

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

JOSUE JARA
Claimant

WASHINGTON LUMBER INC
Employer

APPEAL NO. 21A-UI-12404-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

**OC: 02/28/21
Claimant: Respondent (2)**

Iowa Code Section 96.5(2)(a) – Discharge for Misconduct
Iowa Code Section 96.3(7) – Overpayment
Public Law 116-136, §2104 – Federal Pandemic Unemployment Compensation

STATEMENT OF THE CASE:

The employer filed a timely appeal from the May 3, 2021, reference 01, decision that allowed benefits to the claimant provided the claimant met all other eligibility requirements and that held the employer's account could be charged for benefits, based on the deputy's conclusion that the claimant was discharged on March 1, 2021 for no disqualifying reason. After due notice was issued, a hearing was held on July 27, 2021. The claimant did not provide a telephone number for the appeal hearing and did not participate. Robert Redlinger represented the employer and presented additional testimony through Jeremy Redlinger. The administrative law judge took official notice of the Agency's record of benefits disbursed to the claimant and received Exhibits 1 through 4 into evidence. The administrative law judge took official notice of the fact-finding materials for the limited purpose of documenting the employer's participation in 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 regular benefits.
Whether the claimant must repay overpaid regular benefits.
Whether the employer's account may be charged for regular benefits.
Whether the claimant was overpaid Federal Pandemic Unemployment Compensation (FPUC).

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant, Josue Jara, was employed by Washington Lumber, Inc. as a full-time material handler from July 2020 until February 26, 2021, when the employer discharged him from the employment. The claimant's work hours were 7:00 a.m. to 5:30 p.m. on Monday through Thursday, 7:00 a.m. to 5:00 p.m. on Friday, and 8:00 a.m. to noon on Saturday. Co-owner Jeremy Redlinger was the claimant's supervisor.

The employer lacks an employee handbook or written attendance policy. The employer had told the claimant the employer expected notice prior to the scheduled start of the shift if the claimant needed to be absent.

The incidents that triggered the discharge began on February 24, 2021. Prior to the scheduled start of the shift, the claimant notified Jeremy Redlinger that he would be absent due to the need to care for his ill child. The employer lacks an employee handbook or a written attendance policy. At 8:01 a.m., Mr. Redlinger sent a text message to the claimant: "How long are you thinking before you'll be in?" At 8:14 a.m., Mr. Redlinger sent a second text message that consisted only of a question mark. At 8:28 a.m., Mr. Redlinger sent a third text message: "WTF man?" At 10:00 a.m., the claimant sent a text message response: "Just getting ready to leave the doctor sorry I didn't answer you sooner reception sucks out here[.]" At the time the claimant sent his message, the employer was aware the claimant's vehicle was still at home and that the claimant was not in fact just getting to leave the doctor. Upon receipt of the claimant's message, co-owner Robert Redlinger called the claimant. The claimant told Robert Redlinger that he had been sleeping, that his child was ill, and that they were about to leave for a 10:30 a.m. medical appointment. The employer subsequently concluded this statement about leaving for the medical appointment was false, but that the claimant's child was indeed ill. At 12:11 p.m. on February 24, 2021, Robert Redlinger sent the claimant a text message: "When you come tomorrow we're going to need you to bring in a copy of the visit summary from today's doctor appointment for your kid. If they didn't give you one just run back out there to have them print one off."

The claimant was scheduled to work on February 25, 2021, but did not report for work that day. At 6:39 a.m., the claimant sent a text message to Robert Redlinger: "Hey saw your message pretty late last night I'm gonna run out there when it opens grab copy and I'll be in[.]" At 6:45 a.m., Robert Redlinger replied: "When do they open?" The claimant did not respond to the message. At 7:19 a.m., Robert Redlinger sent a second message: "Why not come out to work and then leave when they open? What hospital did you go to?" The claimant did not respond.

Between 10:54 a.m. and 10:58 a.m. on February 25, 2021, Jeremy Redlinger sent the claimant the first of a series of a four messages:

What's the deal man?

We've tried to help you out as much as we can so why can't we get the same in return?

Not even a phone call.

We've given you money, paid vacations, any time off that you've asked for, and can[t] even get a call?

The claimant did not respond and did not make further contact with the employer that day.

The claimant reported for work on February 26, 2021 and brought with him a medical note signed by a registered nurse practitioner affiliated with Washington County Hospitals and Clinics (WCHC) Family Medicine. The medical note stated:

[Child's name omitted by administrative law judge] was under my care on 02/25/2021. Please excuse his dad from work on 2/24 and 2/25 to care for ill child.

