

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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**PHILLIP T JACKSON**  
Claimant

**WESLEYLIFE**  
Employer

**APPEAL 18A-UI-02761-JP-T**  
**ADMINISTRATIVE LAW JUDGE  
DECISION**

**OC: 01/28/18**  
**Claimant: Respondent (2)**

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Iowa Code § 96.5(2)a – Discharge for Misconduct  
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:**

The employer filed an appeal from the February 19, 2018, (reference 01) unemployment insurance decision that allowed benefits. The parties were properly notified about the hearing. A telephone hearing was held on March 27, 2018. Claimant participated. Employer participated through hearing representative Alyce Smolsky, director of community nutrition and transportation Brett Peterson, and director of people and culture Jaymie Banks. Employer Exhibits 1 and 2 were admitted into evidence with no objection. Official notice was taken of the administrative record with no objection.

**ISSUES:**

Was the claimant discharged for disqualifying job-related misconduct?

Has the claimant been overpaid unemployment insurance benefits, and if so, can the repayment of those benefits to the agency be waived?

Can charges to the employer's account be waived?

**FINDINGS OF FACT:**

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed part-time as a meals on wheels driver from December 30, 2014, and was separated from employment on February 1, 2018, when he was discharged.

The employer has a written policy (code of conduct) that prohibits violence or threats of violence. The policy provides that if an employee violates this policy they may be disciplined, up to and including discharge. Claimant was aware of the policy.

On January 16, 2018, during claimant's scheduled shift, he had two altercations with individuals at Oak Park Apartments while he was delivering meals to a client. The first incident occurred when claimant was leaving the building. Employer Exhibit 1. As claimant was leaving, he had to walk through four individuals and one of the individuals called him a "son-of-b\*\*ch." Employer Exhibit 2. After the individual said this to claimant, he turned around and came back and

confronted the individual. Employer Exhibits 1 and 2. Claimant asked the individual what he said. Another person confirmed that the individual did say "son-of-b\*\*ch." Employer Exhibit 2. Claimant and the individuals exchanged words. Claimant then left the building and got into his car. Shortly after the first altercation, one of the four individuals went to that individual's vehicle. Once the individual was near that individual's vehicle, claimant approached this individual and claimant started a second altercation with the individual. Employer Exhibit 1. During the second altercation, a female got between claimant and the individual and tried to separate them. Employer Exhibit 1. The female pushed claimant away and then claimant pushed the female. Employer Exhibit 1. The other individual then approached claimant and assaulted him. Employer Exhibit 1. After the second altercation was over, the other party called the employer and complained about claimant's conduct. The other party alleged that claimant assaulted the female and called them names. The employer attempted to contact claimant by phone, but it was unsuccessful.

After claimant finished his route on January 16, 2018, he returned to the employer and met with Mr. Peterson and Pam (claimant's direct supervisor). Mr. Peterson asked claimant what happened at the Oak Park Apartments. Claimant told Mr. Peterson he understood if the employer needed to fire him. Claimant told also Mr. Peterson he probably should have just walked away, but the people had been harassing him. Claimant told the employer that the individual called him a "son-of-b\*\*ch" as he was leaving. Employer Exhibit 2. Claimant told the employer he turned around and asked why the individual was harassing him. Employer Exhibit 2. Claimant told the employer he was tired of the individual harassing him; claimant had previously reported to the employer about the individual harassing him at Oak Park Apartments. Employer Exhibit 2. Mr. Peterson asked claimant if anything got physical. Claimant responded no. Mr. Peterson informed claimant that the other party alleged he pushed a female and he was calling them names. Claimant denied that he pushed a female. Claimant stated the female was trying to break up the fight, but nothing got physical. Mr. Peterson informed claimant that the employer was going to investigate the incident. The employer requested a written statement from claimant. The employer told claimant it was going to contact the property manager about the incident and it removed the client from claimant's route.

The employer contacted the apartment complex and left multiple messages trying to find out more information about the incident. On January 26, 2018, an employee from apartment complex called Mr. Peterson and informed him that there was video that indicated claimant started at least one of the altercations. On January 29, 2018, claimant provided the employer his written statement about the incident on January 16, 2018. Employer Exhibit 2.

On January 31, 2018, the employer received a copy of the videos and Mr. Peterson reviewed the videos. Employer Exhibit 1. Mr. Peterson then called claimant and scheduled a meeting on February 1, 2018. On February 1, 2018, Mr. Peterson and Pam met with claimant. Mr. Peterson showed claimant the videos of the altercations. Mr. Peterson mentioned that claimant failed to mention the second altercation that occurred in the parking lot during his verbal or written statement to the employer. Claimant denied starting the altercation in the parking lot. Mr. Peterson then informed claimant he was discharged because of the altercations and failing to mention the second altercation to the employer.

