

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

AMBER J EICKELBERG
Claimant

EATSTREET INC
Employer

APPEAL 21A-UI-07271-DB-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 11/29/20
Claimant: Respondent (2R)

Iowa Code § 96.5(2) a – Discharge for Misconduct
Iowa Code § 96.3(7) – Recovery of Benefit Overpayment of Benefits
Iowa Admin. Code r. 871-24.10 – Employer/Representative Participation Fact-finding Interview

STATEMENT OF THE CASE:

The employer/appellant filed an appeal from the March 3, 2021 (reference 01) unemployment insurance decision that allowed unemployment insurance benefits to the claimant based upon her discharge from work on September 16, 2020. The parties were properly notified of the hearing. A telephone hearing was held on May 20, 2021. The claimant participated personally. The employer participated through witnesses Tatjana Woody and Kendra Bahr. The parties waived due notice of the issue of whether the claimant was able to and available for work pursuant to Iowa Code § 96.4(3). Employer's Exhibit 1 was admitted. The administrative law judge took administrative notice of the claimant's unemployment insurance benefits records. The hearing was consolidated with Appeal No. 21A-UI-07272-DB-T.

ISSUE:

Was the claimant discharged for disqualifying job-related misconduct?
Has the claimant been overpaid any regular 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?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed part-time as a delivery driver. Her employment began on March 11, 2020 and ended on November 4, 2020 when she was discharged from employment. Claimant's job duties required her to drive a vehicle for deliveries. Her immediate supervisor was Victoria D'amico.

On September 23, 2020, the claimant was involved in a motor vehicle accident which resulted in the destruction of her personal vehicle. She was not working at the time of the accident. The motor vehicle accident resulted in her being charged with driving under the influence (DUI). The claimant reported the accident to her immediate supervisor and asked to be taken off of the schedule because she no longer had a vehicle to use for her job duties. Claimant did not inform the employer about the pending criminal charges. Claimant pled guilty to the charges. At some point after September 23, 2020 but before October 22, 2020, the claimant driver's license was

suspended. The employer ran a 6-month background check on October 22, 2020 and it revealed that the claimant had a suspended driver's license. A notification was forwarded to the claimant notifying her that she was being suspended pending any information that she would like to provide to the employer. Claimant was given until November 3, 2020 to provide the employer additional information regarding the suspension. Claimant did not provide any information to the employer prior to November 3, 2020 and did not dispute that her license was suspended.

The employer has a written policy stating in pertinent part: "EatStreet requires that each employee must report to Human Resources within five (5) business days if he or she is charged with or convicted of (including pleas of guilty or nolo contendere) any of the following criminal offenses: (i) a felony; (ii) a misdemeanor involving the use, possession, or sale of a controlled substance; (iii) a misdemeanor involving a serious moving violation punishable by a loss or suspension of one's driver's license....". See Exhibit 1. Claimant was aware of the policy. Claimant was discharged from employment for violation of the policy when she failed to notify human resources of her DUI charges and license suspension and because she was required to have an active license as a delivery driver.

Claimant's administrative records establish that she received unemployment insurance benefits funded by the State of Iowa of \$5,871.27 from November 29, 2020 through May 1, 2021. Claimant's administrative records establish that the employer participated by telephone in the fact-finding interview on March 2, 2021, through witness Kendra Bahr. Ms. Bahr provided information that the claimant was discharged for violation of the employer's motor vehicle record policy.

Claimant has also received Federal Pandemic Unemployment Compensation (FPUC) benefits and Pandemic Emergency Unemployment Compensation (PEUC) benefits. The issues of whether the claimant is overpaid FPUC benefits and PEUC benefits will be remanded to the Benefits Bureau for an initial investigation and determination.

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.

Iowa Admin. Code r.871-24.32(8) provides:

(8) Past acts of misconduct. While past acts and warnings can be used to determine the magnitude of a current act of misconduct, a discharge for misconduct cannot be based on such past act or acts. The termination of employment must be based on a current act.

Claimant was discharged from employment. As such, the employer has the burden of proof in establishing disqualifying job 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).

Under the definition of misconduct for purposes of unemployment benefit disqualification, the conduct in question must be "work-connected." *Diggs v. Emp't Appeal Bd.*, 478 N.W.2d 432 (Iowa Ct. App. 1991). The courts have concluded that off duty conduct can have the requisite

element of work connection. *Kleidosty v. Emp't Appeal Bd.*, 482 N.W.2d 416, 418 (Iowa 1992). Under similar definitions of misconduct, for an employer to show that an employee's off-duty activities rise to the level of misconduct in connection with the employment, the employer must show by a preponderance of the evidence that the employee's conduct (1) had some nexus with the work; (2) resulted in some harm to the employer's interest, and (3) was conduct which was (a) violative of some code of behavior impliedly contracted between employer and employee, and (b) done with intent or knowledge that the employer's image would suffer. See also *Dray v. Director*, 930 S.W. 2d 390 (Ark. Ct. App. 1996); *In re Kotrba*, 418 N.W. 2d 313 (SD 1988), quoting *Nelson v. Dept. of Emp't Security*, 656 P.2d 242 (WA 1982); 76 *Am. Jur. 2d, Unemployment Compensation* §§77-78.

