

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

**WILLIAM D COOK**  
Claimant

**HY-VEE INC**  
Employer

**APPEAL NO. 21A-UI-12288-JTT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

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

Iowa Code Section 96.5(2)(a) – Discharge for Misconduct  
Iowa Code Section 96.3(7) – Overpayment  
Public Law 116-136, Section 2104 – Federal Pandemic Unemployment Compensation

**STATEMENT OF THE CASE:**

The employer filed a timely appeal from the April 30, 2021, reference 02, decision that allowed benefits to the claimant, provided the claimant was otherwise eligible, and that held the employer's account could be charged, based on the deputy's conclusion that the claimant was discharged on February 22, 2021 for no disqualifying reason. After due notice was issued, a hearing was held on July 26, 2021. The claimant did not provide a telephone number for the hearing and did not participate. Barbara Buss of Corporate Cost Control represented the employer and presented testimony through Joe Van Arsdale. Exhibits 1 through 4 and 9 through 15 were received into evidence. The administrative law judge took official notice of the benefits disbursed to the claimant (DBRO and KPYX). The administrative law judge took official notice of the Agency's administrative record of the fact-finding interview: KFFV, SIDES protest, and the deputy's notes documented the claimant's statement and the deputy's attempt to reach the employer's representative for the fact-finding interview.

**ISSUES:**

Whether the claimant voluntary quit without good cause attributable to the employer.  
Whether the claimant was discharged for misconduct in connection with employment.  
Whether the claimant was overpaid regular state benefits.  
Whether the claimant must repay overpaid regular benefits.  
Whether the employer's account may be charged.  
Whether the claimant was overpaid Federal Pandemic Unemployment Compensation.

**FINDINGS OF FACT:**

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed by Hy-Vee, Inc. as a full-time night stock employee. The claimant worked for the employer during two distinct periods. The most recent period of employment began in January 2017. The claimant last performed work for the employer on February 22, 2021. The claimant's shift started at 10:00 a.m. and ended at 6:00 a.m. The claimant's regular days off were Wednesday and Saturday. In January 2021, Austin Van Pelt became Night Stock

Manager and claimant's immediate supervisor. The claimant had applied for the Night Stock Manager position, but was not chosen for the position due to attendance and other concerns.

On the evening of Tuesday, January 21, 2021, the claimant reported for work, but clocked out and left at 12:44 a.m. The claimant's earlier departure followed a brief exchange between the claimant and Mr. Van Pelt. At 12:40 a.m., Mr. Van Pelt observed the claimant and another employee heading outside for a smoking break. Mr. Van Pelt told the two men that if they were leaving the building they had to clock out for 30 minutes for an unscheduled break. The claimant responded "this is bullshit and fucking stupid." The claimant asserted that denying him a break was illegal. However, Mr. Van Pelt had not denied a break. Instead, he merely advised the claimant, pursuant to company policy, that if claimant was leaving the store he had to clock out. The claimant clocked out and left shortly thereafter without speaking to anyone. The claimant's departure was not based on illness and was instead based on the claimant being upset with the new supervisor. At the claimant left, he sent a text message to the assistant night stock manager asking him to let the store manager, Sean Patterson, know that he would be in the next day after he spoke to Hy-Vee's corporate office. Under the employer's absence reporting policy, the employer explicitly prohibits notice by text message. The employer had most recently provided the attendance policy to the claimant in March 2020.

The claimant's unauthorized early departure without notice on February 23, 2021 represented the third time the claimant had walked off the job during his shift. The claimant left without notice on December 8, 2020 and on February 16, 2021. After the first incident, the employer told the claimant not to leave without providing notice. Prior to the final incident on February 23, 2021, the employer told the claimant that the conduct could be considered job abandonment.

The employer made unsuccessful attempts to reach the claimant during the day on February 23, 2021. When the claimant reported for work on the evening of February 23, 2021, he was told to clock out and not return until he had spoken with the human resources manager.

On March 1, 2021, the employer met with the claimant for the purpose of terminating the employment. At that time, the employer referenced the prior incidents and discussions and then ended the employment.

The claimant established an original claim for benefits that Iowa Workforce Development deemed effective February 21, 2021. Hy-Vee is a base period employer. The claimant received \$1,778.00 in regular benefits for the seven weeks between February 21, 2021 and April 10, 2021. The claimant also received \$2,100.00 in Federal Pandemic Unemployment Compensation (FPUC) for the same seven weeks.

