

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

CORY M JONES
Claimant

KINSETH HOTEL CORPORATION
Employer

APPEAL NO. 20A-UI-02437-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 02/09/20
Claimant: Respondent (2)

Iowa Code Section 96.5(2)(a) – Discharge for Misconduct
Iowa Code Section 96.3(7) – Overpayment
PL 116-136 Section 2104(b) – Federal Pandemic Unemployment Compensation

STATEMENT OF THE CASE:

The employer filed a timely appeal from the March 12, 2020, reference 02, decision that allowed benefits to the claimant provided he 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 February 11, 2020 for no disqualifying reason. After due notice was issued, a hearing was held on April 22, 2020. Claimant Cory Jones participated personally and was represented by attorney Bruce Stoltze. Chris Hunter of Employers Unity represented the employer and presented testimony through James Schlichting. 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 determining whether the employer participated in the fact-finding interview and, if not, whether the claimant engaged in fraud or intentional misrepresentation in connection with the fact-finding interview. The parties waived formal notice on the issue of whether the claimant was overpaid Federal Pandemic Unemployment Compensation (FPUC).

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 unemployment insurance benefits.

Whether the claimant was overpaid Federal Pandemic Unemployment Compensation (FPUC) benefits.

Whether the employer's account may be charged.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Cory Jones was employed by Kinseth Hotel Corporation, doing business as Homewood Suites, as the full-time Chief Engineer at the Homewood Suites in West Des Moines from 2017 until February 11, 2020, when James Schlichting, General Manager, and Shana Craven, Director of

Operations, discharged him from the employment. As Chief Engineer Mr. Jones was responsible for repair work orders, preventive maintenance, on-call after-hours maintenance issues, and maintain the hotels pool and spa. Mr. Jones supervised two maintenance employees and a public area attendant. Mr. Schlichting was Mr. Jones' supervisor. Mr. Jones brother, Phillip Bratlee, worked at the same hotel as a Night Auditor.

On the morning of February 6, 2020, Mr. Schlichting was out-of-state for a work-related conference when he received a telephone call from a hotel staff member regarding a verbal "altercation" involving Mr. Bratlee and another hotel employee. Mr. Schlichting had previously notified hotel staff that he would continue to function as the manager-on-duty for the purpose of addressing concerns that arose at the hotel while he was out-of-state on hotel business.

By February 10, 2020, Mr. Schlichting had returned to the workplace and on that morning he met with Mr. Bratlee. Mr. Bratlee asserted that the other employee had harassed him. Mr. Bratlee brought his personal notebook computer to the meeting and used it to show Mr. Schlichting surveillance footage of the February 6 incident with the coworker. Mr. Bratlee had downloaded the surveillance record from the hotel's password-protected and ostensibly locked office computer. Only Mr. Schlichting, Mr. Jones, and the assistant manager were authorized to access and use the computer password. Mr. Bratlee had surveillance records not only from the specific incident of concern on February 6, but also had additional footage from February 6, 7 and 8 on his personal computer. The video surveillance record on Mr. Bratlee's computer included surveillance of patrons and staff in multiple areas of the hotel. Mr. Schlichting was concerned about the unauthorized access to and copying of the surveillance record and the associated breach of privacy concerning patrons and staff depicted on the surveillance record. When Mr. Schlichting asked Mr. Bratlee how he obtained the surveillance record, Mr. Bratlee told Mr. Schlichting that Mr. Jones had assisted him in obtaining the surveillance record. Because the employer's computer system is set up to delete the surveillance record three days after the record is created, the June 6 record would have been lost if affirmative steps had not been taken to preserve it. Neither Mr. Bratlee nor Mr. Jones had asked Mr. Schlichting's permission to preserve or copy the surveillance record, though Mr. Schlichting remained available by telephone. Nor had they raised with Mr. Schlichting a concern about a need to preserve the surveillance record. The employer was able to determine the surveillance record had been reviewed and copied at 5:35 a.m. on February 8, 2020, a time when Mr. Jones was not scheduled to be at work.

