

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

KALANDRA VANWEELDEN

Claimant

APPEAL NO. 19A-UI-07379-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

PILOT TRAVEL CENTERS LLC

Employer

OC: 08/11/19

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 September 12, 2019, reference 01, decision that allowed benefits to the claimant provided she was otherwise eligible and that held the employer's account could be charged for benefits, based on the deputy's conclusion that the claimant was discharged on August 11, 2019 for no disqualifying reason. After due notice was issued, a hearing was held on October 9, 2019. The claimant did not comply with the hearing notice instructions to register a telephone number for the hearing and did not participate. Randy Vandello 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, 2, 6, 8 and 10 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 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: The claimant was employed as a full-time Overnight Lead early 2018 until August 11, 2019, when the employer discharged her for failure to protect company assets. On August 9, 2019, the claimant was duped in connection with a short-change scam. As the scam unfolded, the claimant deviated from the employer's change-making protocol by failing to close the register drawer between distinct transactions and failing to close the register drawer when confusion arose in connection with the transaction. As a result of the scam, the employer lost \$300.00 in

cash. The claimant subsequently realized she had been scammed and reported the matter to the employer. Two weeks earlier, the claimant and/or a coworker deviated from the employer established fuel transaction protocol in the context of a fuel-theft scam that resulted in loss to the employer. The employer could not determine which employee was responsible for that loss and elected not to issue a reprimand to either employee. However, the employer took the opportunity to discuss the need to remain alert and adhere to company protocol in connection with all transactions. In April, the claimant deviated from the employer's established policy that prohibited telephone transactions. The claimant issued \$600.00 in MoneyPak cards to a caller based on the caller's over-the-phone presentation of credit card information that turned out to be bogus. The employer issued a written reprimand in connection with the April incident. After the August 9, 2019 incident, the claimant readily discerned that she would likely be discharged in connection with the incident. The employer did indeed decide to discharge the claimant. The claimant avoided the employer's attempts to communicate the discharge decision to her.

The claimant established an original claim for benefits that was effective August 11, 2019 and received \$2,264.00 in benefits for eight weeks between August 11, 2019 and October 5, 2019. This employer is the sole base period employer.

On September 10, 2019, an Iowa Workforce Development Benefits Bureau deputy held a fact-finding interview that addressed the claimant's separation from the employment. The employer did not participate in the fact-finding interview phone call. The employer provided documentation for the fact-finding interview that included the two written reprimands for the two incidents that factored in the discharge. The employer provided a handbook acknowledgement, but not the relevant policy. The employer provided several additional but irrelevant documents. The claimant's statement to the deputy was by and large truthful, but contained a minor misstatement about there being no calls from the employer to her on August 10, 2019.

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).

The evidence in the record establishes misconduct in connection with the employment based on two incidents in a four-month period wherein the claimant knowingly violated the employer's established protocol for transactions and thereby caused the employer significant loss. The second incident came just two weeks after the employer had reinforced the need to adhere to company policies in connection with transactions. The claimant's repeated negligence, repeated deviation from policy, and repeated failure to protect company assets was sufficient to establish an intentional and substantial disregard of the employer's interests. The claimant 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 claimant must meet all other eligibility requirements.

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).

The claimant received \$2,264.00 in benefits for eight weeks between August 11, 2019 and October 5, 2019, but this decision disqualifies her for those benefits. Accordingly, the benefits the claimant 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 un rebutted 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 documentation the employer submitted for the fact-finding interview did not satisfy the participation requirement. Though the employer provided the two written reprimands, those lacked sufficient detail to prove misconduct in connection with the employer. The employer provided a handbook acknowledgement without providing the policy being acknowledged. The claimant's misstatement regarding the employer's attempts to notify her of the discharge did not rise to the level of fraud or intentional misrepresentation. Because the claimant did not receive benefits due to fraud or willful misrepresentation and because employer failed to participate in the finding interview, the claimant is not required to repay the overpayment and the employer's account may be charged for the overpaid benefits. However, the employer's account will be relieved of charges for the period beginning October 6, 2019.

DECISION:

The September 12, 2019, reference 01, decision is reversed. The claimant was discharged on October 11, 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 \$2,264.00 in benefits for eight weeks between August 11, 2019 and October 5, 2019. The claimant is not required to repay the overpaid benefits. The employer's account may be charged for the overpaid benefits. However, the employer's account will be relieved of charges for the period beginning October 6, 2019.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/scn