

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

MIRIAM AGUILAR
Claimant

APPEAL 20A-UI-14219-DZ-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

FINANCIAL PLUS CREDIT UNION
Employer

OC: 06/28/20
Claimant: Respondent (2)

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Code § 96.5(1) – Voluntary Quit
Iowa Code § 96.3.(7) – Overpayment
Iowa Admin. Code r. 871-24.10 – Overpayment
PL 116-136, Sec. 2104(B) – Federal Pandemic Unemployment Compensation (FPUC)

STATEMENT OF THE CASE:

Financial Plus Credit Union, the employer/appellant, filed an appeal from the October 26, 2020, (reference 01) unemployment insurance decision that allowed benefits. The parties were properly notified of the hearing. A telephone hearing was held on January 7, 2021. The employer participated through Susan Kiesner, vice president of operations. Ms. Aguilar participated and testified. Official notice was taken of the administrative record.

ISSUES:

Was Ms. Aguilar's separation a layoff, discharge for misconduct or voluntary quit without good cause attributable to the employer?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Ms. Aguilar began working for the employer on April 16, 2018. She worked as a full-time member service representative (teller). Her last day of work was June 30, 2020 when she was discharged.

The employer's policy provides that employees must be clocked in and at their workstation at the start of their shift. If any employee is unable to do so, the employee is required to notify their supervisor or another supervisor before the employee's shift begins. Employees who violate the policy are subject to discipline up to, and including, termination.

On December 3, 2019, Ms. Aguilar was given a written about being tardy. Ms. Aguilar was tardy at least twenty-five times after the warning. On May 26, 2020, Ms. Aguilar and the employer agreed to a 60-day Performance Improvement Plan that required Ms. Aguilar to be clocked in and at her workstation at the beginning of her shifts. The plan provided that if Ms. Aguilar was tardy any time within the next 60 days her employment would be terminated.

Ms. Aguilar was not tardy during the first 30 days of the plan. Ms. Aguilar was tardy six times during the second 30 days of the plan. On June 29, Ms. Aguilar was tardy for a seventh time during the second 30 days of the plan. Ms. Aguilar's manager spoke with her and reminded her of the plan and the consequences for being tardy. Ms. Aguilar was tardy on June 30 and the employer terminated her employment that day.

The administrative record shows that Ms. Aguilar has received unemployment benefits in the amount of \$1,920.00, since filing a claim with an effective date of June 28, 2020, for the six weeks ending August 8, 2020. The administrative record also shows that the employer did not participate in the fact-finding interview.

Ms. Aguilar also received federal unemployment insurance benefits through Federal Pandemic Unemployment Compensation (FPUC). Ms. Aguilar received \$2,400.00 in federal benefits for the four week period ending July 25, 2020.

REASONING AND CONCLUSIONS OF LAW:

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

Iowa Code section 96.5(2)a provides:

An individual shall be disqualified for benefits:

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 individual shall be disqualified for benefits 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.

871 IAC 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 Department of Job Service*, 275 N.W.2d 445, 448 (Iowa 1979).

The employer has the burden of proof in establishing disqualifying job misconduct. *Cosper v. Iowa Dep't of Job Serv.*, 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. Iowa Dep't of Job Serv.*, 364 N.W.2d 262 (Iowa Ct. App. 1984). The Iowa Court of Appeals held that three incidents of tardiness or absenteeism after a warning was misconduct. *Clark v. Iowa Department of Job Service*, 317 N.W.2d 517 (Iowa Ct. App. 1982). Generally, continued refusal to follow reasonable instructions constitutes misconduct. *Gilliam v. Atlantic Bottling Co.*, 453 N.W.2d 230 (Iowa Ct. App. 1990). Misconduct must be "substantial" to warrant a denial of job insurance benefits. *Newman v. Iowa Dep't of Job Serv.*, 351 N.W.2d 806 (Iowa Ct. App. 1984).

In this case, Ms. Aguilar was tardy several times even after agreeing to the May 26 Performance Improvement Plan and was tardy the day after being warned again by her supervisor. Despite several warnings and a Performance Improvement Plan, Ms. Aguilar continued to be tardy. This is disqualifying misconduct. Benefits must be denied.

Iowa Code §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, in pertinent part:

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.

Because the Ms. Aguilar's separation was disqualifying, benefits were paid to which she was not entitled. The unemployment insurance law provides that benefits must be recovered from a claimant who receives benefits and is later determined to be ineligible for those 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 they did participate in the fact-finding interview. Iowa Code § 96.3(7).

In this case, Ms. Aguilar has received benefits but was not eligible for those benefits. Since the employer did not participate in the fact-finding interview the claimant is not obligated to repay to the agency the benefits she received in connection with this employer's account and this employer's account shall be charged.

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...

Here, the claimant is disqualified from receiving regular unemployment insurance (UI) benefits. Accordingly, this also disqualifies claimant from receiving Federal Pandemic Unemployment Compensation (FPUC). Because claimant received an additional \$2,400.00 in FPUC benefits for the four week period ending July 25, 2020, and is not eligible, claimant has been overpaid \$2,400.00 in FPUC unemployment insurance benefits, which must be repaid.

DECISION:

The October 26, 2020, (reference 01) unemployment insurance decision is reversed. Ms. Aguilar was discharged from employment due to job-related misconduct. Benefits are withheld until such time as she has worked in and been paid wages for insured work equal to ten times her weekly benefit amount, provided she is otherwise eligible. Ms. Aguilar has been overpaid unemployment insurance benefits in the amount of \$1,920.00 and is not obligated to repay the agency those benefits. The employer did not participate in the fact-finding interview and its account shall be charged. The claimant has also been overpaid \$2,400.00 in FPUC unemployment insurance benefits, which must be repaid.



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January 27, 2021
Decision Dated and Mailed

dz/scn