

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

**LANCE HIGUERA**  
Claimant

**WALMART INC**  
Employer

**APPEAL 21A-UI-17933-CS-T**  
**ADMINISTRATIVE LAW JUDGE**  
**DECISION**

**OC: 04/25/21**  
**Claimant: Respondent (1)**

Iowa Code §96.5(2)a-Discharge/Misconduct  
Iowa Code §96.5(1)- Voluntary Quit  
Iowa Code § 96.5(2)b & c – Discharge/Gross Misconduct  
Iowa Code § 96.3(7) – Recovery of Benefit Overpayment  
Iowa Admin. Code r. 871-24.10 – Employer/Representative Participation Fact-finding Interview  
PL116-136, Sec. 2104 – Federal Pandemic Unemployment Compensation (FPUC)

**STATEMENT OF THE CASE:**

On August 13, 2021, the employer/appellant filed an appeal from the August 3, 2021, (reference 01) unemployment insurance decision that allowed benefits based on claimant being dismissed but no evidence of willful or deliberate misconduct. The parties were properly notified about the hearing. A telephone hearing was held on October 7, 2021. Claimant participated at the hearing. Claimant called his former co-worker, Joshua Quinn as a witness. Employer participated through hearing representative, Toni McColl. The employer called as a witness Digital Coach, Jessie Albin. Exhibit 1 was admitted into the record. Administrative notice was taken of claimant's unemployment benefits records.

**ISSUES:**

Was the separation a discharge for job related misconduct?

Should claimant repay benefits?

Should the employer be charged due to employer participation in fact finding?

Is the claimant overpaid benefits?

Is the claimant eligible for FPUC?

Was the claimant discharged for reasons related to job gross misconduct sufficient to warrant a denial of unemployment benefits and deletion of wage credits prior to the separation?

**FINDINGS OF FACT:**

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant began working for employer on June 5, 2013. Claimant last worked as a full-time Asset Protection

Associate. Claimant was separated from employment on April 27, 2021, when he was discharged.

Claimant was called into a meeting with his supervisor, Courtney George, Digital Coach, Jessie Albin and Ryan Rand. Claimant was accused of using Ms. George's user id and password to access her files and email. During the interview claimant admitted that he used her password to access Ms. George's files and email. During the investigation he claimed Joshua Quinn gave him Ms. George's password. (Exhibit 1, pg. 3). During the hearing Claimant testified Ms. George gave him her password. Claimant testified the employees knew each other passwords and that he needed it to access information to perform investigations into time theft. Claimant's position did not allow for him to have access to the files that contained employee time clock information.

Claimant testified that he accessed Ms. George's email to find information on when the ink for the printer was going to be arriving. However during the investigation he reported that he accessed her email to see when there was a claim and he would look for pictures and information related to the claims to investigate them. (Exhibit 1, pg. 3). The employer concluded their investigation and terminated claimant due to gross misconduct. The employer found the claimant had violated their integrity policy. (Exhibit 1, pg. 1-2). Mr. Albin could not testify with specificity what part of the policy the claimant violated. Mr. Albin could not provide specific details such as the date(s) of the incident(s) regarding the alleged misconduct other than claimant accessed Ms. George's emails and claimant admitted that he did it. Mr. Albin testified that he was not involved in the investigation of the misconduct.

Mr. Albin testified that claimant had previous warnings and had a previous written warning for time theft that occurred on November 25, 2020. Mr. Albin testified that the warning was regarding the attendance and punctuality policy and the integrity policy for adjusting his time. No criminal charges were brought against claimant for him accessing Ms. George's emails.

The claimant received a weekly benefit amount of \$493.00 per week. Claimant received unemployment benefits for the weeks ending May 1, 2021 through May 29, 2021. The claimant received a total of \$1,972.00 in regular unemployment benefits. (DBRO).

The claimant received Federal Pandemic Unemployment Compensation (FPUC) for four weeks ending May 29, 2021. Claimant received a total of \$1,200 in FPUC benefits.

Mr. Albin was unaware if the employer participated in the fact finding interview. However, the employer submitted answers to the questionnaire during the fact finding interview.

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

For the reasons set forth below, the decision dated August 3, 2021 (reference 01) that allowed benefits based on a finding claimant was discharged on March 30, 2021, but there was no evidence of willful or deliberate misconduct is **AFFIRMED**.

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 provides in relevant part:

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.

Iowa Admin. Code r.871-24.32(8) provides:

(8) Past acts of misconduct. While past acts and warnings can be used to determine the magnitude of a current act of misconduct, a discharge for misconduct cannot be based on such past act or acts. The termination of employment must be based on a current act.

