

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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**HEATHER A RIFE**  
Claimant

**CENTRAL IOWA KFC INC**  
Employer

**APPEAL 21R-UI-16043-DB-T**  
**ADMINISTRATIVE LAW JUDGE  
DECISION**

**OC: 03/29/20**  
**Claimant: Respondent (2)**

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Iowa Code § 96.5(2)a – Discharge for Misconduct  
Iowa Code § 96.3(7) – Overpayment of Benefits and Lost Wages Assistance  
Iowa Code § 96.6(3) & 96.6(4) – Previous Adjudication  
Iowa Admin. Code r. 871-24.10 – Employer Participation in Fact-finding Interview  
PL 116-136 Section 2104 – Federal Pandemic Unemployment Compensation (FPUC)

**STATEMENT OF THE CASE:**

The employer/appellant filed an initial appeal from the February 18, 2021 (reference 02) unemployment insurance decision that allowed unemployment insurance benefits to the claimant based upon her separation from employment. A hearing was conducted on May 7, 2021 with Administrative Law Judge (ALJ) Zeno with only the employer participating. ALJ Zeno entered a decision dated May 17, 2021 in Appeal No. 21A-UI-06347-DZ-T. Claimant filed an appeal to the Employment Appeal Board (EAB) and the EAB issued an order on July 19, 2021 directing the Appeals Bureau to conduct a new hearing with due notice provided to both parties.

Due notice was issued for a new hearing and mailed to the parties on August 19, 2021. A telephone hearing was held on September 9, 2021. The claimant participated personally. The employer participated through witness Marshall Brandt. The claimant waived due notice of the issue of previous adjudication pursuant to Iowa Code § 96.6(3) and 96.6(4). Employer's Exhibit 1 was admitted. The administrative law judge took official notice of the claimant's unemployment insurance benefits records. The hearing was consolidated with Appeal No. 21R-UI-16948-DB-T; 21R-UI-16949-DB-T; and 21R-UI-16950-DB-T.

**ISSUES:**

Was the claimant discharged for disqualifying job-related misconduct?  
Was claimant overpaid regular unemployment insurance benefits?  
Was claimant overpaid FPUC benefits?  
Was claimant overpaid LWA benefits?  
Were the issues previously adjudicated?

**FINDINGS OF FACT:**

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant worked for this employer as a part-time customer service team member. She worked at the employer's fast food restaurant. Her employment began on October 28, 2016 and ended on

September 27, 2020 when she was discharged from work. Her direct supervisor was Delta "Dee" Spivey.

On September 27, 2020, the claimant was working at the drive-thru window. A customer and Ms. Spivey were having a conversation at the counter. The customer had wanted free food. Ms. Spivey refused to give him free food. Claimant came over to Ms. Spivey to determine what had occurred. Ms. Spivey explained to the claimant that the customer wanted free food. Claimant told Ms. Spivey that she would have paid for food for him. Ms. Spivey told the claimant that she should have come up front and did it. Claimant then told Ms. Spivey that she "didn't have to be such a fucking bitch about it". This was near the front counter in front of customers. The employer has a written policy forbidding profane language in the workplace. See Exhibit 1. Claimant received a copy of the policy. See Exhibit 1. The policy provides that an employee may be discharged for abuse or harassment of an employee, including profanity. See Exhibit 1.

Claimant had filed an original claim for unemployment insurance benefits with an effective date of March 29, 2020. Claimant was paid regular unemployment insurance benefits in the amount of \$2, 443.00 for the weeks between March 29, 2020 and October 24, 2020. Claimant was also paid Federal Pandemic Unemployment Compensation (FPUC) benefits in the amount of \$7,800.00 for the thirteen weeks between March 29, 2020 and July 25, 2020. Claimant was also paid Lost Wages Assistance (LWA) benefits of \$1,800.00 for the six weeks between July 26, 2020 and September 5, 2020.

According to the claimant's administrative records, a fact-finding interview regarding the separation from employment was scheduled for February 17, 2021. Claimant does not remember receiving notification of the fact-finding interview or participating in the fact-finding interview. The employer does not remember receiving notification of the fact-finding interview or participating in the fact-finding interview. Claimant did not receive any benefit payments after the fact-finding interview was conducted as her account was already locked due to another decision being issued on her account.

