

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

JEREMY S CONNOR
Claimant

HY-VEE INC
Employer

APPEAL NO. 20A-UI-13148-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 07/26/20
Claimant: Respondent (2)

Iowa Code Section 96.5(2)(a) – Discharge for Misconduct
Iowa Code Section 96.5(7) – Recovery of Overpaid Benefits

STATEMENT OF THE CASE:

The employer filed a timely appeal from the October 13, 2020, reference 01, decision that allowed benefits to the claimant provided he 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's July 14, 2020 discharge was not based on a current act. After due notice was issued, a hearing was held on December 16, 2020. Claimant Jeremy Connor did not provide a telephone number for the appeal hearing and did not participate. Barbara Buss of Corporate Cost Control represented the employer and presented testimony through Billi Jo Hixson and Matt Egger. The administrative law judge took official notice of the Agency's record of benefits disbursed to the claimant and received Exhibits 3 through 7, 11, 12 and 13 were received 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 and, if not, whether the claimant engaged in fraud or intentional misrepresentation in connection with the fact-finding interview.

ISSUES:

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 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: Jeremy Connor was employed by Hy-Vee as a full-time Hickory House clerk kitchen clerk until July 24, 2020, when Matt Egger, Store Manager, discharged him from the employment for giving a coworker an unauthorized discount and for giving the same coworker items free of charge. Mr. Connor began his employment in 2013. The employer reviewed its policies with Mr. Connor at that time and provided him with an employee handbook that included a Code of Conduct. The Code of Conduct highlighted honesty, integrity, ethics and morals as Hy-Vee values and

standards. The Code of Conduct included the following: "Purchase of merchandise requires a paid receipt..." In other words, the employer made clear that employees were required to appropriately pay for Hy-Vee merchandise prior to consuming it or otherwise disposing of it and that all employees, including Mr. Connor, were responsible for ensure such honest dealings with the employer.

The final incident that triggered the discharge occurred on the evening of July 21, 2020 and came to the employer's attention the following morning. On July 21, 2020, Hy-Vee kitchen clerk Jamie Meyers, a school teacher works for Hy-Vee during the summer, waited on part-time cashier Yvette Taylor. During that interaction, Ms. Taylor told Ms. Meyers that she wanted "the Jeremy discount." When Ms. Meyers stated she did not know what Ms. Taylor was referring to, Ms. Taylor told Ms. Meyers that she would just have Mr. Connor wait on her. At that moment, Mr. Connor made a beeline from his assigned work area and stepped in to handle Ms. Taylor's transaction. Mr. Connor provided an unauthorized discount whereby Ms. Taylor was able to obtain two pounds of chicken salad, three egg rolls, \$6.00 worth of mashed potatoes and a beverage for \$5.29, rather than the actual purchase price that would have exceeded \$20.00. On the morning of July 22, 2020, Ms. Meyers brought the matter to Mr. Egger's attention and provided a duplicate receipt for the transaction. Mr. Egger reviewed the video surveillance record and the computer record of the transaction, which confirmed the concern raised by Ms. Meyers. Mr. Egger interview Ms. Taylor, who denied receiving an unauthorized discount and who claimed to have paid for the two pounds of chicken salad later in the shift. Mr. Egger reviewed the store's computer record of transactions, which include no purchase by Ms. Taylor of two ponds of chicken salad later in her shift. Mr. Egger discharged Ms. Taylor from her employment. On July 24, 2020, Mr. Egger met with Mr. Connor to discuss the matter. Mr. Connor stated that he did not think giving away or discounting food was a big deal and asserted there were greater concerns in the kitchen department. Mr. Egger then discharged Mr. Connor from the employment.

In making the decision to discharge Mr. Connor from the employment, Mr. Egger considered other recent concerns. These included Mr. Conner's repeated disregard for Mr. Egger's directive not to take his personal property into the his work area, an area where the employer prepared and sold food and therefore needed to prevent potential contamination for public health reasons. Mr. Egger had conspicuously posted the rule. On one recent occasion, Mr. Connor disregarded the rule by taking his sweatshirt into the kitchen area, only to have his sweatshirt, with his car keys in the pocket, stolen from the kitchen area. Mr. Egger also considered recent conduct whereby Mr. Conner would leave his work area before his quit time and loiter by the time clock until it was time to clock out. Mr. Egger had just concluded his investigation of one or more of these matters when the unauthorized discount and give away came to his attention.

