

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

68-0157 (9-06) - 3091078 - EI

**MADISON L RUGE**

Claimant

**APPEAL NO. 19A-UI-05273-JTT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**FEDERAL EXPRESS CORP**

Employer

**OC: 05/19/19**

**Claimant: Respondent (2)**

Iowa Code Section 96.5(2)(a) – Discharge for Misconduct

Iowa Code Section 96.3(7) – Overpayment

**STATEMENT OF THE CASE:**

The employer filed a timely appeal from the June 21, 2019, reference 02, decision that allowed benefits to the claimant provided she 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 20, 2019 for no disqualifying reason. After due notice was issued, a hearing was held on July 25, 2019. Claimant Madison Ruge participated. Thomas Kuiper of Equifax represented the employer and presented testimony through Tom McBride. The administrative law judge took official notice of the Agency's record of benefits disbursed to the claimant and received Exhibits 1 and 2 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 employer's account may be charged.

**FINDINGS OF FACT:**

Having reviewed all of the evidence in the record, the administrative law judge finds: Madison Ruge was employed by Federal Express Corporation (FedEx) as a full-time courier from 2016 until May 20, 2019, when the employer discharged her from the employment for theft of customer property. Ms. Ruge was assigned to the Des Moines terminal. Chuck Williams, Operations Supervisor, was Ms. Ruge's supervisor. Ms. Ruge's duties involved sorting packages after they were scanned into the Des Moines facility, scanning packages prior to loading those packages on her assigned truck in preparation for delivering the packages, and delivering the packages to their appropriate destinations.

In April 2019, the employer determined that 11 boxes containing new cell phones had disappeared from the Des Moines terminal after those packages had initially arrived and been scanned into the terminal but before the packages were scanned a second time prior to being loaded onto the appropriate delivery trucks. The employer suspected someone was stealing the cell phones from the facility.

On May 1, 2019, Mr. Williams and Tom McBride, Senior Security Specialist, conducted surveillance on the Des Moines facility. During that operation, Mr. Williams and Mr. McBride located six cell phone boxes on Ms. Ruge's assigned truck that did not belong on Ms. Ruge's assigned truck. During the package sorting process, Ms. Ruge had taken the cell phone boxes from the sorting line, though their outside labeling clearly indicated they were intended for other trucks and routes, not Ms. Ruge's truck or route. Though the established procedure called for Ms. Ruge to scan packages before loading the packages onto her truck, Ms. Ruge had bypassed that step. Ms. Ruge had neatly stacked the six boxes in an area of the truck where packages would not ordinarily be stored. Ms. Ruge had stacked the six boxes so that the shipping labels could not readily be seen. The six boxes were supposed to be part of the deliveries associated with five other routes. Ms. Ruge had no legitimate purpose to have the boxes on her truck and had placed the boxes there in the process of stealing the boxes from the employer. When Mr. McBride questioned Ms. Ruge about the presence of the boxes on her truck, Ms. Ruge asserted that she had not been paying attention while loading her truck and had made a mistake. Ms. Ruge's statement to Mr. McBride was a deliberately false statement. After Ms. Ruge was interviewed, Mr. Williams suspended Ms. Ruge from the employment with pay pending completion of the employer's investigation. Mr. McBride completed drafting his investigative report on or about May 5, 2019. On May 20, 2019, Mr. Williams notified Ms. Ruge that she was discharged from the employment.

Ms. Ruge established a claim for benefits that was effective May 19, 2019 and received \$4,203.00 in benefits for nine weeks between May 26, 2019 and July 27, 2019. FedEx is the sole base period employer in connection with the claim

On June 20, 2019, an Iowa Workforce Development Benefits Bureau deputy held a fact-finding interview that addressed Ms. Ruge's separation from the employment. When the deputy contacted the employer's representative, an Equifax Unemployment Claim Specialist, for the fact-finding interview, the employer representative told the deputy to use the documentation that Equifax had submitted to the Benefits Bureau and declined to provide a verbal statement to the deputy. The documentation that Equifax provided for the fact-finding interview was limited to a June 19, 2019 letter. That letter stated that the employer and the representative were unavailable for the fact-finding interview. That letter provided dates of employment and stated the basis for the discharge as follows:

The claimant was discharged for violation of a reasonable and known policy. Before leaving building, management found six packages loaded in the claimant's truck that did not belong on her route. FedEx security was involved. She was suspended with pay at that time for Unauthorized Possession of Property. After investigation, she was terminated. Packages must be scanned before being placed in the truck to confirm they are going out on the correct route. The claimant had no business reason to have the six packages. This was grounds for termination. The claimant was terminated by Operations Manager Chuck Williams.

Equifax had included an abbreviated version of the above statement in the protest Equifax filed on June 7, 2019 via the SIDES system.