In this case, the claimant knew that her license was suspended and she was charged for a crime in violation of the employer's policy. She failed to report this to human resources pursuant to the policy. Claimant pled guilty to the act that precipitated the suspension of her license. Claimant was required to have a valid driver's license as part of her job qualifications. As such, claimant's conduct in failing to report her charges and suspension of driver's license to the employer and failing to have a valid driver's license as part of her driver position were deliberate acts and omissions that constituted a material breach of her duties and obligations that arose out of her contract of employment with the employer as a delivery driver. When the employer learned of the violation, it requested that the claimant notify it of any disagreement or extenuating circumstances prior to November 3, 2020, which she did not. Claimant was discharged on November 4, 2020 for a current act of job-related misconduct. As such, benefits are denied.

Because benefits are denied, the issues of overpayment of regular unemployment insurance benefits and chargeability must be addressed.

Iowa Code § 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 she 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 those 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).

In this case, the claimant has received benefits but was not eligible for those benefits. Since the employer did sufficiently participate in the fact-finding interview through Ms. Bahr, the claimant is obligated to repay to the agency the regular unemployment insurance benefits she received, \$5,871.27 from November 29, 2020 through May 1, 2021, in connection with this employer's account. This employer's account may not be charged for those regular unemployment insurance benefits paid. The issues of whether the claimant is overpaid PEUC and FPUC benefits is remanded to the Benefits Bureau for an initial investigation and determination.

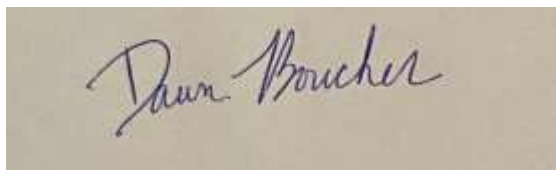
DECISION:

The March 3, 2021 (reference 01) unemployment insurance decision is reversed. Claimant was discharged from employment for job-related misconduct. The separation from employment is disqualifying and benefits are denied until claimant has worked in and earned wages for insured work equal to ten times her weekly benefit amount after her November 4, 2020 separation date, and provided she is otherwise eligible.

The claimant has been overpaid regular unemployment insurance benefits of \$5,871.27 from November 29, 2020 through May 1, 2021 and is obligated to repay the agency those benefits she received because the employer sufficiently participated in the fact-finding interview. The employer's account may not be charged for those regular unemployment insurance benefits paid.

REMAND:

The issues of whether the claimant is overpaid FPUC benefits and PEUC benefits will be remanded to the Benefits Bureau for an initial investigation and determination.

A handwritten signature in blue ink that reads "Dawn Boucher". The signature is written in a cursive, flowing style. The background is a light beige or cream color.

Dawn Boucher
Administrative Law Judge

May 28, 2021
Decision Dated and Mailed

db/ol

Note to Claimant

- This decision may determine you are not eligible for regular unemployment insurance benefits funded by the State of Iowa under state law and 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.
- If you do not qualify for regular unemployment insurance benefits funded by the State of Iowa under state law, you may qualify for benefits under the Federal Pandemic Unemployment Assistance ("PUA") section of the Coronavirus Aid, Relief, and Economic Security Act ("Cares Act") that discusses eligibility for claimants who are unemployed due to the Coronavirus.
- **You will need to apply for PUA to determine your eligibility under the program.**
For additional information on how to apply for PUA go to:
<https://www.iowaworkforcedevelopment.gov/pua-information>.
- If you are denied regular unemployment insurance benefits funded by the State of Iowa and wish to apply for PUA, please visit:
<https://www.iowaworkforcedevelopment.gov/pua-information> and scroll down to "Submit Proof Here." You will fill out the questionnaire regarding the reason you are not working and upload a picture or copy of your fact-finding decision. Your claim will be reviewed for PUA eligibility. If you are eligible for PUA, you will also be eligible for Federal Pandemic Unemployment Compensation (FPUC) until the program expires. Back payments PUA benefits may automatically be used to repay any overpayment of state benefits. If this does not occur on your claim, you may repay any overpayment by visiting:
<https://www.iowaworkforcedevelopment.gov/unemployment-insurance-overpayment-and-recovery>.
- If you have applied and have been approved for PUA benefits, this decision will **not** negatively affect your entitlement to PUA benefits.