

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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**JACOB W TJEPKES**

Claimant

**APPEAL 20A-UI-03363-JC-T**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**TIMBERLINE MANUFACTURING COMPANY**

Employer

**OC: 03/22/20**

**Claimant: Respondent (2)**

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

Iowa Code § 96.3(7) – Recovery of Benefit Overpayment

Iowa Admin. Code r. 871-24.10 – Employer/Representative Participation Fact-finding Interview

PL116-136, Sec. 2104 – Federal Pandemic Unemployment Compensation (FPUC)

**STATEMENT OF THE CASE:**

The employer/appellant, Timberline Manufacturing Company, filed an appeal from the April 14, 2020 (reference 01) Iowa Workforce Development (“IWD”) unemployment insurance decision that allowed benefits. A first hearing was scheduled for May 13, 2020 but continued before any testimony was taken, to allow both parties and the Appeals Bureau to receive the parties’ proposed exhibits. After proper notice, a telephone hearing was held on May 28, 2020. The claimant, Jacob Tjepkes, participated personally. The employer participated through Craig Schroeder, human resources director. Stacy Lowe also testified.

Claimant Exhibits A-E and Employer Exhibits 1-5 were admitted into evidence. The administrative law judge took official notice of the administrative records. Based on the evidence, the arguments presented, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

**NOTE TO EMPLOYER:**

If you wish to change the address of record, please access your account at:  
<https://www.myiowauui.org/UITIPTaxWeb/>.

**ISSUES:**

Was the claimant discharged for disqualifying job-related misconduct?

Has the claimant been overpaid any unemployment insurance benefits, and if so, can the repayment of those benefits to the agency be waived?

Can any charges to the employer’s account be waived?

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: The claimant was employed full-time as a product specialist and was separated from employment on January 3, 2020, when he was discharged. The employer stated the claimant was discharged for violating its professionalism policy and for attempted theft of time.

Prior to discharge, the claimant was issued a documented verbal warning on December 6, 2019 (Employer Exhibit 3) in response to excessive absenteeism. The warning stated that additional attendance issues in the next 30 days will result in additional discipline, and levels of discipline may be skipped at the employer's discretion (Employer Exhibit 3). The warning, which was signed by the claimant, also stated that, "Employees are expected to report to work as scheduled, on time, and prepared to begin work. Employees are also expected to remain at work for their entire work schedule" (Employer Exhibit 3).

The claimant was a salaried employee, and therefore was not required to clock in and out of each shift on a timekeeping system. Rather, he would simply submit his timecard for the end of the pay period, reflecting any modifications for vacation, illness, etc. While the employer did not require the claimant to clock in and out each shift, it was able to monitor his approximate start times by when he entered the employer doors and swiped his badge for entry. Employer also had video cameras located on its premises.

The claimant requested to take a half-day on December 24, 2019, and be permitted to flex the four hours of work during the week, because he did not have vacation to cover the time off request. Ms. Lowe approved the request, and asked the claimant what his specific schedule would be for December 23-27. (Employer Exhibit 4). The claimant replied:

6-4:30 Mon

6-10 Tues

7-4:30 Thurs and Fri (Employer Exhibit 4)

The employer suspected that the claimant was not working his required hours that week as agreed upon and initiated an investigation. A review of his badge entry times revealed the following time of entry into the building: (Employer Exhibit 5)

Monday, December 23: 7:57 a.m.

Tuesday, December 24: 7:52 a.m.

Thursday, December 26: 8:03 a.m.

Friday, December 27: 8:03 a.m.

In addition, Mr. Schroeder's office was within proximity of viewing the claimant's office. He noted in an email to Ms. Lowe that the claimant had left before 3:40 p.m. on one of the days (Schroeder testimony). Mr. Schroeder stated video footage he reviewed also confirmed the claimant leaving early during the week.

At no time during the week, did the claimant inform Ms. Lowe that he had adjusted the schedule provided to her, or that he had left early. He knew that he had not met the required 40 hours worked that week and did not inform her that he had only worked "36 or 37".

When the employer questioned the claimant, he initially stated he had worked all 40 hours. He then changed his answer and said he had worked all but 15 minutes of the forty hour shift. The employer estimated the claimant worked less than 36 hours for the week.