If you require additional information, please do not hesitate to contact my office.

The employer interpreted the February 25 medical note to mean there had been no medical appointment on February 24, 2021.

During a meeting with the business owners on February 26, 2021, the claimant became angry after the employer highlighted the employer's prior leniency and prior financial assistance to the claimant versus the claimant's dishonesty and otherwise poor handling of the most recent absences. The claimant turned to Robert Redlinger and Eric Redlinger and stated that he respected them. The claimant then turned to Jeremy Redlinger, pointed, and stated, "I have zero respect for you." For Jeremy Redlinger, this was the last straw. The employer discharged the claimant at that time.

The claimant was intermittently late for personal reasons beginning in August 2020. The employer was aware of the late arrivals and tolerated the intermittent late arrivals until January 2021, at which time Jeremy Redlinger told the claimant the late arrivals were unacceptable and that he was thereafter going to keep a close eye on the claimant's punctuality. At the time, the claimant stated that he would work on being prompt. The employer had become concerned that the claimant's lax attention to punctuality was prompting hard feelings amongst other employees aware of the behavior. The employer did not issue a written reprimand to the claimant regarding the tardiness issue and did not further counsel the claimant regarding his continued intermittent late arrivals. However, the claimant was thereafter late for personal reasons on January 15, January 26 and six times between February 3, 2021 and February 17, 2021.

The claimant established an original claim for benefits that Iowa Workforce Development deemed effective February 28, 2021. IWD set the weekly benefit amount for regular benefits at \$512.00. The claimant received \$11,264.00 in regular benefits for the 22-week period between February 28, 2021 and July 31, 2021. The claimant received \$4,500.00 in Federal Pandemic Unemployment Compensation (FPUC) for the 15-week period of February 28, 2021 through June 12, 2021. This employer is a base period employer.

On April 30, 2021, an Iowa Workforce Development Benefits Bureau deputy held a fact-finding interview that addressed the claimant's separation from the employer. Robert Redlinger represented the employer at the fact-finding interview.

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).

In order for a claimant's absences to constitute misconduct that would disqualify the claimant from receiving unemployment insurance benefits, the evidence must establish that the claimant's *unexcused* absences were excessive. See Iowa Administrative Code rule 871-24.32(7). The determination of whether absenteeism is excessive necessarily requires consideration of past acts and warnings. However, the evidence must first establish that the most recent absence that prompted the decision to discharge the employee was unexcused. See Iowa Administrative Code rule 871-24.32(8). Absences related to issues of personal responsibility such as transportation and oversleeping are considered unexcused. On the other hand, absences related to illness are considered excused, provided the employee has complied with the employer's policy regarding notifying the employer of the absence. Tardiness is a form of absence. See *Higgins v. Iowa Department of Job Service*, 350 N.W.2d 187 (Iowa 1984). Employers may not graft on additional requirements to what is an excused absence under the law. See *Gaborit v. Employment Appeal Board*, 743 N.W.2d 554 (Iowa Ct. App. 2007). For example, an employee's failure to provide a doctor's note in connection with an absence that was due to illness properly reported to the employer will not alter the fact that such an illness would be an excused absence under the law. *Gaborit*, 743 N.W.2d at 557.

The weight of the evidence establishes a discharge for misconduct in connection with the employment. The claimant's unexcused absences were excessive. The final unexcused absence occurred on the February 25, 2021, when the claimant communicated that he would report to work after getting the medical excuse, but then did not report for work or make further contact with the employer to advise he needed to be absent that day. The evidence establishes eight instances of unexcused tardiness for personal reasons between January 15 and February 17, 2021, after the employer counseled the claimant about his tardiness issue. The pattern of unexcused absences indicated an intentional and substantial disregard of the employer's interests. The claimant's intentionally dishonest communication with the claimant on February 24, 2021 also indicated an intentional and substantial disregard of the employer's interests. The claimant's disrespectful utterance directed at Jeremy Redlinger on February 26, 2021 would not by itself be sufficient to establish disqualifying misconduct in connection with the employment, but in keeping with the other conduct contrary to the employer's interests.

The claimant is disqualified for benefits until he has worked in and been paid wages for insured work equal to 10 times his weekly benefit amount. The claimant must meet all other eligibility requirements.