On February 10, 2020, Mr. Schlichting met with Mr. Jones for the purposes of questioning him about the unauthorized access to and copying of the surveillance record. Mr. Schlichting asked Mr. Jones whether he had given his brother authority to download the surveillance record from the office computer. Mr. Jones refused to provide a direct answer to the question. Mr. Jones told Mr. Schlichting that he told his brother, "You have to do what you have to do." Mr. Jones told Mr. Schlichting that he was not going to answer further because he was "biased" based on his relationship with his brother. Based on Mr. Jones refusal to cooperate with Mr. Schlichting's investigation into the unauthorized downloading and copying of the surveillance record, Mr. Schlichting conferred with the Director of Operations and then discharged Mr. Jones from the employment the following morning. The employer deemed Mr. Jones to have facilitated violation of the employer's handbook policy prohibiting "Personal use of KHC equipment, facilities, or materials without authorization from the General Manager or Manager on Duty." Mr. Jones had signed at the start of his employment to acknowledge his receipt of the handbook and his agreement to follow the policies set forth in the handbook.

Mr. Jones established an original claim for benefits that was effective February 9, 2020 and received \$4,780.00 in state benefits for 10 weeks between February 9, 2020 and April 18, 2020.

Mr. Jones also received \$1,200.00 in Federal Pandemic Unemployment Compensation for two-weeks between April 5, 2020 and April 18, 2020.

On March 11, 2020, an Iowa Workforce Development Benefits Bureau deputy held a fact-finding interview that addressed Mr. Jones separation from the employment. Coral Erickson of Employers Unity represented the employer. Ms. Erickson provided a verbal statement to the deputy that contained some inaccurate information. However, the employer had also submitted for the fact-finding interview a copy of the Separation Notice that Mr. Schlichting had drafted in preparation for and use in discharging Mr. Jones from the employment. The Separation Notice contained Mr. Schlichting's detailed and signed statement concerning the conduct that prompted the employer to discharge Mr. Jones from the employment.

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).

The weight of the evidence in the record establishes a discharge for misconduct in connection with the employment. The worst of the misconduct occurred when Mr. Jones knowingly and intentionally refused to cooperate with the employer’s investigation into unauthorized access to and copying of a password-protected surveillance record, including investigation of Mr. Jones’ involvement in the unauthorized access and copying of the record. Mr. Jones’ refusal to cooperate with the employer’s investigation of the matter demonstrated an intentional and substantial disregard of the employer’s interests in restricting access to and maintaining control of its business records, especially such records wherein a right to privacy might apply. Mr. Jones’ refusal to cooperate with the employer’s investigation was sufficient to establish disqualifying misconduct in connection with the employment. However, the misconduct goes beyond refusal to cooperate with an investigation. As a member of management, Mr. Jones had a duty not only to comply with the employer’s policies, but also to assist in enforcing those policies. Mr. Jones knowingly and intentionally elected to disregard his duty to the employer in favor of assisting his close kin in an unauthorized manner with furtherance of a complaint of purported harassment. There was nothing to prevent Mr. Jones from raising with Mr. Schlichting, or with Mr. Schlichting’s superiors, the need to preserve the surveillance record so that the employer could then make the appropriate determination. Mr. Jones decided to take a different path contrary to the employer’s interests. Mr. Jones is disqualified for benefits until he has worked in and been paid wages for insured work equal to 10 times his weekly benefit amount. Mr. Jones must meet all other eligibility requirements. The employer’s account shall not be charged for benefits.

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).

Iowa Administrative Code rule 871-24.10(1) defines employer participation in fact-finding interviews as follows:

Employer and employer representative participation in fact-finding interviews.

24.10(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.

Because this decision disqualifies Mr. Jones for unemployment insurance benefits, the \$4,780.00 in state benefits Mr. Jones received for 10 weeks between February 9, 2020 and April 18, 2020 constitutes an overpayment of benefits. The detailed statement in the Separation Notice was sufficient to satisfy the participation requirement pertaining to the fact-finding interview.

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...

Because this decision disqualifies Mr. Jones for regular state unemployment insurance (UI) benefits, Mr. Jones is also disqualified from receiving Federal Pandemic Unemployment Compensation (FPUC). The \$1,200.00 in Federal Pandemic Unemployment Compensation (FPUC) that Mr. Jones received for the two weeks between April 5, 2020 and April 18, 2020 constitutes an overpayment of benefits. Mr. Jones must repay the FPUC benefits.

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>.

DECISION:

The March 12, 2020, reference 02, decision is reversed. The claimant was discharged on February 11, 2020 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 \$4,780.00 in state benefits for 10 weeks between February 9, 2020 and April 18, 2020. The claimant is overpaid \$1,200.00 in Federal Pandemic Unemployment Compensation (FPUC) for two weeks between April 5, 2020 and April 18, 2020. The claimant must repay the overpaid state and FPUC benefits.



James E. Timberland
Administrative Law Judge

May 4, 2020
Decision Dated and Mailed

jet/scn