

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

MICHAEL R KAIN
Claimant

APPEAL 21A-UI-09084-JC-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

HY-VEE INC
Employer

OC: 10/04/20
Claimant: Respondent (2R)

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
PL116-136, Sec. 2104 – Federal Pandemic Unemployment Compensation (FPUC)

STATEMENT OF THE CASE:

The employer/appellant, Hy-Vee Inc., filed an appeal from the March 17, 2021 (reference 01) Iowa Workforce Development (“IWD”) unemployment insurance decision that allowed benefits. The parties were properly notified about the hearing. A telephone hearing was held on June 15, 2021. The claimant, Michael Kain, participated. The employer participated through Barbara Buss, a hearing representative for Corporate Cost Control. Carey Gibson and Eddie Cupp testified for the employer.

The administrative law judge took official notice of the administrative records. Based on the evidence, the arguments presented, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUES:

Was the claimant discharged for disqualifying job-related misconduct?
Has the claimant been overpaid any unemployment insurance benefits, and if so, can the repayment of those benefits to the agency be waived?
Can any charges to the employer’s account be waived?
Is the claimant eligible for Federal Pandemic Unemployment Compensation?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed part-time as a courtesy clerk beginning October 18, 2020 and was separated from employment on January 9, 2021, when he was discharged (fired) for conduct unbecoming of a Hy-Vee employee.

When Mr. Kain began his employment, he attended training, which included a verbal review of the rules and procedures, as well as a written copy of rules. Hy-Vee Inc. has a policy which states employees are to be free from unwanted comments and touching in the workplace.

On October 30, 2020-, Hy-Vee met with Mr. Kain to issue a documented warning, which he had to sign. Management held the meeting after an employee complained that Mr. Kain had touched her face and made a comment about her pregnancy, which upset her. At the meeting, Mr. Kain was told he could not touch employees anymore and to only discuss work related issues with his co-workers. Mr. Kain apologized and indicated the face touch was due to the co-worker having something on her cheek.

The final incident that led to Hy-Vee's decision to fire Mr. Kain was when three employees left statements under the door of management regarding Mr. Kain's conduct over the past week. The conduct included requesting hugs, touching an employee's cheek, and trying to rub the shoulders of another employee. Mr. Kain admitted to requesting hugs and trying to rub a co-worker's shoulders. Because he had already been warned, the employer fired him.

The administrative record reflects that claimant has received unemployment benefits, Pandemic Unemployment Emergency Compensation (PEUC) benefits, and Federal Pandemic Unemployment Compensation (FPUC) benefits since this separation from employment. The administrative record reflects that Mr. Kain has received unemployment benefits in the amount of \$3,926.00 since separation. Mr. Kain also received federal unemployment insurance benefits through Federal Pandemic Unemployment Compensation (FPUC). Mr. Kain has been paid \$5,100.00 in FPUC benefits. He has been paid \$8,154.00 in PEUC benefits. Employer did not participate in the fact finding interview because it did not receive a notice of the fact finding interview or a telephone call.

A review of Mr. Kain's claim for unemployment benefits reflects he filed weekly claims each week he worked at Hy-Vee but did not record any wages.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes that Mr. Kain was fired for job-related misconduct, and benefits must be denied.

Iowa unemployment insurance law disqualifies individuals who are discharged from employment for misconduct from receiving unemployment insurance benefits. Iowa Code § 96.5(2)a. They remain disqualified until such time as they requalify for benefits by working and earning insured wages ten times their weekly benefit amount. *Id.*

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 establishing disqualifying job related misconduct. *Cosper v. Iowa Dep't of Job Serv.*, 321 N.W.2d 6 (Iowa 1982). The issue is not whether the employer made a correct decision in separating claimant, but whether the claimant is entitled to unemployment insurance benefits. *Infante v. Iowa Dep't of Job Serv.*, 364 N.W.2d 262 (Iowa Ct. App. 1984). Misconduct serious enough to warrant discharge is not necessarily serious enough to warrant a denial of job insurance benefits. Such misconduct must be "substantial." *Newman v. Iowa Dep't of Job Serv.*, 351 N.W.2d 806 (Iowa Ct. App. 1984). Generally, continued refusal to follow reasonable instructions constitutes misconduct. *Gilliam v. Atlantic Bottling Co.*, 453 N.W.2d 230 (Iowa Ct. App. 1990).