In a decision dated August 7, 2020 (reference 01), Iowa Workforce Development determined that the claimant was eligible for regular unemployment insurance benefits pursuant to Iowa Code § 96.4(3) because she was unemployed due to a short-term layoff. The employer filed an appeal to the August 7, 2020 (reference 01) decision and an appeal hearing was held with ALJ Scheetz on December 2, 2020. ALJ Scheetz issued a decision in Appeal No. 20A-UI-12231-S1-T on December 9, 2020. That decision found that the claimant was not able to and available for work effective March 29, 2020 and that regular unemployment insurance benefits were denied effective March 29, 2020. ALJ Scheetz also found that the claimant was overpaid regular unemployment insurance benefits in the amount of \$2,443.00 for the weeks between March 29, 2020 and October 24, 2020. ALJ Scheetz found that the claimant was overpaid Federal Pandemic Unemployment Compensation (FPUC) benefits of \$7,800.00 for the 13-week period between March 29, 2020 and July 25, 2020. No further appeal to the decision issued by ALJ Scheetz was filed.

On July 12, 2021, Iowa Workforce Development issued two decisions waiving the claimant's established overpayment balance of FPUC benefits in the amount of \$7,800.00 and waiving the claimant's established overpayment balance of LWA benefits in the amount of \$1,800.00. Those decisions found that the claimant was not required to repay those FPUC and LWA benefits that the claimant had received. This decision does not change the agency's determination that those overpayment FPUC and LWA balances have been waived.

#### **REASONING AND CONCLUSIONS OF LAW:**

For the reasons that follow, the administrative law judge concludes as follows:

Iowa Code § 96.5(2)a provides:

An individual shall be disqualified for benefits:

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 individual shall be disqualified for benefits 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).

Iowa Admin. Code r. 871-24.32(4) provides:

(4) Report required. The claimant's statement and employer's statement must give detailed facts as to the specific reason for the claimant's discharge. 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. In cases where a suspension or disciplinary layoff exists, the claimant is considered as discharged, and the issue of misconduct shall be resolved.

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). What constitutes misconduct justifying termination of an employee and what misconduct warrants denial of unemployment insurance benefits are two separate decisions. *Pierce v. Iowa Dep't of Job Serv.*, 425 N.W.2d 679 (Iowa Ct. App. 1988). 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). 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). Misconduct must be substantial in nature to support a disqualification from unemployment benefits. *Gimbel v. Employment Appeal Bd.*, 489 N.W.2d 36, 39 (Iowa Ct. App. 1992). The focus is on deliberate, intentional, or culpable acts by the employee. *Id.*

The Iowa Court of Appeals has determined that “[t]he use of profanity or offensive language in a confrontational, disrespectful, or name-calling context may be recognized as misconduct, even in the case of isolated incidents or situations in which the target of abusive name-calling is not present when the vulgar statements are initially made.” *Myers v. Emp’t Appeal Bd.*, 462 N.W.2d 734 (Iowa Ct. App. 1990). The “question of whether the use of improper language in the workplace is misconduct is nearly always a fact question. It must be considered with other relevant factors ....” *Id.* at 738 (Iowa App. 1990). Aggravating factors for cases of bad language include: (1) cursing in front of customers, vendors, or other third parties (2) undermining a supervisor’s authority (3) threats of violence (4) threats of future misbehavior or insubordination (5) repeated incidents of vulgarity, and (6) discriminatory content. *Id.*; *Deever v. Hawkeye Window Cleaning, Inc.*, 447 N.W.2d 418, 421 (Iowa App. 1989); *Henecke v. Iowa Department of Job Service*, 533 N.W.2d 573 (Iowa App. 1995); *Carpenter v. IDJS*, 401 N.W.2d 242, 246 (Iowa App. 1986); *Zeches v. Iowa Department of Job Services*, 333 N.W.2d 735 (Iowa App. 1983).

In this case, the claimant used profanity at her supervisor directly and in a confrontational, name-calling way. She did this in front of customers at the front counter and with a purpose of undermining her supervisor’s decision not to give out free food. Claimant’s actions in using profane language towards her supervisor in a confrontational way in front of customers is considered substantial job-related misconduct. Benefits are denied effective September 27, 2020 and continuing until the claimant has worked in and been paid wages for insured work equal to ten times her weekly benefit amount after her September 27, 2020 separation date, and provided she is otherwise eligible.