Ms. Ruge participated in the fact-finding interview and provided a verbal statement that included multiple intentionally misleading statements. Her intentionally misleading statements included an assertion that the packages in question that the employer found on her truck were there by accident and that it was standard practice to sometimes scan packages after they were loaded on the truck.

## **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).

In considering an understanding or belief formed, or a conclusion drawn, by an employer or claimant, the administrative law judge considers what a reasonable person would have concluded under the circumstances. See *Aalbers v. Iowa Department of Job Service*, 431 N.W.2d 330 (Iowa 1988) and *O’Brien v. Employment Appeal Bd.*, 494 N.W.2d 660 (1993).

It is the duty of the administrative law judge as the trier of fact in this case, to determine the credibility of witnesses, weigh the evidence and decide the facts in issue. *Arndt v. City of LeClaire*, 728 N.W.2d 389, 394-395 (Iowa 2007). The administrative law judge may believe all, part or none of any witness’s testimony. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa Ct. App. 1996). In assessing the credibility of witnesses, the administrative law judge should consider the evidence using his or her own observations, common sense and experience. *Id.* In determining the facts, and deciding what testimony to believe, the fact finder may consider the following factors: whether the testimony is reasonable and consistent with other believable evidence; whether a witness has made inconsistent statements; the witness’s appearance, conduct, age, intelligence, memory and knowledge of the facts; and the witness’s interest in the trial, their motive, candor, bias and prejudice. *Id.*

Iowa Code section 714.1 provides, in relevant part, as follows

Theft defined. A person commits theft when the person does any of the following:

1. Takes possession or control of the property of another, or property in the possession of another, with the intent to deprive the other thereof.
2. Misappropriates property which the person has in trust, or property of another which the person has in the person’s possession or control, whether such possession or control is lawful or unlawful, by using or disposing of it in a manner which is inconsistent with or a denial of the trust or of the owner’s rights in such property, or conceals found property, or appropriates such property to the person’s own use, when the owner of such property is known to the person.

The weight of evidence in the record establishes a discharge for misconduct in connection with the employment based on Ms. Ruge’s theft of six cell phones on May 1, 2019. Ms. Ruge’s authority to possess any package or property delivered to the employer’s Des Moines facility in the ordinary course of business was limited to authority to dispose of that property in a manner consistent with the employer’s interests and consistent with the property owners’ interests. Ms. Ruge committed theft from the employer by misappropriating the six cell phones in question. Ms. Ruge spirited them onto her truck, though they did not belong there and instead belonged to other routes. Ms. Ruge intentionally bypassed scanning the items before placing them on her truck. Ms. Ruge intentionally arranged the items so that other personnel could not readily discern that the boxes did not belong on her truck. The circumstances prove an intention to deprive the rightful owner of the property and use of the property. Ms. Ruge’s theft and intentional dishonesty was in willful and wanton disregard of the employer’s interest. It was also criminal. Given the circumstances that surrounded Ms. Ruge’s suspension, a reasonable

person in her situation would have clearly understood that the employment was in jeopardy. With that in mind, the evidence does not indicate unreasonable delay on the part of the employment in communicating the discharge decision to Ms. Ruge and the evidence establishes a discharge based on a current act. Ms. Ruge is disqualified for benefits until she has worked in and been paid wages for insured work equal to 10 times her weekly benefit amount.

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).

Ms. Ruge received \$4,203.00 in benefits for nine weeks between May 26, 2019 and July 27, 2019, but this decision disqualifies her for those benefits. Accordingly, the benefits Ms. Ruge received constitute an overpayment of benefits.

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 employer did not participate in the fact-finding interview within the meaning of the law. The employer had no one with personal knowledge present for the fact-finding interview. The Equifax representative declined to provide a verbal statement. The employer did not present documentation that provided detailed factual information of the events leading to the separation. Ms. Ruge made intentionally misleading statements at the fact-finding interview. For that

reason, Ms. Ruge must repay the overpaid benefits and the employer's account shall be relieved of liability for benefits including liability for benefits already paid to Ms. Ruge.

**DECISION:**

The June 21, 2019, reference 02, decision is reversed. The claimant was discharged on May 20, 2019 for misconduct in connection with the employment. The claimant is disqualified for unemployment benefits until she has worked in and been paid wages for insured work equal to 10 times her weekly benefit amount. The claimant must meet all other eligibility requirements. The claimant is overpaid \$4,203.00 in benefits for nine weeks between May 26, 2019 and July 27, 2019. The claimant must repay the overpaid benefits. The employer's account shall be relieved of liability for benefits including liability for benefits already paid to the claimant.

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James E. Timberland  
Administrative Law Judge

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Decision Dated and Mailed

jet/rvs