The administrative record reflects that claimant has received unemployment benefits in the amount of \$627.00, since filing a claim with an effective date of January 28, 2018, for the eight weeks-ending March 24, 2018. The administrative record also establishes that the employer did provide written documentation, but did not provide live testimony at the fact-finding interview. The administrative record further reflects that the employer did not make a first-hand witness available for rebuttal. The administrative record reflects that claimant does not have other full- or part-time employment in the base period and has not requalified for benefits. Thus, claimant is no longer otherwise monetarily eligible for benefits after this employer's wages are excluded from the base period.

## REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes claimant was discharged from employment due to job-related misconduct. Benefits are denied.

It is the duty of an administrative law judge and 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, as the finder of fact, may believe all, part or none of any witness's testimony. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa 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. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996). 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 evidence you believe; whether a witness has made inconsistent statements; the witness's conduct, age, intelligence, memory and knowledge of the facts; and the witness's interest in the trial, their motive, candor, bias and prejudice. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996).

This administrative law judge assessed the credibility of the witnesses who testified during the hearing, considering the applicable factors listed above, and used my own common sense and experience. This administrative law judge reviewed the exhibits that were admitted into the record. This administrative law judge finds the employer's version of events to be more credible than claimant's recollection of those events.

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 Code section 96.5(12) provides:

An individual shall be disqualified for benefits, regardless of the source of the individual's wage credits:

12. *Supplemental part-time employment.* If the department finds that an individual is disqualified for benefits under subsection 1 or 2 based on the nature of the individual's separation from supplemental part-time employment, all wages paid by the supplemental part-time employer to that individual in any quarter which are chargeable following a disqualifying separation under subsection 1 or 2 shall not be considered wages credited to the individual until such time as the individual meets the conditions of requalification as provided for in this chapter, or until the period of disqualification provided for in this chapter has elapsed.

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).

Misconduct must be "substantial" to warrant a denial of job insurance benefits. *Newman v. Iowa Dep't of Job Serv.*, 351 N.W.2d 806 (Iowa Ct. App. 1984). When based on carelessness, the carelessness must actually indicate a "wrongful intent" to be disqualifying in nature. *Id.* Negligence does not constitute misconduct unless recurrent in nature; a single act is not disqualifying unless indicative of a deliberate disregard of the employer's interests. *Henry v. Iowa Dep't of Job Serv.*, 391 N.W.2d 731 (Iowa Ct. App. 1986). Where a claimant participated in a confrontation without attempt to retreat, the Iowa Court of Appeals rejected a self-defense argument stating that to establish such a defense the claimant must show freedom from fault in bringing on the encounter, a necessity to fight back, and an attempt to retreat unless there is no means of escape or that peril would increase by doing so. *Savage v. Emp't Appeal Bd.*, 529 N.W.2d 640 (Iowa Ct. App. 1995).

Employers generally have an interest in protecting the safety of all of its employees. On January 16, 2018, claimant had two altercations with individuals at Oak Park Apartments while delivering meals for the employer. However, when claimant was questioned by the employer, he only mentioned one of the altercations and denied anything physical occurred.

After the first altercation in the building ended, claimant left the building and got into his vehicle. While claimant was in his vehicle, he observed one of the individuals from first altercation approach that individual's vehicle. Claimant then initiated a second altercation. See Employer Exhibit 1. Claimant approached this individual despite his belief that he thought one of the individuals wanted to fight. See Employer Exhibit 2. When claimant reached this individual, he confronted the individual about the earlier altercation. Employer Exhibit 1. During this second altercation, a female attempted to break up the altercation, but claimant pushed her. Employer Exhibit 1. The individual then assaulted claimant. Employer Exhibit 1.

Claimant's response after the first altercation ended of initiating a second altercation by approaching one of the individuals rather than leaving in his car, which he was already in, was in violation of the employer's policies and against commonly known acceptable standards of work behavior. Claimant clearly had the opportunity to avoid the second altercation because he could have left in his car, but instead he instigated the second altercation by confronting the individual as that individual appeared to be leaving. This second altercation resulted in physical violence. Claimant's conduct of leaving his car and approaching the individual indicates a clear intent to participate in and initiate the altercation rather than retreat. The administrative law judge is cognizant of claimant's frustration at the employer not doing anything about his earlier complaints of harassment at the Oak Park Apartments; however, claimant's behavior of

approaching the individual in the parking lot and instigating the second altercation clearly violated the employer's policies and is against commonly known and acceptable standards of work behavior. Furthermore, when the employer questioned claimant regarding what happened on January 16, 2018, he denied there being a physical altercation. The video of the second altercation clearly shows a physical altercation occurred. It is also noted that in claimant's written statement he failed to mention the second altercation. It is further noted that claimant also failed to mention any physical altercation in his written statement or verbal statement to the employer.

