

**IOWA DEPARTMENT OF INSPECTIONS AND APPEALS
ADMINISTRATIVE HEARINGS DIVISION, UI APPEALS BUREAU**

DEWARD L WHITE
Claimant

TYSON FRESH MEATS INC
Employer

APPEAL NO. 23A-UI-05437-JT-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

**OC: 04/09/23
Claimant: Respondent (2)**

Iowa Code Section 96.5(2)(a) & (d) – Discharge for Misconduct
Iowa Code Section 96.3(7) - Overpayment

STATEMENT OF THE CASE:

On May 25, 2023, the employer filed a timely appeal from the May 15, 2023 (reference 01) decision that allowed benefits to the claimant, provided the claimant 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 March 28, 2023 for no disqualifying reason. After due notice was issued, a hearing was held on June 14, 2023. Deward White (claimant) did not comply with the hearing notice instructions to call the designated toll-free number at the time of the hearing and did not participate. Christy Chappelear represented the employer. The administrative law judge took official notice of the Agency's record of benefits disbursed to the claimant. 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 and, if not, whether the claimant engaged in fraud or intentional misrepresentation in connection with the fact-finding interview.

ISSUES:

Whether the claimant was laid off, was discharged for misconduct in connection with the employment, or voluntarily quit without good cause attributable to the employer.
Whether the claimant was overpaid 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:

Deward White (claimant) was employed by Tyson Fresh Meats, Inc. as a full-time Load Picker from December 2021 until March 28, 2023, when the employer discharged the claimant for theft of product from the employer's third-party cafeteria vendor. At the start of the employment, the employer provided orientation and training to the claimant regarding use of the self-pay cafeteria operated by the third-party vendor. The employer issued an employee account to the claimant. The employer took a digital fingerprint from the claimant so that the claimant could add items to

his employee account by scanning his fingerprint. The claimant routinely used the self-pay cafeteria throughout his employment and was familiar with the process for obtaining and paying for cafeteria product.

During the period of employment, the third-party cafeteria vendor became concerned with theft of merchandise and installed surveillance cameras to monitor the self-pay cafeteria. The vendor thereafter provided the employer video surveillance records of suspected employee theft from the cafeteria. The employer would interview employees suspected of theft to determine whether the failure to pay was due to mere oversight or so other reason.

On March 28, 2023, the third-party vender provided the surveillance records of suspected employee theft from the cafeteria. Those records included a record from March 5, 2023 that showed the claimant obtaining coffee from an automated coffee machine and leaving the cafeteria without paying for the coffee. The vendor's sharing of the video on March 28, 2023 was the employer's first knowledge of the claimant's suspected theft from the cafeteria. The claimant's supervisor and two human resources personnel reviewed the video on March 28 and recognized the claimant as the person depicted in the surveillance video. On March 28, the employer interviewed the claimant regarding the incident. During that interview, the claimant stated that he had been struggling financially, that he intentionally and routinely took coffee from the cafeteria without paying for it, and that he did not think it was a big deal.

The employer deemed the claimant's theft of coffee from the cafeteria to be a violation of the standards of conduct the employer reviewed with the claimant at the start of the employment. Those standards included a prohibition against theft from the employer and coworkers, but did not specifically reference theft from third-party vendors.

The claimant established an original claim for benefits that was effective April 9, 2023. This employer is the sole base period employer. Iowa Workforce Development set the weekly benefit amount at \$551.00. The claimant received \$3,857.00 in benefits for the seven weeks between April 23, 2023 and June 10, 2023.

On May 11, 2023, an Iowa Workforce Development Benefits Bureau deputy held a fact-finding interview that addressed the claimant's discharge from the employment. Emery Smith, a Tyson Fresh Meats corporate representative, represented the employer at the fact-finding interview and provided a verbal statement regarding the theft of coffee from the cafeteria.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code section 96.5(2)(a) and (d) provides as follows:

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.

...

d. For the purposes of this subsection, "misconduct" means a deliberate act or omission by an employee that constitutes a material breach of the duties and obligations arising out of the employee's contract of employment. Misconduct is 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. Misconduct by an individual includes but is not limited to all of the following:

- ...
- (2) Knowing violation of a reasonable and uniformly enforced rule of an employer.
- ...
- (13) Theft of an employer or coworker's funds or property.
- ...

Iowa Admin. Code r. 871-24.32(1)a provides:

Discharge for misconduct.

(1) Definition.

- a. For the purposes of this rule, "misconduct" is defined as a deliberate act or omission by an employee that constitutes a material breach of the duties and obligations arising out of the employee's contract of employment. Misconduct is 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 a 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. Misconduct by an individual includes but is not limited to all of the following:

- ...
- (2) Knowing violation of a reasonable and uniformly enforced rule of an employer.
- ...
- (13) Theft of an employer's or coworker's funds or property.
- ...

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 Iowa Admin. Code r.871 -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).

