

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

GABE WOLF
Claimant

FAREWAY STORES INC
Employer

APPEAL NO. 22A-UI-00828-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

**OC: 11/14/21
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 December 7, 2021, reference 01, decision that held the claimant was eligible for benefits, provided he met all other eligibility requirements, and that the employer's account could be charged for benefits, based on the Benefits Bureau deputy's conclusion that the claimant was discharged on November 15, 2021 for no disqualifying reason. After due notice was issued, a hearing was held on January 31, 2022. The 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. Bret Grimes represented the employer. 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 documenting the employer's participated in 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 unemployment insurance benefits
Whether the claimant must repay overpaid benefits.
Whether the employer's account may be charged.
Whether the employer participated in the fact-finding interview.

FINDINGS OF FACT:

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

The claimant, Gabriel Wolf, was employed by Fareway Stores, Inc. as a part-time warehouse order picker from August 2021 and last performed work for the employer on October 5, 2021. The employer hired the claimant based on a positive reference and despite a criminal history that would ordinarily preclude the claimant from being considered for employment with Fareway Stores. The employer's policy generally bars a person from employment if the person has a misdemeanor conviction for a crime against a person within three years prior to the application

or a felony conviction within seven years prior to the application. The claimant would ordinarily have been barred under both bases. The employer and the claimant discussed this topic at the time of hire and the claimant entered into the employment with the understanding that further criminal conduct would trigger a separation from the employment. The employer provided the claimant with an employee handbook at the start of the employment that included a policy regarding "Outside Activities" and a "Self-Reporting Policy." The Outside Activities Policy provided as follows:

While criminal activity is clearly outside the scope of permissible conduct, Company employees must do more than simply avoid criminal behavior. Employees should maintain positive and ethical behavior and avoid outside employment or activities that would interfere with the performance of their jobs.

Failure to live up to these standards of conduct may be subject to discipline, even where the conduct itself does not result in conviction of a crime. You are further advised that conduct during the course of your employment or outside of the course of your employment that results in a criminal charge or charges may result in suspension. The subsequent conviction of a crime may result in termination.

The Self-Reporting Policy provided as follows:

In order to ensure a safe and profitable workplace, all employees are required to report to their supervisor if they are arrested, charged or convicted for any criminal offense, with the exception of minor traffic offenses. ...

If an employee is arrested, charged or convicted for any offense, then the employee must report the matter to their direct supervisor and submit a police report or other documentation concerning the arrests, charges, and/or conviction. The report must occur within two business days of the arrest.

The Company will review the underlying facts of the matter. The Company will not take any adverse action based only upon the fact of an arrest, charge, or conviction. Any action will be considered on a case-by-case basis taking into account the underlying facts and the totality of all circumstances. At the Company's discretion, actions may range from no action, to leave with or with pay, or termination.

Noncompliance with the above stated requirements may result in termination.

Furthermore, misrepresentation of the circumstances of the events can serve as grounds for termination. Employees that are unavailable to report for work due to incarceration are subject to suspension or termination in accordance with the terms of the employee handbook.

On October 3, 2021, the claimant was arrested and charged with misdemeanor Disorderly Conduct – Fighting/Violent Behavior. The claimant did not report the arrest or charge to the employer. The claimant was absent from work on October 3, 2021 and referenced illness when he reported the absence. The claimant was absent on October 4, 2021 without notifying the employer. The claimant returned to work on October 5, 2021 and completed his shift that day.

On October 6, 2021, the employer learned of the criminal charge. On that day, the employer met with the claimant. The claimant asserted the charge stemmed from an altercation with a

former friend. The employer suspended the claimant pending the outcome of the criminal prosecution.

On November 15, 2021, the claimant returned to the employer with a record of the charge along with a copy of the plea and sentencing document indicating the claimant had pleaded guilty to and been convicted of Disorderly Conduct – Fighting/Violent Behavior. The employer formally discharged the claimant from the employment at that time. There was no other basis for the suspension and discharge.

The claimant established an original claim for benefits that was effective November 14, 2021. Iowa Workforce Development set the weekly benefit amount at \$149.00. The claimant received \$1,043.00 in benefits for seven weeks between November 21, 2021 and January 8, 2022. Fareway Stores, Inc. is not a base period employer in connection with the benefit year that began for the claimant on November 14, 2021.

On December 6, 2021, Iowa Workforce Development held a fact-finding interview concerning the claimant's separation from the employment. The employer participated in the fact-finding interview by having a human resources generalist appear and provided an oral statement to the deputy.

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).

Violation of a specific work rule, even off-duty, can constitute misconduct. In *Kleidosty v. EAB*, 482 N.W.2d 416, 418 (Iowa 1992), the employer had a specific rule prohibiting immoral and illegal conduct. The worker was convicted of selling cocaine off the employer's premises. The Court found misconduct in connection with the employment. In its analysis, the Court stressed the importance of a specific policy, even one which was stated only in terms of illegal or immoral conduct.

The evidence in the record establishes a suspension and discharge for misconduct in connection with the employment. The employer had two work rules that put the claimant on notice that his off-duty conduct, especially criminal conduct, could subject him to discipline and possible discharge from the employment. The employer reviewed the policies with the claimant at the start of the employment. On October 3, 2021, the claimant violated the employer's policy by engaging in off-duty contact that led to a Disorderly Conduct charge. The claimant subsequently violated the employer's policy by not reporting the charge within two days of receiving the charge. The claimant also violated the policy by being convicted of the criminal offense. Because the employer's policy placed the claimant on notice that the off-duty conduct could subject him to discipline and/or discharge in connection with the employment, the off-duty conduct constituted misconduct in connection with the employment. 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. The employer's account shall not be charged for benefits.

The unemployment insurance law requires that benefits be recovered from a claimant who receives benefits and is later deemed ineligible for 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 base period employer failed to participate in the initial proceeding, the base period employer's account will be charged for the overpaid benefits. Iowa Code § 96.3(7)(a) and (b).

This employer is not a base period employer and, therefore, is not subject to charges for benefits paid to the claimant in connection with the benefit year that began November 14, 2021. See Iowa Code section 96.7 (regarding base period employer liability).

The claimant received \$1,043.00 in benefits for seven weeks between November 21, 2021 and January 8, 2022, but this decision disqualifies the claimant for those benefits. Accordingly, the benefits the claimant received constitute an overpayment of benefits. Because the employer participated in the fact-finding interview, the claimant is required to repay the overpaid benefits. The employer's account will be relieved of liability for benefits, including liability for benefits already paid.

DECISION:

The December 7, 2021, reference 01, decision is reversed. The claimant was suspended on October 6, 2021 and discharged on November 15, 2021 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 \$1,043.00 for seven weeks between November 21, 2021 and January 8, 2022. The claimant must repay the overpaid benefits. The employer's account is relieved of liability for benefits, including liability for benefits already paid.



James E. Timberland
Administrative Law Judge

February 18, 2022
Decision Dated and Mailed

jet/mh