

**IN THE IOWA ADMINISTRATIVE HEARINGS DIVISION
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

WILLIAM J COLLAZO
Claimant

B R STORES INC
Employer

APPEAL NO. 23A-UI-07542-JT-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 07/02/23
Claimant: Respondent (2)

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

STATEMENT OF THE CASE:

On August 2, 2023, the employer filed a timely appeal from the July 26, 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 May 5, 2023 for no disqualifying reason. After due notice was issued, a hearing was held on September 1, 2023. William Collazo (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. Patsi Trotter represented the employer. The administrative law judge took official notice of the Agency's record of benefits disbursed to the claimant (DBRO) and received Exhibits 1 through 9 into evidence. The administrative law judge took official notice of the fact-finding materials and SIDES protest 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.

This matter was originally scheduled for hearing on August 18, 2023 with notice mailed to the parties on August 4, 2023. The United States Postal Service returned the claimant's notice as undeliverable. At the time of the hearing, the employer advised that the claimant was incarcerated in the Polk County Jail. The administrative law judge reviewed the Iowa Judicial Branch docketing records for Polk County Case Number SRCR372323 and confirmed the claimant was indeed incarcerated and that there was a no-contact order in place that likely involved the claimant's address of record. The hearing was then rescheduled to September 1, 2023 to allow the claimant the opportunity to participate in the appeal hearing. The Appeals Bureau directed the hearing notices to the address of record and to the Polk County Jail. The new hearing notices were mailed on August 21, 2023. The USPS returned the notice directed to the jail as undeliverable. The hearing notice directed to the claimant's address of record was not returned to the Appeals Bureau. The administrative law judge confirmed from Polk County Case Number SRCR372323 docketing record that the claimant had been sentenced and released from custody on August 22, 2023 and that the no-contact order had been cancelled on the sentencing/release date. Thus, there is a presumption the USPS delivered the new hearing notice to the address of record.

ISSUES:

Whether the claimant was discharged for misconduct in connection with the employment.
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:

William Collazo (claimant) was employed by B.R. Stores, Inc. as a full-time grocery stocker at the Cash Saver in Des Moines from 2021 until May 5, 2023, when the employer discharged him for attendance. Supervisor Todd Brandsfield was the claimant's immediate supervisor. Todd Hocker is Store Director for the Des Moines location. The claimant generally worked evening shifts.

If the claimant needed to be late or absent from work, the employer's policy required that the claimant call the designated absence reporting line at least two hours prior to the shift to notify a manager. The absence reporting requirement was set forth in the employee handbook the employer gave the claimant and had the claimant acknowledge in July 2021.

The final absences that triggered the discharge occurred on May 3 and 5, 2023. On May 3, 2023, the claimant was absent from his shift without notifying the employer. The claimant was next scheduled to work on May 5, 2023 and was three hours late without proper notice to the employer. The claimant had also been a no-call/no-show on July 16, 2022 and on January 27 and February 18, 2023.

The employer alleges many additional instances of tardiness between January 3, 2023 and April 30, 2023, but is unable to provide information regarding the scheduled start of the shift or the time the claimant arrived.

Prior to discharging the claimant for attendance, the employer issued warnings to the claimant regarding attendance. On July 17, 2022, the employer issued a written warning in response to the July 16, 2022 no-call/no-show absence. The warning stated that if the claimant was a no-call/no-show again the employment would be terminated. Three no-call/no-show absences followed this warning. On April 2, 2023, the employer issued a warning to the claimant in response to tardiness concerns and a no-call/no-show absence within the preceding 2.5 months. The warning stated that the claimant needed to show immediate improvement or further action would be taken, up to termination of employment. Additional absences followed this warning.

The claimant established an original claim for benefits that was effective July 2, 2023 and received \$710.00 in benefits for the two weeks between July 2 and July 15, 2023. This employer is the sole base period employer.

