

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

BRIAN J HORTON

Claimant

APPEAL 20A-UI-02657-AD-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

PAUL MUELLER COMPANY

Employer

OC: 03/01/20

Claimant: Respondent (2R)

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

Iowa Code § 96.5(1) – Voluntary Quitting

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

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

STATEMENT OF THE CASE:

On March 27, 2020, Paul Mueller Company (employer) filed an appeal from the March 20, 2020 (reference 01) unemployment insurance decision that determined Brian Horton (claimant) was eligible to receive unemployment insurance benefits.

A telephone hearing was held on May 1, 2020. The parties were properly notified of the hearing. Employer participated by HR Generalist Lauren Robins. Plant Manager Brad Anderson and Supervisor Alex Ripperger participated as witnesses on behalf of employer. Claimant participated personally.

Employer's Exhibits 1-3 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?

FINDINGS OF FACT:

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

ONLINE RESOURCES:

UI law and administrative rules:

<https://www.iowaworkforcedevelopment.gov/unemployment-insurance-law-and-administrative-rules>

UI Benefits Handbook:

<https://www.iowaworkforcedevelopment.gov/unemployment-insurance-benefits-handbook-guide-unemployment-insurance-benefits>

Forms for Employers: <https://www.iowaworkforcedevelopment.gov/employerforms>

Employer account access and information: <https://www.myiowaui.org/UITIPTaxWeb/>

National Career Readiness Certificate and Skilled Iowa Initiative: <http://skillediowa.org/>

Claimant worked for employer as a full-time welder. Claimant's first day of employment was January 31, 1994. The last day claimant worked on the job was February 28, 2020. Claimant's immediate supervisor was Ripperger. Claimant separated from employment on February 28, 2020. Claimant was discharged on that date by Robins and Anderson.

The most recent incidents leading to claimant's discharge occurred on February 27 and 28, 2020. On February 27, Ripperger found claimant smoking in his work area before the morning safety meeting. Ripperger advised claimant at that time that he could not smoke in the building. The following morning, Ripperger came to get claimant for a disciplinary meeting related to his smoking the prior morning. When Ripperger came to get claimant, he was again smoking in the building. Claimant was discharged shortly thereafter. See Exhibit 1.

Smoking is prohibited on employer's premises, except for designated areas. See Exhibit 3. This policy has been in place for some time and claimant was aware of it. Claimant had previously been disciplined for smoking in the building in July 2018. Ripperger had also previously informally counseled claimant about smoking in the building. However, until recently enforcement of the policy had generally been lax.

Employer had an air quality test done near the beginning of the year which found tobacco smoke was prevalent in the building. This caused liability for employer, as there were flammable materials in the building and it violated the state's smoke-free air law. Around mid-February, employees were made aware that the non-smoking policy would be enforced more strictly.

Claimant had previously been suspended for a week for sending several generally threatening text messages to a maintenance supervisor's personal cell phone after work hours. This occurred on October 15, 2019. The text messages stated the maintenance supervisor was "going down," was "worthless," should "find a different job," and so on. Claimant sent these messages because he felt the maintenance supervisor had not adequately repaired a piece of claimant's equipment.

The maintenance supervisor did not have claimant's number and repeatedly replied to claimant, asking who was sending the messages. Claimant did not tell the maintenance supervisor it was him. However, employer was able to determine claimant sent the messages because it knew his phone number. At that time, claimant was warned that further disciplinary issues would result in termination. See Exhibit 2.

The unemployment insurance system shows claimant has received weekly benefits in the amount of \$451.00 for a total of eight weeks, from the benefit week ending March 7, 2020 and continuing through the benefit week ending April 25, 2020. The total amount of benefits paid to date is \$3,608.00.

Claimant has also received Federal Pandemic Unemployment Compensation (FPUC) benefits in the amount of \$600.00 for a total of four weeks, from the benefit week ending April 11, 2020 and continuing through the benefit week ending April 25, 2020. The total amount of FPUC benefits paid to date is \$2,400.00.

Robins provided a statement at the fact-finding hearing on behalf of employer. Robins provided substantially the same information at that time as is set forth above.

REASONING AND CONCLUSIONS OF LAW:

For the reasons set forth below, the March 20, 2020 (reference 01) unemployment insurance decision that determined claimant was eligible to receive unemployment insurance benefits is REVERSED. Claimant is disqualified from receiving benefits.

- 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 testimony provided by Robins, Anderson, and Ripperger to be more reliable than the testimony provided by claimant. Specifically, the administrative law judge did not find credible claimant’s testimony that his text messages were not intended to threaten the maintenance supervisor. Claimant testified he was simply trying to get the maintenance supervisor to fix his equipment. Claimant also testified that the maintenance supervisor should have had his number and known it was him. However, claimant acknowledged it was clear the maintenance supervisor did not know it was him, as he repeatedly asked who was sending the messages, and claimant chose to remain anonymous rather than reveal his identity. Claimant also acknowledged he should have gone to another supervisor if there was an issue with the maintenance supervisor. For these reasons, the administrative law judge found that claimant’s intent in sending the text messages was to threaten the maintenance supervisor. Claimant’s testimony otherwise does not ring true, and also calls into question the reliability of his other testimony. For these reasons factual disputes were resolved in favor of employer, as set forth above.

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). While enforcement of the smoking policy had previously been generally lax, claimant was aware of the policy and chose to continue violating it. He made this decision even after being warned for smoking in July 2018, being warned in October 2019 that further disciplinary issues would result in termination, and even after being warned a day prior to his discharge not to smoke in the building. Claimant deliberately and repeatedly disregarded the standards of behavior which the employer has the right to expect of him and other employees. As such, benefits must be 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 \$451.00 for a total of eight weeks, from the benefit week ending March 7, 2020 and continuing through the benefit week ending April 25, 2020. The total amount of benefits paid to date is \$3,608.00.

Robins provided a statement at the fact-finding hearing on behalf of employer. Robins provided substantially the same information at that time as is set forth above. Because the administrative law judge now finds claimant ineligible for benefits, he has been overpaid benefits in that amount. Because employer participated in the fact-finding interview within the meaning of Iowa Admin. Code r. 871-24.10, benefits shall be recovered. 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.

DECISION:

The March 20, 2020 (reference 01) unemployment insurance decision that determined claimant was eligible to receive unemployment insurance benefits is REVERSED. Claimant is disqualified from receiving 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 \$3,608.00. Benefits shall be recovered. 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.

REMAND:

The issue of whether claimant has been overpaid Federal Pandemic Unemployment Compensation (FPUC) benefits is remanded to the Benefits Bureau of IWD for an investigation and decision.



Andrew B. Duffelmeyer
Administrative Law Judge
Unemployment Insurance Appeals Bureau
1000 East Grand Avenue
Des Moines, Iowa 50319-0209
Fax (515) 478-3528

May 8, 2020
Decision Dated and Mailed

abd/scn

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 due to disqualifying separations 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>.