The employer has presented substantial and credible evidence that claimant's conduct on January 16, 2018 and his failure to notify the employer about the second altercation, including that he initiated the second altercation, was a "deliberate violation or disregard of standards of behavior which the employer has the right to expect of employees[.]" Iowa Admin. Code r. 871-24.32(1)a. This is disqualifying misconduct even without prior warning. Benefits are denied. Since claimant has not requalified for benefits since the separation and is not otherwise monetarily eligible according to base period wages, benefits are denied until he requalifies and is otherwise eligible for benefits. The administrative law judge further concludes that the claimant has been overpaid unemployment insurance benefits.

Iowa Code section 96.3(7)a, b, as amended in 2008, 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.

(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.

(2) An accounting firm, agent, unemployment insurance accounting firm, or other entity that represents an employer in unemployment claim matters and demonstrates a continuous pattern of failing to participate in the initial determinations to award benefits, as determined and defined by rule by the department, shall be denied permission by the department to represent any employers in unemployment insurance matters. This subparagraph does not apply to attorneys or counselors admitted to practice in the courts of this state pursuant to section 602.10101.

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.

(2) “A continuous pattern of nonparticipation in the initial determination to award benefits,” pursuant to Iowa Code section 96.6, subsection 2, as the term is used for an entity representing employers, means on 25 or more occasions in a calendar quarter beginning with the first calendar quarter of 2009, the entity files appeals after failing to participate. Appeals filed but withdrawn before the day of the contested case hearing will not be considered in determining if a continuous pattern of nonparticipation exists. The division administrator shall notify the employer’s representative in writing after each such appeal.

(3) If the division administrator finds that an entity representing employers as defined in Iowa Code section 96.6, subsection 2, has engaged in a continuous pattern of nonparticipation, the division administrator shall suspend said representative for a period of up to six months on the first occasion, up to one year on the second occasion and up to ten years on the third or subsequent occasion. Suspension by the division administrator constitutes final agency action and may be appealed pursuant to Iowa Code section 17A.19.

(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.

This rule is intended to implement Iowa Code section 96.3(7)“b” as amended by 2008 Iowa Acts, Senate File 2160.

Because the claimant's separation was disqualifying, benefits were paid to which he was not entitled. The unemployment insurance law provides that benefits must be recovered from a claimant who receives benefits and is later determined to be ineligible for benefits, even though the claimant acted in good faith and was not otherwise at fault. However, the overpayment will not be recovered when it is based on a reversal on appeal of an initial determination to award benefits on an issue regarding the claimant's employment separation if: (1) the benefits were not received due to any fraud or willful misrepresentation by the claimant and (2) the employer did not participate in the initial proceeding to award benefits. The employer will not be charged for benefits if it is determined that they did participate in the fact-finding interview. Iowa Code § 96.3(7), Iowa Admin. Code r. 871-24.10.

In this case, the claimant has received benefits but was not eligible for those benefits. Although the employer provided written documentation for the fact-finding interview, it did not provide live testimony. The employer also failed to provide "the name and telephone number of an employee with firsthand information who may be contacted, if necessary, for rebuttal" as required by the administrative rule if there is no live testimony provided. Iowa Admin. Code r. 871-24.10. Since the employer did not participate in the fact-finding interview the claimant is not obligated to repay to the agency the benefits he received and the employer's account shall be charged.

**DECISION:**

The February 19, 2018, (reference 01), unemployment insurance decision is reversed. Claimant was discharged from employment due to job-related misconduct, has not requalified for benefits, and is not otherwise monetarily eligible. Benefits are withheld until such time as claimant works in and has been paid wages equal to ten times his weekly benefit amount, provided he is otherwise eligible.

Claimant has been overpaid unemployment insurance benefits in the amount of \$627.00 and is not obligated to repay the agency those benefits. The employer did not participate in the fact-finding interview and its account shall be charged.

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Jeremy Peterson  
Administrative Law Judge

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Decision Dated and Mailed

jp/rvs