On April 29, 2021, an Iowa Workforce Development Benefits Bureau deputy held a scheduled fact-finding interview that addressed the claimant's separation from the employment. Notice of the fact-finding interview was mailed to the parties on April 13, 2021. The employer did not participate in the fact-finding interview. The employer's designated representative of record, Corporate Cost Control, was not available at the number Corporate Cost Control had provided in the employer protest submitted through the SIDES system. The deputy left a message for the Corporate Cost Control representative, but did not receive a return call. The deputy consider the short narrative provided in the protest:

On Monday 2/22/21 Bill was upset and left in the middle of his scheduled shift and did not return. Bill was spoken to on 1/18/2021 after he left work in the middle of his shift about this could be seen as job abandonment.

The attachments to the SIDES protest did not pertain to the claimant's most recent period of employment, but pertained instead to an earlier employment.

The claimant participated in the fact-finding interview and provided a verbal statement to the deputy. The claimant provided intentionally misleading statements at the fact-finding interview. These included repeated assertions that the claimant had spoken to an assistant manager *prior* to leaving in connection with the final absence. These included an assertion that the claimant had left due to illness, stomach problems.

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

A discharge is a termination of employment initiated by the employer for such reasons as incompetence, violation of rules, dishonesty, laziness, absenteeism, insubordination, or failure to pass a probationary period. Iowa Administrative Code rule 871-24.1(113)(c). A quit is a separation initiated by the employee. Iowa Administrative Code rule 871-24.1(113)(b). 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 Iowa Administrative Code rule 871-24.25.

The weight of the evidence establishes a discharge, rather than a voluntary quit. The claimant left early without authorization on three occasions. The claimant returned to work following the two earlier instances. The connection with the final departure, the claimant went to the effort to clock out, rather than simply walking off the job. The claimant did not tell anyone that he was quitting. Shortly after the claimant left he contacted the employer via text and specifically indicated he would be returning to the employment. The employer anticipated the claimant would return and left directions for the claimant to be turned away with a requirement that he meet with store management. The claimant returned and was turning away. The employer met with the claimant on March 1, 2021 and terminated the employment. The employer characterized the separation as a discharge in the termination document.

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 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 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).

In order for a claimant's absences to constitute misconduct that would disqualify the claimant from receiving unemployment insurance benefits, the evidence must establish that the claimant's *unexcused* absences were excessive. See Iowa Administrative Code rule 871-24.32(7). The determination of whether absenteeism is excessive necessarily requires consideration of past acts and warnings. However, the evidence must first establish that the most recent absence that prompted the decision to discharge the employee was unexcused. See Iowa Administrative Code rule 871-24.32(8). Absences related to issues of personal responsibility such as transportation and oversleeping are considered unexcused. On the other hand, absences related to illness are considered excused, provided the employee has complied with the employer's policy regarding notifying the employer of the absence. Tardiness is a form of absence. See *Higgins v. Iowa Department of Job Service*, 350 N.W.2d 187 (Iowa 1984). Employers may not graft on additional requirements to what is an excused absence under the law. See *Gaborit v. Employment Appeal Board*, 743 N.W.2d 554 (Iowa Ct. App. 2007). For example, an employee's failure to provide a doctor's note in connection with an absence that was due to illness properly reported to the employer will not alter the fact that such an illness would be an excused absence under the law. *Gaborit*, 743 N.W.2d at 557.

An employer has the right to expect decency and civility from its employees and an employee's use of profanity or offensive language in a confrontational, disrespectful, or name-calling context may be recognized as misconduct disqualifying the employee from receipt of unemployment insurance benefits. *Henecke v. Iowa Department of Job Service*, 533 N.W.2d 573 (Iowa App. 1995). Use of foul language can alone be a sufficient ground for a misconduct disqualification for unemployment benefits. *Warrell v. Iowa Dept. of Job Service*, 356 N.W.2d 587 (Iowa Ct. App. 1984). An isolated incident of vulgarity can constitute misconduct and warrant disqualification from unemployment benefits, if it serves to undermine a superior's authority. *Deever v. Hawkeye Window Cleaning, Inc.*, 447 N.W.2d 418 (Iowa Ct. App. 1989).