The unemployment insurance law requires that benefits be recovered from a claimant who receives benefits and is later deemed ineligible for 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 base period employer failed to participate in the initial proceeding, the base period employer's account will be charged for the overpaid benefits. Iowa Code § 96.3(7)(a) and (b).

The claimant received \$11,264.00 in regular benefits for the 22-week period between February 28, 2021 and July 31, 2021, but this decision disqualifies him for those benefits. Accordingly, the regular benefits the claimant received constitute an overpayment of benefits. Because the employer participated in the fact-finding interview, the claimant is required to repay the overpaid benefits. The employer's account will be relieved of liability for benefits, including liability for benefits already paid.

PL116-136, Sec. 2104 provides, in pertinent part:

(b) Provisions of Agreement

(1) Federal pandemic unemployment compensation.--Any agreement under this section shall provide that the State agency of the State will make payments of regular compensation to individuals in amounts and to the extent that they would be determined if the State law of the State were applied, with respect to any week for which the individual is (disregarding this section) otherwise entitled under the State law to receive regular compensation, as if such State law had been modified in a manner such that the amount of regular compensation (including dependents' allowances) payable for any week shall be equal to

(A) the amount determined under the State law (before the application of this paragraph), plus

(B) an additional amount of \$600 (in this section referred to as “Federal Pandemic Unemployment Compensation”).

....

(f) Fraud and Overpayments

(2) Repayment.--In the case of individuals who have received amounts of Federal Pandemic Unemployment Compensation to which they were not entitled, the State shall require such individuals to repay the amounts of such Federal Pandemic Unemployment Compensation to the State agency, except that the State agency may waive such repayment if it determines that—

(A) the payment of such Federal Pandemic Unemployment Compensation was without fault on the part of any such individual; and

(B) such repayment would be contrary to equity and good conscience.

(3) Recovery by state agency —

(A) In general.—The State agency shall recover the amount to be repaid, or any part thereof, by deductions from any Federal Pandemic Unemployment Compensation payable to such individual or from any unemployment compensation payable to such individual under any State or Federal unemployment compensation law administered by the State agency or under any other State or Federal law administered by the State agency which provides for the payment of any assistance or allowance with respect to any week of unemployment, during the 3-year period after the date such individuals received the payment of the Federal Pandemic Unemployment Compensation to which they were not entitled, in accordance with the same procedures as apply to the recovery of overpayments of regular unemployment benefits paid by the State.

(B) Opportunity for hearing.—No repayment shall be required, and no deduction shall be made, until a determination has been made, notice thereof and an opportunity for a fair hearing has been given to the individual, and the determination has become final.

(4) Review.—Any determination by a State agency under this section shall be subject to review in the same manner and to the same extent as determinations under the State unemployment compensation law, and only in that manner and to that extent.

Because the claimant is disqualified for regular benefits, the claimant is also disqualified for the \$4,500.00 in Federal Pandemic Unemployment Compensation (FPUC) benefits he received for the 15-week period of February 28, 2021 through June 12, 2021. Those benefits also constitute an overpayment of benefits. The claimant must repay the overpaid FPUC benefits unless he applies for and is approved for a waiver of repayment of FPUC benefits. See below.

DECISION:

The May 3, 2021, reference 01, decision is reversed. The claimant was discharged on February 26, 2021 for misconduct in connection with the employment. The claimant is disqualified for unemployment benefits until he has worked in and been paid wages for insured work equal to 10 times his weekly benefit amount. The claimant must meet all other eligibility requirements. The claimant is overpaid \$11,264.00 in regular benefits for the 22-week period between February 28, 2021 and July 31, 2021. The claimant must repay the overpaid regular state benefits. The claimant is overpaid \$4,500.00 in Federal Pandemic Unemployment Compensation (FPUC) for the 15-week period of February 28, 2021 through June 12, 2021. The claimant must repay the overpaid FPUC benefits unless he applies for and is approved for a waiver of repayment of FPUC benefits. See below.



James E. Timberland
Administrative Law Judge

October 29, 2021
Decision Dated and Mailed

jet/scn

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 due to disqualifying separations, but who are currently 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>.

Note to Claimant: This decision determines you have been overpaid FPUC under the CARES Act. 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. Additionally, instructions for requesting a waiver of this overpayment can be found at <https://www.iowaworkforcedevelopment.gov/unemployment-insurance-overpayment>. If this decision becomes final and you are not eligible for a waiver, you will have to repay the benefits you received.