In this case, Mr. Kain was given a warning on October 30, 2020 not to touch his co-workers because it violated the employer's rules of unwanted touching/harassment. Mr. Kain then touched a co-worker when he tried to rub her shoulders. The administrative law judge is persuaded Mr. Kain knew or should have known his conduct was contrary to the best interests of the employer. Therefore, based on the evidence presented, Mr. Kain was discharged for misconduct, and benefits are denied.

The next issue is whether Mr. Kain was overpaid benefits and should have to repay those benefits. In this case, Mr. Kain received regular unemployment insurance benefits, PEUC benefits, and FPUC benefits after his separation from employment. While the issues regarding overpayment of regular and FPUC benefits were on the hearing notice, the issue regarding entitlement to and overpayment of PEUC benefits was not. Therefore, the issue regarding overpayment of benefits will be remanded to the Benefits Bureau of Iowa Workforce Development for a calculation.

Mr. Kain should not be required to repay regular unemployment insurance benefits and employer should be charged for unemployment insurance benefits, as employer did not participate in the fact finding interview through no fault of its own. See Iowa Code § 96.3(7)a-b; Iowa Admin. Code r. 871- 24.10.

The issue of Mr. Kain's unrecorded wages from October 18, 2020 through his January 9, 2021 separation is remanded to the Benefits Bureau for an adjustment and determination of whether Mr. Kain has been overpaid benefits during that period.

DECISION:

The March 17, 2021, (reference 01) unemployment insurance decision is reversed. Mr. Kain was discharged (fired) for job-related misconduct. Regular unemployment insurance benefits are withheld until such time as he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible. Mr. Kain has been overpaid unemployment insurance benefits and the issue of the amount of the overpayment will be remanded to the Benefits Bureau of Iowa Workforce Development for calculation. Mr. Kain may not be required to repay regular unemployment insurance benefits and employer will not be charged for any benefits because employer did not participate in the fact finding interview through no fault of its own.

REMAND:

The issue of Mr. Kain's overpayment of regular unemployment insurance benefits, PEUC benefits, and FPUC benefits is remanded to the Benefits Bureau of Iowa Workforce Development for a calculation and decision. Mr. Kain may not be required to repay the overpayment of regular unemployment insurance benefits and employer will not be charged.

The issue of Mr. Kain's unrecorded wages from October 18, 2020 through his January 9, 2021 separation is also remanded to the Benefits Bureau for an adjustment and determination of whether Mr. Kain has been overpaid benefits during that period.



Jennifer L. Beckman
Administrative Law Judge
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Iowa Workforce Development
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Fax 515-478-3528

June 28, 2021
Decision Dated and Mailed

jlb/lj

NOTE TO CLAIMANT: This decision determines you are not eligible for regular unemployment insurance benefits. If you disagree with this decision you may file an appeal to the Employment Appeal Board by following the instructions on the first page of this decision.

Individuals who do not qualify for regular unemployment insurance benefits, but who are unemployed or continue to be unemployed for reasons related to COVID-19 may qualify for Pandemic Unemployment Assistance (PUA). **You will need to apply for PUA to determine**

your eligibility under the program. Additional information on how to apply for PUA can be found at <https://www.iowaworkforcedevelopment.gov/pua-information>. If this decision becomes final or if you are not eligible for PUA, you may have an overpayment of benefits.

ATTENTION: On May 11, 2021, Governor Reynolds announced that Iowa will end its participation in federal pandemic-related unemployment benefit programs effective June 12, 2021. The last payable week for PUA in Iowa will be the week ending June 12, 2021. Additional information can be found in the press release at <https://www.iowaworkforcedevelopment.gov/iowa-end-participation-federal-unemployment-benefit-programs-citing-strong-labor-market-and>.

You may find information about food, housing, and other resources at <https://covidrecoveryiowa.org/> or at <https://dhs.iowa.gov/node/3250>

Iowa Finance Authority also has additional resources at <https://www.iowafinance.com/about/covid-19-ifa-recovery-assistance/>