

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

AGUER G DIANG
Claimant

WELLS ENTERPRISES, INC.
Employer

APPEAL 20A-UI-06637-AD-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

**OC: 05/17/20
Claimant: Respondent (2)**

Iowa Code § 96.5(2)a – Discharge for Misconduct

STATEMENT OF THE CASE:

On June 22, 2020, Wells Enterprises, Inc. (employer/appellant) filed an appeal from the June 10, 2020 (reference 01) decision that allowed unemployment insurance benefits.

A telephone hearing was held on July 27, 2020. The parties were properly notified of the hearing. Employer participated by Hearing Representative Susan Chmelovsky. R Generalist Jaycy Reardon and Night Shift Freezer Manager Tonya Musquat participated as witnesses for employer. Aguer Diang (claimant/respondent) did not register a number for the hearing and did not participate.

Employer's Exhibits 1-5 were admitted. Official notice was taken of the administrative record.

ISSUE(S):

- I. Was the separation a layoff, discharge for misconduct, or voluntary quit without good cause?
- II. Was the claimant overpaid benefits? Should claimant repay benefits or should employer be charged due to employer participation in fact finding?
- III. Is the claimant eligible for Federal Pandemic Unemployment Compensation?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds:

Claimant worked for employer as a full-time freezer order picking technician. Claimant's first day of employment was January 7, 2019. The last day claimant worked on the job was May 18, 2020. Claimant was discharged on that date.

Claimant was discharged due to insubordination and unprofessionalism. On May 18, 2020, claimant was assigned to clean a freezer area. He was assigned to work 30 minutes in the freezer and then spend 10 minutes in the warm-up room. Claimant's supervisor located him in the warm-

up room and inquired as to the progress of his task, as it did not appear claimant had started cleaning yet. Claimant's supervisor returned sometime later to find him still in the warm-up room. At that time, the supervisor directed him to work as assigned. Claimant became upset and accused the supervisor of treating him like a child.

After being unable to get claimant back on task, the supervisor brought claimant to Musquat's office. Claimant was insubordinate and disrespectful to Musquat, including waving his arms around, yelling, and telling Musquat to fire him. Musquat had in the past been able to defuse claimant when he became belligerent but was unable to do so on this occasion. Musquat finally called Reardon to step in.

Reardon was also unsuccessful in calming claimant. Claimant yelled at Reardon, directing her several times to fire him. Reardon asked claimant several times if he could simply return to work in a professional manner. Claimant declined to do so. Reardon finally called a union representative for claimant. The union representative was also unable to calm claimant, who continued to yell and direct Reardon to fire him. Reardon eventually did discharge claimant.

A similar incident occurred just a week prior on May 11, 2020. Reardon had called claimant to discuss his performance. During this conversation, claimant was also yelling and directing Reardon to fire him. Reardon called another manager to participate and they were eventually able to calm claimant. Reardon did not formally discipline claimant at this time, as she felt a verbal coaching was appropriate since she had been able to resolve the situation. However, he was reminded at that time that he cannot be disrespectful to management.

The unemployment insurance system shows claimant has received weekly benefits in the amount of \$481.00 for a total of nine weeks, from the benefit week ending May 23, 2020 and continuing through the benefit week ending July 18, 2020. The total amount of benefits paid to date is \$4,329.00.

The unemployment insurance system shows claimant has received Federal Pandemic Unemployment Compensation (FPUC) in the amount of \$600.00 for the same nine-week period. The total amount of FPUC paid is \$5,400.00.

Reardon did not participate in the fact-finding interview and is unsure if someone else did on behalf of employer. Employer was unable to provide further information as to whether it participated in the fact-finding interview.

REASONING AND CONCLUSIONS OF LAW:

For the reasons set forth below, the June 10, 2020 (reference 01) decision that allowed unemployment insurance benefits is REVERSED.

- I. Was the separation a layoff, discharge for misconduct, or voluntary quit without good cause?

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 provides in relevant part:

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.