The evidence in the record establishes a March 1, 2021 discharge for misconduct in connection with the employment. The weight of the evidence establishes the claimant left work early without authorization and without notice to the employer on three occasions between December 8, 2020 and February 23, 2021. Each absence was an unexcused absence under the applicable law. The absences occurred in the context of the employer verbally reminding the claimant of the notice expectation and in the context of the warning at the claimant's conduct could be deemed job abandonment. The unexcused absences were excessive and demonstrated an intentional and substantial disregard of the employer's interests.

The claimant's profane outburst on February 23, 2021 also amounted to misconduct in connection with employment. The claimant's comments were aimed squarely at undermining the authority of the new supervisor, who was merely enforcing the employer's established break policy. The conduct demonstrated an intentional and substantial disregard for the employer's interests.

The claimant is disqualified for benefits until the claimant has worked in and been paid wages for insured work equal to 10 times the claimant's weekly benefit amount. The claimant must meet all other eligibility requirements. The employer's account shall not be charged for benefits.

The unemployment insurance law requires benefits be recovered from a claimant who receives benefits and is later denied 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 employer failed to participate in the initial proceeding, the employer's account will be charged for the overpaid benefits. Iowa Code § 96.3(7)(a) and (b).

The claimant received \$1,778.00 in regular benefits for the seven weeks between February 21, 2021 and April 10, 2021, but this decision disqualifies him for those benefits. The benefits are an overpayment of benefits. The employer did not participate in the fact-finding interview. Because the claimant provided intentionally misleading statements to the deputy regarding material facts, he claimant must repay the overpaid regular benefits. The employer's account shall be relieved of liability for benefits, including liability for benefits already paid to the claimant.

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, 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.

(3) Recovery by state agency —

(A) In general.—The State agency shall recover the amount to be repaid, or any part thereof, by deductions from any Federal Pandemic Unemployment Compensation payable to such individual or from any unemployment compensation payable to such individual under any State or Federal unemployment compensation law administered by the State agency or under any other State or Federal law administered by the State agency which provides for the payment of any assistance or allowance with respect to any week of unemployment, during the 3-year period after the date such individuals received the payment of the Federal Pandemic Unemployment Compensation to which they were not entitled, in accordance with the same procedures as apply to the recovery of overpayments of regular unemployment benefits paid by the State.

(B) Opportunity for hearing.—No repayment shall be required, and no deduction shall be made, until a determination has been made, notice thereof and an opportunity for a fair hearing has been given to the individual, and the determination has become final.

(4) Review.—Any determination by a State agency under this section shall be subject to review in the same manner and to the same extent as determinations

under the State unemployment compensation law, and only in that manner and to that extent.

Because this decision disqualifies the claimant for the regular benefits, the claimant is also disqualified FPUC benefits. The \$2,100.00 in FPUC benefits the claimant received for seven weeks between February 21, 2021 and April 10, 2021 must be repaid unless the claimant applies for and is approved for waiver of repayment of FPUC benefits. See below. The claimant is overpaid

**DECISION:**

The April 30, 2021, reference 02, decision is reversed. The claimant was discharged for misconduct in connection with the employment. The discharge was effective March 1, 2021. The claimant is disqualified for benefits until the claimant has worked in and been paid wages for insured work equal to 10 times the claimant's weekly benefit amount. The claimant must meet all other eligibility requirements. The employer's account shall be relieved of liability for benefits, including liability for benefits already paid to the claimant. The claimant is overpaid \$1,778.00 in regular benefits for the seven weeks between February 21, 2021 and April 10, 2021. The claimant must repay the overpaid regular benefits. The claimant is overpaid \$2,100.00 in FPUC benefits for the seven weeks between February 21, 2021 and April 10, 2021. The claimant must repay the overpaid FPUC benefits unless he applies for and is approved for waiver of repayment of FPUC benefits. See below.



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James E. Timberland  
Administrative Law Judge

July 30, 2021  
Decision Dated and Mailed

jet/mh

*Note to Claimant:* This decision determines you have been overpaid FPUC under the CARES Act. 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. Additionally, instructions for requesting a waiver of this overpayment can be found at <https://www.iowaworkforcedevelopment.gov/unemployment-insurance-overpayment>. If this decision becomes final and you are not eligible for a waiver, you will have to repay the benefits you received.