

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

KENNETH J SMITH
Claimant

ADVANCE STORES COMPANY INC
Employer

APPEAL 19A-UI-09205-AD-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

**OC: 10/20/19
Claimant: Respondent (2)**

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Code § 96.5(1) – Voluntary Quitting
Iowa Code § 96.3(7) – Recovery of Benefit Overpayment
Iowa Admin. Code r. 871-24.10 – Employer/Representative Participation Fact-finding Interview

STATEMENT OF THE CASE:

On November 22, 2019, Advance Stores Company Inc. (employer) filed an appeal from the November 14, 2019 (reference 01) unemployment insurance decision that determined Kenneth Smith (claimant) was eligible to receive unemployment insurance benefits.

A telephone hearing was held on December 17, 2019. The parties were properly notified of the hearing. Employer participated by Representative Jackie Boudreaux and Store Manager Jacob Campfield. Claimant did not register for the hearing and did not participate.

Employer's Exhibit 1 was admitted. Administrative notice was taken of claimant's payment history on the unemployment insurance system.

ISSUE(S):

- I. Was the separation a layoff, discharge for misconduct, or voluntary quit without good cause?
- II. Was the claimant overpaid benefits? Should claimant repay benefits and/or charge employer due to employer participation in fact finding?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds:

Claimant worked for employer as a full-time Retail Parts Pro. Claimant's first day of employment was February 18, 2019. The last day claimant worked on the job was October 16, 2019. Claimant's immediate supervisor was Campfield. Claimant separated from employment on October 19, 2019. Claimant was discharged by Campfield on that date.

Claimant was discharged based on his failure to protect company assets. The most recent incident occurred approximately two weeks prior to his discharge. Campfield discovered on that date that claimant had returned an item for a coworker. The coworker initially bought the item at a discounted rate. However, claimant returned the item at a higher rate. Claimant followed the wrong procedure for the return, processing it as a manual return and giving the coworker cash as a refund. Claimant was trained to review the history to see what was originally paid and then provide a refund through whatever the original payment method was.

That incident caused Campfield to investigate. Campfield uncovered seven incidents over approximately two months where claimant's sales ID was used to sell items at a discount and, in some cases, below cost. All of these sales were to the same coworker from the first incident.

Claimant was interviewed by employer and provided a signed statement in which he acknowledged two incidents. Exhibit 1. He stated that one incident, where he sold a \$239.99 item for \$209.99, was due to a "miskey." For the most recent incident, claimant acknowledged he did not follow the proper procedure for refunding the item. He denied knowledge of the other incidents, even though those sales were made through his sales ID. Claimant stated other associates have his ID and password. He denied that these actions were with any malicious intent or for personal gain.

Employer was unable to review video footage to confirm claimant made all of the transactions at issue, as no video footage existed. Employer was also unable to interview the coworker, as he never returned to work or responded to phone calls or messages. Claimant had never been warned for similar conduct. Claimant had to change his password every month. He also could have changed his password if he believed it was compromised. Employer has a system where employees can sign out of the terminal with a single click.

The unemployment insurance system shows claimant has received weekly benefits in the amount of \$290.00 for a total of seven weeks, beginning with the week ending October 26, 2019 and continuing through the benefit week ending December 17, 2019. The total amount of benefits paid to date is \$2,030.00.

Employer did not provide a detailed factual statement for use at the fact-finding hearing. Employer did not provide live testimony at the fact-finding hearing or the name and telephone number of an employee with firsthand information who could be contacted.

REASONING AND CONCLUSIONS OF LAW:

For the reasons set forth below, the November 14, 2019 (reference 01) unemployment insurance decision that determined claimant was eligible for benefits is REVERSED.

- I. Was the separation a layoff, discharge for misconduct, or voluntary quit without good cause?

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).

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).

Employer has 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).

Claimant acknowledged the most recent incident, where he failed to follow the proper procedure for refunding the coworker. Claimant also acknowledged a “miskey” on another item. These incidents standing alone are likely not enough to constitute substantial job-related misconduct, particularly because it is unclear to what extent claimant was intentionally discounting items for the coworker’s benefit and which transactions he personally participated in. Furthermore, claimant had not been warned and given an opportunity to correct his conduct.

However, there is no question claimant knowingly allowed others access to his sales ID. Claimant knew or should have known that allowing others access to his sales ID exposed employer’s assets. This was a material breach of the duties and obligations arising out of claimant’s contract of employment. When viewed as a whole, it’s clear that Claimant’s pattern of conduct as a whole is not “mere...unsatisfactory conduct, ...inadvertencies or ordinary negligence in isolated instances, or good faith errors in judgment or discretion...” Instead, claimant’s pattern of conduct is better characterized as “carelessness or negligence of such degree of recurrence as to...show an intentional and substantial disregard of the employer’s interests or of the employee’s duties and obligations to the employer.”

Claimant is therefore disqualified from benefits.

- II. Was the claimant overpaid benefits? Should claimant repay benefits and/or charge employer due to employer participation in fact finding?

Iowa Code section 96.3(7) provides, in pertinent part:

7. Recovery of overpayment of benefits.

a. If an individual receives benefits for which the individual is subsequently determined to be ineligible, even though the individual acts in good faith and is not otherwise at fault, the benefits shall be recovered. The department in its discretion may recover the overpayment of benefits either by having a sum equal to the overpayment deducted from any future benefits payable to the individual or by having the individual pay to the department a sum equal to the overpayment.

b. (1) (a) If the department determines that an overpayment has been made, the charge for the overpayment against the employer’s account shall be removed and the account shall be credited with an amount equal to the overpayment from the unemployment compensation trust fund and this credit shall include both contributory and reimbursable employers, notwithstanding section 96.8, subsection 5.

(b) However, provided the benefits were not received as the result of fraud or willful misrepresentation by the individual, benefits shall not be recovered from an individual if the employer did not participate in the initial determination to award benefits pursuant to section 96.6, subsection 2, and an overpayment occurred because of a subsequent reversal on appeal regarding the issue of the individual's separation from employment.

Iowa Admin. Code r. 871-24.10 provides:

Employer and employer representative participation in fact-finding interviews.

(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 unemployment insurance system shows claimant has received weekly benefits in the amount of \$290.00 for a total of seven weeks, beginning with the week ending October 26, 2019 and continuing through the benefit week ending December 17, 2019. The total amount of benefits paid to date is \$2,030.00.

Because this administrative law judge now finds claimant is not eligible for benefits, he has been overpaid benefits in the amount of \$2,030.00. However, the employer did not participate in the fact-finding interview within the meaning of Iowa Admin. Code r. 871-24.10. Therefore, benefits shall not be recovered from claimant.

DECISION:

The November 14, 2019 (reference 01) unemployment insurance decision is REVERSED. Claimant is disqualified from receiving benefits. 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. Benefits shall not be recovered.

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Decision Dated and Mailed

abd/scn