The employer bears the burden of proving that a claimant is disqualified from receiving benefits because of substantial misconduct within the meaning of Iowa Code section 96.5(2). *Myers v. Emp't Appeal Bd.*, 462 N.W.2d 734, 737 (Iowa Ct. App. 1990). 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). The focus is on deliberate, intentional, or culpable acts by the employee. When based on carelessness, the carelessness must actually indicate a "wrongful intent" to be disqualifying in nature. *Newman, Id.* In contrast, 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. *Newman, Id.*

When reviewing an alleged act of misconduct, the finder of fact may consider past acts of misconduct to determine the magnitude of the current act. *Kelly v. Iowa Dep't of Job Serv.*, 386 N.W.2d 552, 554 (Iowa Ct. App. 1986). However, conduct asserted to be disqualifying misconduct must be both specific and current. *West v. Emp't Appeal Bd.*, 489 N.W.2d 731 (Iowa 1992); *Greene v. Emp't Appeal Bd.*, 426 N.W.2d 659 (Iowa Ct. App. 1988).

Because our unemployment compensation law is designed to protect workers from financial hardships when they become unemployed through no fault of their own, we construe the provisions "liberally to carry out its humane and beneficial purpose." *Bridgestone/Firestone, Inc. v. Emp't Appeal Bd.*, 570 N.W.2d 85, 96 (Iowa 1997). "[C]ode provisions which operate to work a

forfeiture of benefits are strongly construed in favor of the claimant.” *Diggs v. Emp’t Appeal Bd.*, 478 N.W.2d 432, 434 (Iowa Ct. App. 1991).

Employer has carried its burden of proving claimant is disqualified from receiving benefits because of a current act of substantial misconduct within the meaning of Iowa Code section 96.5(2). Claimant was repeatedly insubordinate and unprofessional toward several supervisors on May 18, 2020. He had been warned about this kind of behavior just a week prior and yet still chose to behave in this way. This was intentional conduct which constituted a breach of his employment contract and which ran counter to the behavior employer has the right to expect of employees. Benefits are denied.

- II. Was the claimant overpaid benefits? Should claimant repay benefits and/or charge employer due to employer participation in fact finding?

Iowa Code section 96.3(7) provides, in pertinent part:

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.

(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.

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.

The unemployment insurance system shows claimant has received weekly benefits in the amount of \$481.00 for a total of nine weeks, from the benefit week ending May 23, 2020 and continuing through the benefit week ending July 18, 2020. The total amount of benefits paid to date is \$4,329.00. Because the administrative law judge now denies benefits, claimant has been overpaid in this amount.

Reardon did not participate in the fact-finding interview and is unsure if someone else did on behalf of employer. Employer was unable to provide further information as to whether it participated in the fact-finding interview. The administrative law judge finds employer did not participate in the fact-finding interview. Because employer failed to participate in the fact-finding interview within the meaning of Iowa Admin. Code r. 871-24.10 and the overpayment occurred because of a subsequent reversal on appeal regarding the issue of the individual's separation from employment, benefits shall not be recovered from claimant.

III. Is the claimant eligible for federal pandemic unemployment compensation?

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 the claimant is disqualified from receiving regular unemployment insurance (UI) benefits, he is also disqualified from receiving FPUC. Claimant has therefore been overpaid FPUC in the amount of \$5,400.00. Claimant is required to repay that amount.

DECISION:

The June 10, 2020 (reference 01) decision that allowed unemployment insurance benefits is REVERSED. Claimant is disqualified from benefits until he earns wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible.

Claimant has been overpaid benefits in the amount of \$4,329.00. However, due to employer's failure to participate in the fact-finding interview, benefits shall not be recovered. Claimant has been overpaid FPUC in the amount of \$5,400.00. Claimant is required to repay that amount.



Andrew B. Duffelmeyer
Administrative Law Judge
Unemployment Insurance Appeals Bureau
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Des Moines, Iowa 50319-0209
Fax (515) 478-3528

July 31, 2020
Decision Dated and Mailed

abd/scn

Note to Claimant:

If you disagree with this decision, you may file an appeal with the Employment Appeal Board by following the instructions on the first page of this decision. If this decision denies benefits, you may be responsible for paying back benefits already received.

Individuals who are disqualified from or are otherwise ineligible for **regular** unemployment insurance benefits 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.** Additional information on how to apply for PUA can be found at <https://www.iowaworkforcedevelopment.gov/pua-information>.