

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

RUDY E ROBINSON
Claimant

AT&T MOBILITY SERVICES LLC
Employer

APPEAL 20A-UI-11341-AD-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

**OC: 05/31/20
Claimant: Respondent (2)**

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 – Eligibility for Federal Pandemic Unemployment Compensation

STATEMENT OF THE CASE:

On September 14, 2020, AT&T Mobility Services LLC (employer/appellant) filed an appeal from the September 4, 2020 (reference 02) unemployment insurance decision that allowed benefits based on a finding claimant's dismissal from, work was not for a current act of misconduct.

A telephone hearing was held on October 19, 2020. The parties were properly notified of the hearing. Employer participated by Area Manager Kenny Turner. Participating as witnesses for employer were Area Manager Kenny Turner and Store Manager Matthew Breitbach. Employer was represented by Hearing Representative Tanis Minters. Rudy Robinson (claimant/respondent) participated personally.

Official notice was taken of claimant's payment history on the unemployment insurance system.

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 store manager. Claimant's first day of employment was June 23, 2010. The last day claimant worked on the job was May 29, 2020. Claimant's

immediate supervisor was Turner. Claimant separated from employment on May 30, 2020. Claimant was discharged on that date.

Claimant was discharged due to credit applications for DirecTV at his store being manipulated to allow for purchase without a deposit. This issue came to light during a conference call with claimant in December 2019. Breitbach was on the call, along with other members of management. During that call, claimant was asked to share how his store had achieved such high DirecTV sales. Claimant shared how to manipulate the customer's name, address, social security number, and other information in the credit check to allow for purchase without deposit. This was useful in making sales when the customer's initial application required a deposit but the customer indicated they could not afford the deposit. The deposit could be up to \$200.00. The increased sales would benefit the store and its employees, as it improved the store's rank and resulted in a commission.

Breitbach was shocked by claimant's statements on the call and alerted the area manager at the time. Breitbach and others had been instructed not to do what claimant was suggesting, as it could lose the company money. An investigation was undertaken based on Breitbach's report. Fishbeck oversaw the investigation. Fishbeck determined the number of applications per customer interaction at claimant's store was higher than others. Fishbeck also found that on numerous occasions, credit checks had been run multiple times for what appeared to be the same customer but with slight variations in the information submitted.

Fishbeck conducted interviews of claimant and several store employees. When claimant was interviewed he did not admit to manipulating the credit applications. He and others blamed the multiple checks on errors in typing in data and system crashes that occurred during the first credit check, which required running a subsequent check. Fishbeck determined this explanation was credible on some applications but not on others. For example, if a check was run twice and the social security number was off by one number, that could be due to a typing error. However, that did not explain some applications being run up to eight times, with the name and social security number changing each time.

Two store employees interviewed in March acknowledged manipulation but said they did not know they were doing anything wrong. Two employees interviewed in July – after claimant was fired – stated claimant had directed them to manipulate the applications. One of these individuals stated he would take a credit application to claimant to “work his magic” to try to get the deposit down to \$0.00. Each store employee had to sign in to a tablet with their credentials to begin a credit application. Notably, claimant only had two credit applications under his name. Neither of those applications was questionable.

Turner participated in the fact-finding process. He provided essentially the same information at that time as is set forth above.

The unemployment insurance system shows claimant has received weekly benefits in the total amount of \$5,233.00, from the benefit week ending June 6, 2020 and continuing through the benefit week ending September 5, 2020. The unemployment insurance system shows claimant has received Federal Pandemic Unemployment Compensation (FPUC) in the amount of \$4,200.00.

REASONING AND CONCLUSIONS OF LAW:

For the reasons set forth below, the September 4, 2020 (reference 02) unemployment insurance decision that allowed 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.

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 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).

It is the duty of the administrative law judge, as the trier of fact in this case, to determine the credibility of witnesses, weigh the evidence and decide the facts in issue. *Arndt v. City of LeClaire*, 728 N.W.2d 389, 394-395 (Iowa 2007). The administrative law judge may believe all, part or none of any witness's testimony. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996). In assessing the credibility of witnesses, the administrative law judge should consider the evidence using his or her own observations, common sense and experience. *Id.* In determining the facts, and deciding what testimony to believe, the fact finder may consider the following factors: whether the testimony is reasonable and consistent with other believable evidence; whether a witness has made inconsistent statements; the witness's appearance, conduct, age, intelligence, memory and knowledge of the facts; and the witness's interest in the trial, their motive, candor, bias and prejudice. *Id.*

The administrative law judge found the information offered by employer to be more credible and reliable than that offered by claimant. Factual findings were made accordingly. Claimant testified that he was unaware of the credit check manipulation occurring at the store. He testified that he did not train employees to manipulate the applications and that they must have been doing it on their own. He also denied making the comments Breitbach attributed to him during the December 2019 call. He suggested the two employees who blamed him for the manipulation only did so because by then he had already been fired and it was therefore convenient for them to do so.

It is not believable that claimant was unaware of the credit check manipulation occurring at the store. While claimant did not oversee each and every sale made at the store, surely claimant was aware of the high number of sales his store was making and had some idea of the reason therefore. This is confirmed by claimant being asked during the December 2019 call to share with other managers how his store had achieved such high sales. It is not believable that Breitbach fabricated claimant's comments during this call. Breitbach has no discernable motivation for doing so. The fact that an investigation found there was manipulation happening at claimant's store further buttresses that claimant did make comments to that effect and that Breitbach did not fabricate them.

Claimant also testified that he does not believe credit checks can be manipulated. He stated the information in the credit check is populated by scanning a photo ID, and that information cannot be changed. However, he also testified that sometimes when scanning a photo ID the information would not populate correctly. When interviewed, he and others indicated the credit check errors could be due to typing in information correctly. These statements are self-contradicting; if information is populated automatically and can't be changed, then how could multiple credit

checks with slight variations be run? And how can those variations in the applications be due to typing errors? This further calls into question the reliability and credibility of claimant's testimony.

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). The administrative law judge finds that claimant was aware of the credit check manipulation and was instructing employees how to do so. This is supported by Breitbach's testimony and the statements offered by coworkers during Fishbeck's investigation. The administrative law judge recognizes the statements made after claimant had already been discharged are perhaps less reliable than those made beforehand. However, even giving these statements less weight than if they had been made prior to discharge, the administrative law judge still finds ample evidence to support claimant's knowledge and direction regarding the credit check manipulation. This constitutes a current act of substantial, job-related misconduct such that claimant is disqualified from benefits.

The administrative law judge further finds that - even if claimant was not directing employees to manipulate the credit checks - he knew of its existence and failed to take steps to address it. It is simply not believable that the store manager would be unaware of his employees' conduct in this regard, particularly given the store's apparently stellar sales numbers as a result. Claimant's failure to address the conduct constitutes disqualifying misconduct in its own right, even if he was not directing the conduct.

- 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.

Because the administrative law judge finds claimant disqualified from benefits from the date of separation, he has been overpaid benefits in the amount of \$5,233.00. Because employer did 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 be recovered from claimant. 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.

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 \$4,200.00. Claimant is required to repay that amount.

DECISION:

The September 4, 2020 (reference 02) unemployment insurance decision that allowed benefits is REVERSED. Claimant was discharged for disqualifying reasons. Benefits are denied until claimant 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 \$5,233.00. Benefits shall be recovered from claimant. 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.

Claimant has been overpaid FPUC in the amount of \$4,200.00. Claimant is required to repay that amount.

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>.



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October 28, 2020
Decision Dated and Mailed

abd/scn