The evidence in the record establishes a March 28, 2023 discharge for misconduct in connection with the employment. The evidence indicates the claimant knowingly and intentionally took coffee from the cafeteria without tendering the payment the claimant knew was due. The claimant admitted to the employer that he had routinely engaged in similar behavior. Each such incident constituted theft from the third-party vendor. These thefts took place in the workplace and during the claimant's workday. Though the employer's standards of conduct policy did not specifically reference theft from a vendor, the claimant's conduct nonetheless reflected a willful and wanton disregard of the employer's interests in maintaining an employee cafeteria and in maintaining a workplace free of theft. In light of the claimant's admission to the employer during the interview on March 28, 2023, the employer's failure to provide the video surveillance record as evidence is not fatal to the employer's case. The conduct that triggered the discharge did not come to the employer's attention until March 28, 2023, when the vendor provided the surveillance record. The employer investigated the matter and discharged the claimant the same day. Based on when the employer learned of the conduct and discharge without unreasonable delay, the conduct that came to the employer's attention on March 28, 2023 constituted a "current act" for purposes of determining the claimant's eligibility for unemployment insurance benefits. The claimant is disqualified for 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 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).

The claimant received \$3,857.00 in benefits for the seven weeks between April 23, 2023 and June 10, 2023, but this decision disqualifies the claimant for those benefits. Accordingly, the benefits the claimant received are an overpayment of benefits. Because the employer participated in the fact-finding interview, the claimant is required to repay the overpaid benefits. The employer's account will be relieved of liability for benefits, including liability for benefits already paid.

DECISION:

The May 15, 2023 (reference 01) decision is REVERSED. The claimant was discharged on March 28, 2023 for misconduct in connection with the employment. 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 claimant is overpaid \$3,857.00 in benefits for the seven weeks between April 23, 2023 and June 10, 2023. The claimant is required to repay the overpaid benefits. The employer's account is relieved of liability for benefits, including liability for benefits already paid.



James E. Timberland
Administrative Law Judge

June 16, 2023
Decision Dated and Mailed

r/s

APPEAL RIGHTS. If you disagree with the decision, you or any interested party may:

1. Appeal to the Employment Appeal Board within fifteen (15) days of the date under the judge's signature by submitting a written appeal via mail, fax, or online to:

**Employment Appeal Board
4th Floor – Lucas Building
Des Moines, Iowa 50319
Fax: (515)281-7191
Online: eab.iowa.gov**

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

AN APPEAL TO THE BOARD SHALL STATE CLEARLY:

- 1) The name, address, and social security number of the claimant.
- 2) A reference to the decision from which the appeal is taken.
- 3) That an appeal from such decision is being made and such appeal is signed.
- 4) The grounds upon which such appeal is based.

An Employment Appeal Board decision is final agency action. If a party disagrees with the Employment Appeal Board decision, they may then file a petition for judicial review in district court.

2. If no one files an appeal of the judge's decision with the Employment Appeal Board within fifteen (15) days, the decision becomes final agency action, and you have the option to file a petition for judicial review in District Court within thirty (30) days after the decision becomes final. Additional information on how to file a petition can be found at Iowa Code §17A.19, which is online at <https://www.legis.iowa.gov/docs/code/17A.19.pdf>.

Note to Parties: YOU MAY REPRESENT yourself in the appeal or obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds.

Note to Claimant: It is important that you file your weekly claim as directed, while this appeal is pending, to protect your continuing right to benefits.

SERVICE INFORMATION:

A true and correct copy of this decision was mailed to each of the parties listed.

DERECHOS DE APELACIÓN. Si no está de acuerdo con la decisión, usted o cualquier parte interesada puede:

1. Apelar a la Junta de Apelaciones de Empleo dentro de los quince (15) días de la fecha bajo la firma del juez presentando una apelación por escrito por correo, fax o en línea a:

**Employment Appeal Board
4th Floor – Lucas Building
Des Moines, Iowa 50319
Fax: (515)281-7191
En línea: eab.iowa.gov**

El período de apelación se extenderá hasta el siguiente día hábil si el último día para apelar cae en fin de semana o día feriado legal.

UNA APELACIÓN A LA JUNTA DEBE ESTABLECER CLARAMENTE:

- 1) El nombre, dirección y número de seguro social del reclamante.
- 2) Una referencia a la decisión de la que se toma la apelación.
- 3) Que se interponga recurso de apelación contra tal decisión y se firme dicho recurso.
- 4) Los fundamentos en que se funda dicho recurso.

Una decisión de la Junta de Apelaciones de Empleo es una acción final de la agencia. Si una de las partes no está de acuerdo con la decisión de la Junta de Apelación de Empleo, puede presentar una petición de revisión judicial en el tribunal de distrito.

2. Si nadie presenta una apelación de la decisión del juez ante la Junta de Apelaciones Laborales dentro de los quince (15) días, la decisión se convierte en acción final de la agencia y usted tiene la opción de presentar una petición de revisión judicial en el Tribunal de Distrito dentro de los treinta (30) días después de que la decisión adquiriera firmeza. Puede encontrar información adicional sobre cómo presentar una petición en el Código de Iowa §17A.19, que está en línea en <https://www.legis.iowa.gov/docs/code/17A.19.pdf>.

Nota para las partes: USTED PUEDE REPRESENTARSE en la apelación u obtener un abogado u otra parte interesada para que lo haga, siempre que no haya gastos para Workforce Development. Si desea ser representado por un abogado, puede obtener los servicios de un abogado privado o uno cuyos servicios se paguen con fondos públicos.

Nota para el reclamante: es importante que presente su reclamo semanal según las instrucciones, mientras esta apelación está pendiente, para proteger su derecho continuo a los beneficios.

SERVICIO DE INFORMACIÓN:

Se envió por correo una copia fiel y correcta de esta decisión a cada una de las partes enumeradas.