

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

CHAD SLOBODNIK
Claimant

APPEAL NO. 21A-UI-06875-JT-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

HARVEYS BR MANAGEMENT CO INC
Employer

OC: 04/05/20
Claimant: Respondent (2)

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

STATEMENT OF THE CASE:

The employer filed a timely appeal from the February 23, 2021, reference 02, 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 January 15, 2021 for no disqualifying reason. After due notice was issued, a hearing was held on May 11, 2021. The claimant did not provide a telephone number for the appeal hearing and did not participate. Jackie Boudreaux of Equifax/ADP represented the employer and provided additional testimony through Mitchell Parker. The administrative law judge took official notice of the Agency's record of benefits disbursed to the claimant and received Exhibits 1 through 5 into evidence. The administrative law judge took official notice of the available 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. At the administrative law judge's request, the employer representative submitted a copy of the employer's SIDES protest materials, which the administrative law judge received into evidence as Exhibit 6.

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 benefits.
Whether the claimant must repay overpaid regular state benefits.
Whether the employer's account may be charged for benefits.
Whether the claimant was eligible for FPUC benefits or was overpaid FPUC benefits.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed by Harvey's BR Management Co, Inc., d/b/a Horseshoe Casino, as a full-time security officer from May 2019 until January 15, 2021, when the employer discharged

him from the employment. The claimant's duties as a security office included screening patrons at the entrance of the gaming casino to ensure the patron was of legal age to enter the casino and access the gaming floor. The claimant received appropriate training in the performance of his duties and was well aware of the required screening protocol. The multiple step screening procedure applied to anyone who appeared 35 years old or younger. After the claimant completed training on the policy, the claimant signed to acknowledge his obligation to follow the policy, including the warning that failure to follow the policy would result in disciplinary action up to and including discharge from the employment.

On the afternoon of January 14, 2021, the claimant allowed a 17-year-old female patron to enter the casino and access to the gaming floor without taking any steps to ensure the patron was of legal age to enter. There were no distractions and no cue of waiting patrons. Rather, the claimant simply elected not to screen the under-aged patron and allowed the minor onto the gaming floor in violation of the employer's written policy and in violation of Iowa Racing and Gaming Commission regulations. The claimant's action exposed the claimant and the employer to IRGC sanction. When question about his failure to screen the under-aged patron, the claimant made the dubious assertion that the patron appeared to be over the age of 35.

The employer invoked its progressive discipline policy when making the decision to discharge the claimant from the employment. The employer considered a documented verbal warning a supervisor issued to the claimant in September 2020 for being inattentive at his entrance screening post. The employer also considered a December 2020 written warning a supervisor had issued to the claimant for gossiping in the workplace about a coworker with whom he had a previous romantic relationship.

The claimant established an original claim for benefits that was effective April 5, 2020 and an additional claim for benefits that was effective January 10, 2021. IWD set the weekly benefit amount for regular benefits at \$335.00. This employer is a base period employer. In connection with the additional claim, the claimant received \$2,450.00 in regular benefits for the seven weeks between January 10, 2021 and March 6, 2021. The claimant also received \$2,100.00 in FPUC benefits for that same week.

Upon receipt of the a notice of claim in January 2021, the employer's representative of record, Talx/Equifax, submitted a detailed protest through the SIDES system that included the Exhibits that were later received into the appeal hearing record as Exhibits 1 through 5. At the administrative law judge's request, the employer representative submitted a copy of the employer's SIDES protest materials, which the administrative law judge received into evidence as Exhibit 6. There was no scheduled fact-finding interview and Talx/Equifax has no record of being contacted for a cold-call fact-finding interview. IWD Benefits Bureau staff has confirmed to the administrative law judge that it has no record of a 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 Iowa Admin. Code r.871 -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 evidence in the record establishes that on January 14, 2021, the claimant knowingly and intentionally violated the employer's written policy concerning screening for under-aged individuals. The claimant's conduct violated IRGC regulations barring under-aged individuals from gaming establishments. The claimant's conduct subjected the claimant and the employer to potential sanction. See Administrative Code rule 491-5.4(17) (under-aged persons barred

from gaming floor) and Iowa Administrative Code rule 491-5.4(16) (licensee liable for the actions of its agent). The claimant's dereliction of duty on January 14, 2021 was sufficient to demonstrate an intentional and substantial disregard of the employer's interests. The September 2020 documented verbal warning is noteworthy, but does not rise to the level of a prior act of misconduct. The December 2020 discipline regarding workplace gossip may have factored in progressive discipline scheme, but is otherwise of minimal relevance.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that the claimant was discharged for misconduct in connection with the employment. Accordingly, 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 benefits be recovered from a claimant who receives benefits and is later denied 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 employer failed to participate in the initial proceeding, the employer's account will be charged for the overpaid benefits. Iowa Code § 96.3(7)(a) and (b).

The claimant received \$2,450.00 in regular benefits for the seven weeks between January 10, 2021 and March 6, 2021, but this decision disqualifies him for those benefits. The regular benefits the claimant received constitute an overpayment of benefits. The evidence indicates the employer was denied a reasonable opportunity to participate in a fact-finding interview. There is fact-finding interview record of a claimant statement and, therefore, no record reflecting intentional misrepresentation on the part of the claimant. Accordingly, the claimant is not required to repay the overpaid regular state benefits. The employer's account shall be relieved of charge for benefits, including charge for overpaid benefits.

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 was disqualified for regular benefits for the seven-week period of January 10, 2021 through March 6, 2021, the claimant is also disqualified for the \$2,100.00 in FPUC benefits he received for that period. The claimant must repay the overpaid FPUC benefits unless repayment is waived. See below.

DECISION:

The February 23, 2021, reference 02, decision is reversed. The claimant was discharged on January 15, 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 employer's account shall not be charged for benefits, including overpaid regular state benefits. The claimant is overpaid \$2,450.00 in regular benefits for the seven weeks between January 10, 2021 and March 6, 2021. The claimant is not required to repay the overpaid regular state benefits. The claimant is also overpaid \$2,100.00 in FPUC benefits for the seven-week period of January 10, 2021 through March 6, 2021. The claimant must repay the overpaid FPUC benefits unless repayment is waived. See below.



James E. Timberland
Administrative Law Judge

May 18, 2021
Decision Dated and Mailed

jet/kmj

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. *If this decision becomes final or if you are not eligible for Pandemic Unemployment Assistance (PUA), you will have an overpayment of benefits that you will be required to repay.* 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.