On July 24, 2023, an Iowa Workforce Development deputy held a fact-finding interview that addressed the claimant's separation from the employment. Notice of the fact-finding interview was mailed on July 18, 2023. The weight of the evidence indicates the United States Postal Service delivered notice of the fact-finding interview to the employer's address of record in a timely manner. Neither the claimant nor the employer was available by telephone for the fact-finding interview. On July 14, 2023, Patsi Trotter, Director of Human Resources, had submitted

a SIDES protest of the claim with attachments. The employer later submitted the same written material as appeal Exhibits 2 through 5, 7, 8 and 9. After Ms. Trotter submitted the SIDES protest, she commenced a 10-day vacation and did not return to work until August 27, 2023. The written protest materials provided dates of employment, the claimant's title, and a statement that Mr. Hocker, Store Director, had discharged the claimant on May 5, 2023 for attendance. The written protest materials indicated documentation of a no-call/no-show absence on May 3, 2023 and a late call regarding a subsequent shift. The written submission included insufficient and incomplete information regarding other alleged absences that factored in the discharge.

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:

...

(9) Excessive unexcused tardiness or absenteeism.

...

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:

...
(9) Excessive unexcused tardiness or absenteeism.
...

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).

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.

The evidence in the record establishes a discharge for misconduct in connection with the employment. The weight of the evidence establishes no-call/no-show absences on July 16, 2022, and on January 27, February 18, and May 3, 2023. Each of these absences without notice was an unexcused absence. In addition, the evidence establishes a late arrival on May 5, 2023 without proper notice. This also was an unexcused absence under the applicable law. The 2023 unexcused absences occurred in the context of repeated warnings for attendance that included a warning that discharge from the employment was a potential consequence. These unexcused absences were excessive and were sufficient to establish disqualifying misconduct in connection with the employment. The employer presented insufficient evidence regarding the additional alleged instances of tardiness to establish unexcused absences in connection with those alleged incidents. 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.

Iowa Code section 96.3(7)(a) and (b)(1), provides:

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. The employer shall not be relieved of charges if benefits are paid because the employer or an agent of the employer failed to respond timely or adequately to the department's request for information relating to the payment of benefits. This prohibition against relief of charges shall apply to both contributory and reimbursable employers. If the department determines that an employer's failure to respond timely or adequately was due to insufficient notification from the department, the employer's account shall not be charged for the overpayment.

(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.

...

(4) "Fraud or willful misrepresentation by the individual," as the term is used for claimants in the context of the initial determination to award benefits pursuant to Iowa Code section 96.6, subsection 2, means providing knowingly false statements or knowingly false denials of material facts for the purpose of obtaining unemployment insurance benefits. Statements or denials may be either oral or written by the claimant. Inadvertent misstatements or mistakes made in good faith are not considered fraud or willful misrepresentation.

The claimant received \$710.00 in benefits for the two weeks between July 2 and July 15, 2023, but this decision disqualifies the claimant for those benefits. Accordingly, the benefits the claimant received constitute an overpayment of benefits. The employer failed to participate in the fact-finding interview within the meaning of the law. The weight of the evidence indicates the employer was properly notified of the fact-finding interview. The employer provided only written protest materials for the fact-finding interview. Those written materials were insufficient and insufficiently detailed to prove excessive unexcused absences or other misconduct in connection with the employment. The administrative law judge notes the employer added additional proposed exhibits for the appeal hearing that were not included in the protest materials. The claimant did not participate in the fact-finding interview and did not receive benefits through fraud or intentional misrepresentation of material facts. The claimant is not required to repay the overpaid benefits. The employer's account may be charged for the overpaid benefits. The employer's account will not be charged for benefits for the period beginning July 16, 2023.

DECISION:

The July 26, 2023 (reference 01) decision is REVERSED. The claimant was discharged on May 5, 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 \$710.00 in benefits for two weeks between July 2, 2023 and July 15, 2023. The claimant is not required to repay the overpaid benefits. The employer's account may be charged for the overpaid benefits. The employer's account will not be charged for benefits for the period beginning July 16, 2023.



James E. Timberland
Administrative Law Judge

September 5, 2023
Decision Dated and Mailed

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.