant provided she was otherwise eligible 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 21, 2019 for no disqualifying reason. After due notice was issued, a hearing was held on September 12, 2019. Claimant Mitzi Ehlers did not comply with the hearing notice instructions to register a telephone number for the hearing and did participate. Lesley Buhler of Equifax represented the employer and presented testimony through Ryan Exner and Mikayla Funk. The administrative law judge took official notice of the Agency's record of benefits disbursed to the claimant and received Exhibits 1 through 4 into evidence. The administrative law judge took official notice of the fact-finding materials for the limited purpose of determining whether the employer participated in the fact-finding interview. The administrative law judge took official notice of the Woodbury County Clerk of Court records pertaining to Woodbury County Case Numbers AGCR104661 and AMCR104686, which records are available to the public at <https://www.iowacourts.state.ia.us>, otherwise known as Iowa Courts Online.

ISSUES:

Whether the claimant separated from the employment due to incarceration under circumstances that disqualify the claimant for unemployment insurance benefits.

Whether the claimant voluntarily quit the employment without good cause attributable to the employer.

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

Whether the claimant was overpaid unemployment insurance benefits.

Whether the claimant must repay overpaid 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: Mitzi Ehlers was employed by OS Restaurant Services, Inc., doing business as Outback Steakhouse, as a part-time host and server. Ms. Ehlers began the employment in 2017 and last performed work for the employer on May 21, 2019. Ryan Exner, General Manager and proprietor, was Ms. Ehlers' supervisor. After Ms. Ehlers completed her shift on May 21, 2019, law enforcement arrested Ms. Ehlers and charged her with the criminal offense of Driving While Barred in violation of Iowa Code section 321.561, an aggravated misdemeanor. Law enforcement transported Ms. Ehlers to the Woodbury County Jail. At some point after the arrest, Ms. Ehlers' husband notified the employer that Ms. Ehlers was in jail and was expected to remain in jail for several weeks. Ms. Ehlers remained in the Woodbury County Jail at least through May 31, 2019 and most likely continued to be incarcerated until early July 2019. On May 31, 2019, Ms. Ehlers entered a written guilty plea to the Driving While Barred offense. On June 3, 2019, Ms. Ehlers was sentenced to serve 20 days in jail, based on the Driving While Barred conviction. While Ms. Ehlers was in the custody of the Woodbury County Jail on the Woodbury County Driving While Barred charge, she was also being held outstanding warrants issued in Union County, South Dakota. Ms. Ehlers was absent from several scheduled shifts during the period of the incarceration.

During the period of Ms. Ehlers incarceration, an Outback Steakhouse customer contacted the employer to complain about an unauthorized \$5.00 tip being added to the customer's restaurant bill on April 27, 2019. The customer complained on May 28, 2019, after the customer received and reviewed his monthly credit card statement that included the unauthorized \$5.00 tip. Ms. Ehlers had waited on the customer and processed the customer's payment. The customer provided the employer with the original restaurant bill/receipt signed by the customer. The original bill/receipt reflected that the customer had written a zero on the tip line. The employer compared the original bill/receipt signed by the customer with the computer record Ms. Ehlers created with her confidential server PIN when she processed the transaction on April 27, 2019. The employer's review of that record confirmed that Ms. Ehlers had indeed added an unauthorized \$5.00 tip to the customer's bill. The employer's written work rules prohibited employees from adding unauthorized tips to customers' bills. Ms. Ehlers was at all relevant times aware of the work rule.

On July 9, 2019, Ms. Ehlers contacted the employer to indicate that she was out of custody and ready to return to work. It is unclear how long Ms. Ehlers had been out of law enforcement custody at the time she contacted the employer about returning to work. The employer declined to allow Ms. Ehlers to return to work and cited the unauthorized tip as the basis for the decision not to let Ms. Ehlers return to the employment.

Ms. Ehlers established an original claim for benefits that Iowa Workforce Development deemed effective July 7, 2019. OS Restaurant Services is the sole base period employer in connection with the claim. Ms. Ehlers received \$2,203.00 in benefits for the seven weeks between July 7, 2019 and August 24, 2019.

On August 7, 2019, an Iowa Workforce Development Benefits Bureau deputy held a fact-finding interview that addressed Ms. Ehlers' separation from the employment. Ryan Exner represented the employer at the fact-finding interview.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code section 96.5(11) provides as follows:

96.5 Causes for disqualification.

An individual shall be disqualified for benefits:

11. Incarceration – disqualified.

a. If the department finds that the individual became separated from employment due to the individual's incarceration in a jail, municipal holding facility, or correctional institution or facility, unless the department finds all of the following:

(1) The individual notified the employer that the individual would be absent from work due to the individual's incarceration prior to any such absence.

(2) Criminal charges relating to the incarceration were not filed against the individual, all criminal charges against the individual relating to the incarceration were dismissed, or the individual was found not guilty of all criminal charges relating to the incarceration.

(3) The individual reported back to the employer within two work days of the individual's release from incarceration and offered services.