The claimant stated his initial response to the employer of working his full forty hours was a “panicked response.” The claimant stated he didn’t think he was required to adhere to the schedule provided to Ms. Lowe since he was salaried and just had to get his hours in “by the end of the week”. The claimant’s work week ended on December 27, 2019. The claimant stated he intended to notify the employer on January 3, 2020, which was the final day of the pay period, that he had not worked all of his time, but was fired first. He did not agree that the employer’s decision to discharge was consistent with its policies, and acknowledged he did not notify Ms. Lowe that he deviated from the agreed upon schedule or that he was not going to make 40 hours as agreed upon. He was subsequently discharged.

The administrative record reflects that claimant has received unemployment benefits in the amount of \$4,329.00, since filing a claim with an effective date of March 22, 2020. The administrative record also establishes that the employer did not participate in the April 6, 2020 fact-finding interview or make a witness with direct knowledge available for rebuttal (See administrative records). The employer stated it provided a written statement in lieu of participation, containing seven paragraphs about the claimant’s employment and discharge. No warning, applicable policy, or documentation to support the employer’s decision to discharge was furnished. The employer did not provide a name of rebuttal witness for the fact-finder. The employer did not furnish a copy of the letter it sent to the fact-finder, and a copy was not available in the administrative records.

The claimant also received federal unemployment insurance benefits through Federal Pandemic Unemployment Compensation (FPUC). Claimant received \$4,200.00 in federal benefits for the seven-week period ending May 16, 2020.

#### **REASONING AND CONCLUSIONS OF LAW:**

**For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment due to job-related misconduct.**

Iowa law disqualifies individuals who are discharged from employment for misconduct from receiving unemployment insurance benefits. Iowa Code § 96.5(2)a. They remain disqualified until such time as they requalify for benefits by working and earning insured wages ten times their weekly benefit amount. *Id.*

Iowa Administrative Code rule 871-24.32(1)a provides:

“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 establishing disqualifying job misconduct. *Cosper v. Iowa Department of Job Service*, 321 N.W.2d 6 (Iowa 1982). 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. IDJS*, 364 N.W.2d 262 (Iowa 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. IDJS*, 425 N.W.2d 679 (Iowa 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 Department of Job Service*, 351 N.W.2d 806 (Iowa App. 1984).

Honesty is a reasonable, commonly accepted duty owed to the employer. This duty applies to salaried and hourly workers, exempt and non-exempt. Theft from an employer is generally disqualifying misconduct. *Ringland Johnson, Inc. v. Hunecke*, 585 N.W.2d 269, 272 (Iowa 1998). In *Ringland*, the Court found a single attempted theft to be misconduct as a matter of law.

In this case, the claimant had a prior attendance warning three weeks before the final incident. He also had no vacation time but wanted to take a half day off on December 24, 2019. The employer granted the claimant’s request to revise his established work schedule for the week of December 23-27, so that he could take a half day off of work, even though he was out of vacation time. The employer was not required to accommodate this request, but did so, and in exchange, asked the claimant for the specific schedule he would work for the week. A reasonable person would conclude if the employer asked for a specific schedule, it expected the claimant to adhere to it for the week, or alternately provide updated information if he deviated from the already revised schedule. The claimant did not notify the employer of his late arrivals each day, early departures or that he had not made 40 hours as required.

At the very latest, the claimant should have notified the employer at the end of work on December 27, 2019, when he realized he was short on hours and the work week ended. He said nothing all week or December 28, 29, 30, 31, January 1, or 2, 2020. The administrative law judge did not find the claimant’s assertion that he *would* have informed the employer on January 3, 2020, but for the fact they fired him before he could do so, to be credible. Rather, the claimant knew all week he had represented to the employer that he worked the 40 hours, after the employer accommodated a special request from him. The preponderance of the evidence supports that the claimant misrepresented he worked his full work week to the employer for the week ending December 27, 2019, when he knew he had not. The claimant’s actions were not truthful, and were an attempt to receive wages for time not worked. The administrative law judge is persuaded the claimant knew or should have known his conduct was contrary to the best interests of the employer. Therefore, based on the evidence presented, the claimant was discharged for misconduct, even without prior warning. Benefits are denied.