Mr. Connor established a claim for unemployment insurance benefits that was effective July 26, 2020 and received \$4,440.00 in regular benefits for the period of July 26, 2020 through November 7, 2020. Hy-Vee is the sole base period employer. Before the Iowa Workforce Development Benefits Bureau deputy entered the October 13, 2020, reference 01, decision regarding the separation from the employment, the deputy contacted the claimant and the employer's representative to conduct a fact-finding interview. This occurred after the employer's representative had filed a protest of the claim in which the employer representative stated the basis for the discharge as "Employee failed to clock in and out and giving employees free items" without providing any details regarding the incidents that factored in the discharge. The protest provided an erroneous July 14, 2020 discharge date and erroneous July 24, 2020 final incident date. The employer's representative declined to provide a statement in connection with the fact-finding interview and advised the deputy to use the SIDES information referenced above. The

employer's representative provided an Employee Termination Report document along with several policy documents. The Termination report provided dates of employment, referenced a failure to follow store policies, and listed the basis for the discharge as waiting at the time clock without punching out, taking personal items into the kitchen department when asked not to, giving discounts/not charging employees correct prices for items, and given employees free items." Dates and details of events were omitted from the materials the employer provided. Mr. Connor participated in the fact-finding interview and provided a statement indicating he was discharged for failing to clock in and out and for giving away merchandise.

REASONING AND CONCLUSIONS OF LAW:

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).

Continued failure to follow reasonable instructions constitutes misconduct. See *Gilliam v. Atlantic Bottling Company*, 453 N.W.2d 230 (Iowa App. 1990). An employee’s failure to perform a specific task may not constitute misconduct if such failure is in good faith or for good cause. See *Woods v. Iowa Department of Job Service*, 327 N.W.2d 768, 771 (Iowa 1982). The administrative law judge must analyze situations involving alleged insubordination by evaluating the reasonableness of the employer’s request in light of the circumstances, along with the worker’s reason for non-compliance. See *Endicott v. Iowa Department of Job Service*, 367 N.W.2d 300 (Iowa Ct. App. 1985).

The evidence in the record establishes a discharge for misconduct in connection with the employment. Mr. Connor’s July 21, 2020 act of providing an unauthorized heavy discount and giving away Hy-Vee merchandise without authorization involved an intentional and wanton disregard of the employer’s policies and interests. That event by itself was sufficient to establish disqualifying misconduct in connection with the employment. The circumstances surrounding that incident indicate this was not the first time Mr. Connor had engaged in such conduct. In addition, the evidence establishes that insubordination through Mr. Connor’s repeated unreasonable disregard of the employer’s reasonable directive not to take his personal items into his work area, an area where the employer had to be concerned about food safety issues.

Mr. Connor is disqualified for benefits until he has worked in and been paid wages for insured work equal to 10 times his weekly benefit amount. Mr. Connor must meet all other eligibility requirements. The employer’s account shall not be charged for benefits paid for the period following November 7, 2020, the most recent benefit week end date for which benefits have already been paid.

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).

Iowa Administrative Code rule 871-24.10(1) defines employer participation in fact-finding interviews as follows:

Employer and employer representative participation in fact-finding interviews.

24.10(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.

The claimant received \$4,440.00 in regular benefits for the period of July 26, 2020 through November 7, 2020, but this decision disqualifies the claimant for those benefits. The benefits are an overpayment of benefits. The employer, through its representative, declined to participate in the fact-finding interview process in a meaningful manner. Neither the SIDES protest nor the documents submitted for fact-finding interview constituted participation. Both sets of documents were conspicuously lacking a detailed description of the specific conduct that factored in the discharge. The claimant's statement to the deputy did not demonstrate willful misrepresentation of material facts. For these reasons, the claimant is not required to repay the overpayment and the employer's account remains subject to charge for the overpaid benefits.

DECISION:

The October 13, 2020, reference 01, decision is reversed. The claimant was discharged on July 24, 2020 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 \$4,440.00 in benefits for the period of July 26, 2020 through November 7, 2020. The claimant is not required to repay the overpaid benefits. The employer's account may be assessed for the overpaid benefits. The employer's account will not be charged for benefits for the period beginning November 8, 2020.



James E. Timberland
Administrative Law Judge

December 29, 2020
Decision Dated and Mailed

jet/scn

NOTE TO CLAIMANT:

- This decision determines you are not eligible for regular unemployment insurance benefits under state law. 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.
- If you do not qualify for regular unemployment insurance benefits under state law and are currently unemployed for reasons related to COVID-19, you may qualify for Pandemic Unemployment Assistance (PUA). **You will need to apply for PUA to determine your eligibility under the program.** For more information on how to apply for PUA, go to <https://www.iowaworkforcedevelopment.gov/pua-information>. **If you do not apply for and are not approved for PUA, you may be required to repay the benefits you have received in the event the present decision is modified upon further appeal to require repayment of overpaid benefits.**