(4) The employer rejected the individual's offer of services.

b. A disqualification under this subsection shall continue until the individual has worked in and been paid wages for insured work equal to ten times the individual's weekly benefit amount, provided the individual is otherwise eligible.

Iowa Administrative Code rule 871-24.26(17) provides as follows:

24.26(17) Separation due to incarceration.

a. The claimant shall be eligible for benefits if the department finds that all of the following conditions have been met:

(1) The employer was notified by the claimant prior to the absence;

(2) Criminal charges relating to the incarceration were not filed against the individual, all criminal charges against the individual relating to the incarceration were dismissed, or the claimant was found not guilty of all criminal charges relating to the incarceration;

(3) The claimant reported back to the employer within two work days of the release from incarceration and offered services to the employer; and

(4) The employer rejected the offer of services.

b. If the claimant fails to satisfy the requirements of subparagraph 24.26(17)"a"(1), the claimant shall be considered to have voluntarily quit the employment if the claimant was absent for three work days or more under subrule 24.25(4). If the absence was two days or less, the separation shall be considered a discharge under rule 871—24.32(96). If all of the conditions of

subparagraphs 24.26(17)“a”(2), (3)and (4) are not satisfied, the separation should be considered a discharge under rule 871—24.32(96).

This subrule is intended to implement Iowa Code section 96.5 and Supreme Court of Iowa decision, *Irving v. Employment Appeal Board*, 883 N.W.2d 179.

When the separation from employment is based on incarceration, the claimant has burden of proving the claimant is not disqualified for benefits under Iowa Code section 96.5(11). Iowa Code section 96.6(2).

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 a discharge 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).

Iowa Code section 96.5(1) provides:

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

1. Voluntary quitting. If the individual has left work voluntarily without good cause attributable to the individual's employer, if so found by the department.

In general, a voluntary quit requires evidence of an intention to sever the employment relationship and an overt act carrying out that intention. See *Local Lodge #1426 v. Wilson Trailer*, 289 N.W.2d 698, 612 (Iowa 1980) and *Peck v. EAB*, 492 N.W.2d 438 (Iowa App. 1992). In general, a voluntary quit means discontinuing the employment because the employee no longer desires to remain in the relationship of an employee with the employer. See 871 IAC 24.25.

The evidence in the record establishes a voluntary quit without good cause attributable to the employer that was due to incarceration. The voluntary quit was effective May 21, 2019, when Ms. Ehlers became unavailable to report for shifts due to incarceration. Ms. Ehlers did not notify the employer she would be absent due to incarceration prior to being absent due to the incarceration. It is unclear whether Ms. Ehlers' husband alerted the employer to the incarceration *before* or *after* Ms. Ehlers commenced being absent due to the incarceration. Ms. Ehlers pleaded guilty to and was convicted of the Driving While Barred criminal offence. It is unclear how long Ms. Ehlers was out of custody before she contacted the employer on July 9, 2019 to request to return to the employment. In other words, Ms. Ehlers has not proven that she made such contact within two work days of her release from custody. The employer did indeed decline to allow Ms. Ehlers to return. Though the employer had made that decision on or about May 28, 2019, the employer had not communicated that decision to Ms. Ehlers. The weight of the evidence establishes that the decision not to allow Ms. Ehlers to return to the employment was made after Ms. Ehlers had already separated from the employment through the extended period of incarceration.

Even if the evidence in the record had established a discharge, rather than a quit, the evidence would establish a discharge for misconduct in connection with the employment and based on a current act of misconduct. The weight of the evidence establishes that Ms. Ehlers did indeed knowingly and intentionally steal from the customer on April 27, 2019. In doing so, she knowingly and intentionally violated the employer's work rule that prohibited adding an unauthorized tip to a customer's bill. The conduct only came to the employer's attention on May 28, 2019. Because Ms. Ehlers was away from the employment due to incarceration, the employer's decision to delay broaching the matter with Ms. Ehlers until she became available to return to the employment was not unreasonable delay.

Ms. Ehlers is disqualified for benefits until she has worked in and been paid wages for insured work equal to 10 times her weekly benefit amount. Ms. Ehlers 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 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).

Ms. Ehlers received \$2,203.00 in benefits for the seven weeks between July 7, 2019 and August 24, 2019, but this decision disqualifies her for those benefits. Accordingly, the benefits Ms. Ehlers received constitute an overpayment of benefits. Because the employer participated in the fact-finding interview, Ms. Ehlers is required to repay the overpaid benefits. The employer's account will be relieved of liability for benefits, including liability for benefits already paid to Ms. Ehlers.

DECISION:

The August 8, 2019, reference 01, decision is reversed. The claimant voluntarily quit effective May 21, 2019 without good cause attributable to the employer, due to incarceration. The claimant is disqualified for unemployment benefits until she has worked in and been paid wages for insured work equal to 10 times her weekly benefit amount. The claimant must meet all other eligibility requirements. The claimant is overpaid \$2,203.00 in benefits for the seven weeks between July 7, 2019 and August 24, 2019. The claimant must repay the overpaid benefits. The employer's account is relieved of liability for benefits paid to the claimant, including liability for benefits already paid to the claimant.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/rvs