If a decision that had found the claimant was eligible for benefits based upon her separation from employment is reversed on appeal, typically, the issue of whether the employer participated in the fact-finding interview and whether the claimant must repay any overpayment of benefits is addressed.

Iowa Code § 96.3(7)a-b 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.

(emphasis added).

However, in this case, the claimant was not paid any regular unemployment insurance benefits **after** the scheduled fact-finding interview date of February 17, 2021. Therefore, no finding can be made that an overpayment occurred because of a subsequent reversal on appeal regarding the issue of the individual's separation from employment **due to** the employer's failure to respond timely or adequately to the department's request for information relating to the payment of benefits.

Further, the issues of whether the claimant was overpaid regular unemployment insurance benefits of \$2,443.00 for the 26-week period from March 29, 2020 through October 24, 2020 and whether the claimant was overpaid FPUC benefits of \$7,800.00 for the 13-week period between March 29, 2020 and July 25, 2020 was already determined by ALJ Scheetz in Appeal No. 20A-UI-12231-S1-T, and that decision became final. This ALJ cannot re-adjudicate an issue that has already been decided by another ALJ.

Iowa Code section 96.6 creates the jurisdictional structure and parameters by which unemployment insurance issues are to be decided. The Benefits Bureau serves as the first-level decision maker. The Appeals Bureau serves as the second-level adjudicator. The Employment Appeal Board serves as the third-level adjudicator. Unless appealed in a timely manner and reversed on appeal, a finding of fact or law, judgment, conclusion, or final order made pursuant to this section by an employee or representative of Iowa Workforce Development, administrative law judge, or the Employment Appeal Board, is binding upon the parties in proceedings brought under this chapter. See Iowa Code section 96.6(3) and (4). As such, the decision issued by ALJ Scheetz in Appeal No. 20A-UI-12231-S1-T remains in full force and effect.

The issue of whether the claimant was overpaid LWA benefits is addressed in Appeal No. 21R-UI-16950-DB-T. Even though the claimant may have been found overpaid FPUC and LWA benefits, this does not mean that she is required to repay those benefits to the agency.

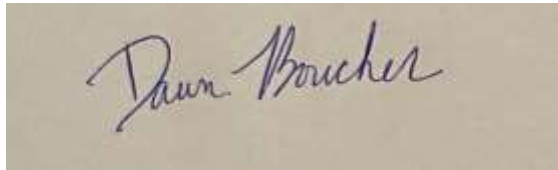
On July 12, 2021, Iowa Workforce Development issued two decisions waiving the claimant's established overpayment balance of FPUC benefits in the amount of \$7,800.00 and waiving the claimant's established overpayment balance of LWA benefits in the amount of \$1,800.00. Those decisions found that the claimant was not required to repay those FPUC and LWA benefits that the claimant had received. This decision does not change the agency's determination that those overpayment FPUC and LWA balances have been waived.

**DECISION:**

The decision issued in Appeal No. 21A-UI-06347-DZ-T is hereby vacated and this decision is issued in its place. The unemployment insurance benefits decision issued on February 28, 2021 (reference 02) is reversed. Claimant was discharged from employment for a current act of job-related misconduct on September 27, 2020. Unemployment insurance benefits are denied effective September 27, 2020 on that basis and continuing until claimant has worked in and been paid wages for insured work equal to ten times her weekly benefit amount after her September 27, 2020 separation date, and provided she is otherwise eligible.

The issue of whether the claimant was overpaid regular unemployment insurance benefits and FPUC benefits has already been adjudicated in by ALJ Scheetz in Appeal No. 20A-UI-12231-S1-T remains in full force and effect. The issue of whether the claimant was overpaid LWA benefits is addressed in Appeal No. 21R-UI-16950-DB-T.

The waiver of FPUC and LWA assistance benefits issued to the claimant on July 12, 2021 still remains in effect and the claimant is not required to repay the FPUC and LWA balances.

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Dawn Boucher  
Administrative Law Judge

September 16, 2021  
Decision Dated and Mailed

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