The employer bears the burden of proving that a claimant is disqualified from receiving benefits because of substantial misconduct within the meaning of Iowa Code section 96.5(2). *Myers v. Emp't Appeal Bd.*, 462 N.W.2d 734, 737 (Iowa Ct. App. 1990). 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). The focus is on deliberate, intentional, or culpable acts by the employee. When based on carelessness, the carelessness must actually indicate a “wrongful intent” to be disqualifying in nature. *Newman, Id.* In contrast, 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. *Newman, Id.*

When reviewing an alleged act of misconduct, the finder of fact may consider past acts of misconduct to determine the magnitude of the current act. *Kelly v. Iowa Dep’t of Job Serv.*, 386 N.W.2d 552, 554 (Iowa Ct. App. 1986). However, conduct asserted to be disqualifying misconduct must be both specific and current. *West v. Emp’t Appeal Bd.*, 489 N.W.2d 731 (Iowa 1992); *Greene v. Emp’t Appeal Bd.*, 426 N.W.2d 659 (Iowa Ct. App. 1988).

Because our unemployment compensation law is designed to protect workers from financial hardships when they become unemployed through no fault of their own, we construe the provisions “liberally to carry out its humane and beneficial purpose.” *Bridgestone/Firestone, Inc. v. Emp’t Appeal Bd.*, 570 N.W.2d 85, 96 (Iowa 1997). “[C]ode provisions which operate to work a forfeiture of benefits are strongly construed in favor of the claimant.” *Diggs v. Emp’t Appeal Bd.*, 478 N.W.2d 432, 434 (Iowa Ct. App. 1991).

Iowa Code section 96.5(2)*b* and *c* 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:

*b.* Provided further, if gross misconduct is established, the department shall cancel the individual's wage credits earned, prior to the date of discharge, from all employers.

*c.* Gross misconduct is deemed to have occurred after a claimant loses employment as a result of an act constituting an indictable offense in connection with the claimant's employment, provided the claimant is duly convicted thereof or has signed a statement admitting the commission of such an act. Determinations regarding a benefit claim may be redetermined within five years from the effective date of the claim. Any benefits paid to a claimant prior to a determination that the claimant has lost employment as a result of such act shall not be considered to have been accepted by the claimant in good faith.

Under Iowa Code section 96.5(2)(b) “if gross misconduct is established, the department shall cancel the individual's wage credits earned, prior to the date of discharge, from all employers.” The cancellation of wage credits means that, even if the claimant earns ten times the benefit amount following the discharge from this employer, she may never collect benefits chargeable to the employer. The parties should be aware that a determination of gross misconduct “may be redetermined within five years from the effective date of the claim.” Iowa Code § 96.5(2)(c).

Gross misconduct, meanwhile, is “deemed to have occurred after a claimant loses employment as a result of an act constituting an indictable offense in connection with the claimant’s employment, provided the claimant is duly convicted thereof or has signed a statement admitting the commission of such an act.” Iowa Code § 96.5(2)(c). In Iowa, indictable offenses include serious misdemeanors, aggravated misdemeanors, and felonies, all of which are punishable by a fine of more than \$500.00 and more than 30 days in jail. Iowa Code § 801.4(8). If the claimant is eventually convicted of an indictable offense, the employer may seek retroactive relief under these provisions.

Claimant has not been charged with any indictable offenses in connection with the claimant’s employment. Gross misconduct has not been established in this matter. Claimant’s prior wage credits shall not be deleted.

Employer has not carried its burden of proving claimant is disqualified from receiving benefits because of a current act of substantial misconduct within the meaning of Iowa Code section 96.5(2). The employer did not establish that a current act of misconduct had occurred. The witness testified generally that an incident occurred but could not testify with specificity regarding the details of the incident which resulted in the claimant’s termination. Furthermore there was no evidence that claimant was warned regarding this behavior prior to his discharge. For these reasons benefits are allowed, provided claimant is not otherwise disqualified or ineligible. The employer’s account shall be charged.

The next issue that must be determined is if the claimant is eligible for Federal Pandemic Unemployment Compensation (FPUC).

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...

The FPUC program was extended and the weekly benefit amount was reduced to \$300.00 by the consolidated Appropriations Act, 2021. Since the claimant is allowed regular unemployment benefits he is eligible for FPUC benefits that he received. Claimant was not overpaid FPUC benefits.

The issue of whether claimant was overpaid regular unemployment benefits and whether he should pay them back is moot since he is allowed benefits.

**DECISION:**

The decision dated August 3, 2021 (reference 01) that allows benefits based on a finding claimant was discharged on April 27, 2021 for conduct that is not willful or deliberate is **AFFIRMED**. The separation from employment was not disqualifying. Benefits are allowed, provided claimant is not otherwise disqualified or ineligible. The employer's account shall be charged.

Since the claimant is allowed regular unemployment benefits he is eligible for FPUC benefits that he received. Claimant was not overpaid FPUC benefits.

The issue of whether claimant was overpaid regular unemployment benefits and whether he should pay them back is moot since he is allowed benefits.



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Carly Smith  
Administrative Law Judge  
Unemployment Insurance Appeals Bureau

October 12, 2021  
Decision Dated and Mailed

cs/mh