**The next issues to address are whether the claimant must repay the regular unemployment insurance benefits he received, and whether the employer’s account is relieved of charges.**

Iowa Code § 96.3(7)a-b provides:

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 § 96.8, subsection 5. The employer shall not be relieved of charges if benefits are paid because the employer or an agent of the employer failed to respond timely or adequately to the department's request for information relating to the payment of benefits. This prohibition against relief of charges shall apply to both contributory and reimbursable employers.

(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 § 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.

(1) An accounting firm, agent, unemployment insurance accounting firm, or other entity that represents an employer in unemployment claim matters and demonstrates a continuous pattern of failing to participate in the initial determinations to award benefits, as determined and defined by rule by the department, shall be denied permission by the department to represent any employers in unemployment insurance matters. This subparagraph does not apply to attorneys or counselors admitted to practice in the courts of this states pursuant to § 602.10101.

Because the claimant's separation was disqualifying, benefits were paid to which he was not entitled. The claimant has been overpaid benefits in the amount of \$4,329.00. The unemployment insurance law provides that benefits must be recovered from a claimant who receives benefits and is later determined to be ineligible for benefits, even though the claimant acted in good faith and was not otherwise at fault. However, the overpayment will not be recovered when it is based on a reversal on appeal of an initial determination to award benefits on an issue regarding the claimant's employment separation if: (1) the benefits were not received due to any fraud or willful misrepresentation by the claimant and (2) the employer did not participate in the initial proceeding to award benefits. The employer will not be charged for benefits if it is determined that it did participate in the fact-finding interview. Iowa Code § 96.3(7), Iowa Admin. Code r. 871-24.10.

Iowa Admin. Code r. 871-24.10 provides in pertinent parts:

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.

...

This rule is intended to implement Iowa Code section 96.3(7)“b” as amended by 2008 Iowa Acts, Senate File 2160.

The employer in this case did not participate live in the fact-finding interview. There is no evidence that the employer's non-participation in the live interview was due to postal service or Agency error. The employer stated it participated in writing by way of a one page document, which was not available in the administrative record, and was not provided for the hearing. The employer did not supplement the written participation with the applicable policy, prior warning, or rebuttal witness as outlined in the rule above. Based upon the information presented, the administrative law judge concludes the employer did not satisfactorily participate in the fact-finding interview. Since the employer did not satisfactorily participate in the fact-finding interview, the claimant is not obligated to repay the regular benefits he received and the employer's account shall be charged.

**The final issues to be determined are whether claimant was eligible for FPUC and whether claimant has been overpaid FPUC. For the reasons that follow, the administrative law judge concludes claimant was not eligible for FPUC and was overpaid FPUC, which must be repaid.**

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 claimant is disqualified from receiving UI, he is also disqualified from receiving FPUC. While Iowa law does not require a claimant to repay regular unemployment insurance benefits when the employer does not participate in the fact-finding interview, the CARES Act makes no such exception for the repayment of FPUC. Therefore, the determination of whether the claimant must repay FPUC does not hinge on the employer's participation in the fact-finding interview. The administrative law judge concludes that claimant has been overpaid FPUC in the gross amount of \$4,200.00 in federal benefits for the seven-week period ending May 16, 2020. Claimant must repay these benefits.

*While the claimant may not be eligible for regular State of Iowa unemployment insurance benefits, he may be eligible for unemployment insurance benefits that have been made available to claimants under the Coronavirus Aid, Relief, and Economic Security Act ("Cares Act"). The Pandemic Unemployment Assistance ("PUA") section of the Cares Act discusses eligibility for claimants who are unemployed due to the Coronavirus. For claimants who are ineligible for regular unemployment insurance benefits under Iowa Code Chapter 96, they may be eligible under PUA.*

*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, 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 April 14, 2020 (reference 01) initial decision is reversed. The claimant was discharged from employment due to job-related misconduct. Benefits are withheld until such time as he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible.

The claimant has been overpaid regular unemployment insurance benefits in the amount of \$4,329.00. Since the employer did not satisfactorily participate in the fact-finding interview, the claimant is not obligated to repay the regular benefits he received and the employer's account shall be charged.

The claimant has been overpaid Federal Pandemic Unemployment Compensation in the gross amount of \$4,200.00 in federal benefits for the seven-week period ending May 16, 2020, which must be repaid.

A handwritten signature in brown ink that reads "Jennifer L. Beckman". The signature is written in a cursive, flowing style.

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Jennifer L. Beckman  
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June 1, 2020  
Decision Dated and Mailed

jlb/scn