

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

JAKWANE O POLIDORE
Claimant

WALMART INC
Employer

APPEAL NO. 21A-UI-08089-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 12/27/20
Claimant: Respondent (2)

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

STATEMENT OF THE CASE:

The employer filed a timely appeal from the March 11, 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 11, 2021 for no disqualifying reason. After due notice was issued, a hearing was held on June 2, 2021. The claimant did not provide a telephone number for the hearing and did not participate. Matthew Gehant represented the employer. The administrative law judge took official notice of the Agency's record of benefits disbursed to the claimant and received Exhibits 3, 4, and 5 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.

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.
Whether the claimant is overpaid Federal Pandemic Unemployment Compensation.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed by Walmart as a Cap Team Associate (stocker) from November 2019 until December 31, 2020.

On December 4, 2020, a Front End Coach (supervisor) notified an Asset Protection Associate that Front End Coach suspected the claimant was stealing from the employer. On December 5, 2020, the employer's asset protection staff commenced an investigation. The Asset Protection

Associate reviewed video surveillance records and register sales transaction records that revealed three shoplifting thefts committed by the claimant on November 27, November 29, and December 4, 2020. In each instance, the claimant went to the same self-check register shortly after 11:00 p.m. In each instance, the claimant took steps to create the appearance that he was paying for all of the items he brought to the register. In the first two instances, the claimant scanned low cost items, but did not scan higher value items. In each instance, the claimant left the workplace with the items he had purchased as well as the items he had not purchased. On November 27, the claimant left with \$89.94 in stolen items included a shower head, a five-quart bottle of oil, and a men's jacket. On November 29, the claimant left with a \$79.00 10-piece cooking set he had not purchased. On December 4, the claimant added a new element to his theft from the employer. In that instance, the claimant covered the UPC sticker (price scanning sticker) for a \$159.00 doll house with a UPC sticker for a \$10.46 plastic tote. The claimant then scanned the bogus sticker, paid the bogus lower price, and left with the higher value merchandise.

The final theft that factored in the discharge occurred on December 24, 2020. The claimant went to a different self-check register in the early afternoon, rang up low cost items, did not ring up a \$92.00 doll house. The claimant then exited the store with the merchandise he had purchased as well as the item he had not purchased.

On December 31, 2020, Matthew Gehant, Asset Protection Assistant Manager, summoned the claimant to a meeting. Store Manager Angie Swanson was also present. Mr. Gehant advised the claimant at the start of the meeting that he was free to leave the meeting. Mr. Gehant described his role as an asset protection staff member. Mr. Gehant asked the claimant when the claimant began taking merchandise without paying for it. The claimant replied that he began taking merchandise when he became homeless. Mr. Gehant then listed some of the items the claimant had taken from the store without payment. The claimant verbally admitted he had taken the items without paying for them. Mr. Gehant asked the claimant to write a brief statement. The claimant wrote a brief statement in which he indicated he did not quit and wanted it known he was fired. Mr. Gehant then asked the claimant to provide a further written statement detailing his thefts from the employer and the thought process behind the thefts. The claimant responded that he was not going to incriminate himself and that he wanted to leave since he was being fired. Mr. Gehant then had the claimant surrender his employee vest, box cutter and badge. The claimant then left the workplace.

The claimant established a claim for benefits that was effective December 27, 2020. Walmart is a base period employer. Iowa Workforce Development set the weekly benefit amount for regular benefits at \$307.00. The claimant received \$2,763.00 in regular benefits for nine weeks between January 10, 2021 and March 13, 2021. The claimant also received \$2,700.00 in Federal Pandemic Unemployment Compensation (FPUC) for the same nine weeks.

Iowa Workforce Development did not schedule a fact-finding interview to address the claimant's separation from the employment. Instead, the Benefits Bureau attempted a "cold-call" fact-finding interview between February 3, 2021 and February 9, 2021. The deputy was unable to reach the claimant despite three attempts and the claimant did not participate in the fact-finding interview. There is no indication in the Workforce Development records that the deputy attempted to contact the employer for 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 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 a December 31, 2020 discharge for misconduct in connection with the employment. The claimant committed theft from the employer on four occasions between November 27, 2020 and December 24, 2020. With each theft, the claimant demonstrated a willful and wanton disregard of the employer's properly ownership interest in the property the claimant stole. With each theft, the claimant fundamentally undermined the trust relationship the employer reasonably expected the claimant to maintain as a condition of the employment. 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 employer's account shall not be charged for benefits.

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 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 \$2,763.00 in regular benefits for nine weeks between January 10, 2021 and March 13, 2021, but this decision disqualifies the claimant for those benefits. The benefits are an overpayment of benefits. The employer penalty set forth at Iowa Code § 96.3(7)(a) and (b) presupposes an employer had a reasonable opportunity to participate in the fact-finding interview. In this instance, the employer was denied a reasonable opportunity to participate. The employer's account will be relieved of liability for benefits, including liability for benefits already paid to the claimant. Because the claimant did not receive benefits due to fraud or willful misrepresentation in connection with the fact-finding interview, and because the employer did not participate in the fact-finding interview, the claimant is not required to repay the overpaid regular 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 this decision disqualifies the claimant for benefits, the \$2,700.00 in FPUC benefits the claimant received for nine weeks between January 10, 2021 and March 13, 2021 is an overpayment of benefits. The claimant is required to repay the overpaid FPUC benefits unless the claimant applies for and is approved for a waiver of repayment of FPUC benefits. See below.

DECISION:

The March 11, 2021, reference 02, decision, is reversed. The claimant was discharged for misconduct in connection with the employment. The claimant is disqualified for unemployment benefits until the claimant has worked in and been paid wages for insured work equal to 10 times the claimant's weekly benefit amount. The claimant must meet all other eligibility requirements. The claimant is overpaid \$2,763.00 in regular benefits for nine weeks between January 10, 2021 and March 13, 2021. The claimant is not required to repay the overpaid regular benefits. The employer's account is relieved of liability for benefits, including overpaid benefits. The claimant is overpaid \$2,700.00 in FPUC benefits for nine weeks between January 10, 2021 and March 13, 2021. The claimant is required to repay the overpaid FPUC benefits unless the claimant applies for and is approved for a waiver of repayment of FPUC benefits. See below.



James E. Timberland
Administrative Law Judge

September 20, 2021
Decision Dated and Mailed

jet/scn

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.