

**IN THE IOWA ADMINISTRATIVE HEARINGS DIVISION
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

NICHOLE GORSLINE
Claimant

HY-VEE INC
Employer

APPEAL NO. 24A-UI-00930-JT-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

**OC: 12/24/23
Claimant: Respondent (2)**

Iowa Code Section 96.5(2)(a) – Discharge for Misconduct
Iowa Code Section 96.3(7) - Overpayment

STATEMENT OF THE CASE:

On January 24, 2024, the employer filed a timely appeal from the January 16, 2024 (reference 01) 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 December 10, 2023 for no disqualifying reason. After due notice was issued, a hearing was held on February 13, 2024. Nichole Gorsline (claimant) participated. Erin Bewley of Corporate Cost Control represented the employer and presented additional testimony through Brandy Kading and Thein Mway. Exhibits 1 through 4 and A through F were received into evidence. Exhibit G was not received into evidence. The administrative law judge took official notice of the agency administrative record of benefits disbursed to the claimant. 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.
Whether the claimant was overpaid benefits.
Whether the claimant must repay overpaid benefits.
Whether the employer's account may be charged.

FINDINGS OF FACT:

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

Nichole Gorsline (claimant) was employed by Hy-Vee, Inc. as a Home Meals Replacement (HMR) production supervisor from September 2022 and until December 22, 2023, when the employer discharged her from the employment. Ms. Gorsline performed her work duties at a food production facility in Ankeny.

Ms. Gorsline last performed work for the employer on December 17, 2023. On that day, Ms. Gorsline's supervisor, Production Manager Mike Byers, sent Ms. Gorsline home early. Mr. Byers told Ms. Gorsline he was sending her home before she had not been performing her duties. Ms. Gorsline asserts she had been performing assigned duties.

On December 18, 2023, Ms. Gorsline complained to the Hy-Vee corporate office and to Human Resources personnel at the Ankeny facility regarding Mr. Byers allegedly harassing her. Ms. Gorsline called the corporate office and emailed the Ankeny Human Resources personnel. Ms. Gorsline stated in her written complaint that Mr. Byers' conduct included selling drugs. Ms. Gorsline indicated in her written complaint that she had screenshots of text messages exchanges between herself and Mr. Byers.

On December 18, 2023, Brandy Kading, Human Resources Manager, and Thein Mway, Human Resources Generalist, met with Ms. Gorsline as part of their investigation of Ms. Gorsline's complaint. During that meeting, Ms. Gorsline disclosed that in August 2023 she had purchased marijuana from Mr. Byers at the workplace. Ms. Gorsline described how she had gone to an ATM to get money for the purchase, had gone to Mr. Byers' car to collect a cooler that contained the controlled substance, had taken the cooler to her own vehicle to take possession of the controlled substance, and had placed money for the purchase in Mr. Byers' desk. Ms. Gorsline provided the employer cell phone screen shots of text messages between her and Mr. Byers that included discussion of illegal drug activity. Ms. Kading reminded Ms. Gorsline that the drug activity Ms. Gorsline admitted to was a "dischargeable offense." Ms. Gorsline indicated she knew that. On December 22, 2023, the discharged Ms. Gorsline from the employment, based on the admission to illegal drug activity on the employer's premises.

The employer provided Ms. Gorsline with a HyVee Fresh Commissary Handbook and HyVee corporate handbook at the start of the employment. Ms. Gorsline signed to acknowledge receipt of each and her obligation to comply with the policies set forth in the handbooks. The HyVee corporate handbook included a policy regarding Drug Possession, Transfer, or Use Other Than Use Detected by a Drug Test. That policy stated:

Except as otherwise provided by Rule A3 above, an employee bringing onto HyVee property, having possession of, using, consuming, selling, transferring, or attempting to sell or transfer, any prescription drug or any form of controlled substance or any "look alike" substance, is guilty of misconduct and is subject to discipline including discharge.

See Exhibit 4. Rule A3 did not pertain to controlled substances and, thus, created no exception to the prohibition against activities involving controlled substances.

Ms. Gorsline has provided a copy of the employer's progressive discipline policy, which includes the following:

Some types of misconduct are so intolerable that they can be subject to a final warning or termination at the first occurrence. These include ... use or possession of ... illegal drugs on the job... HyVee Inc. reserves the right to determine which corrective action step is appropriate to individual circumstances.

See Exhibit B.

The employer also discharged Mr. Byers from the employment, due at least in part to the illegal drug activity on the employer's premises.

Ms. Gorsline established an original claim for unemployment insurance benefits that was effective December 24, 2023. IWD set the weekly benefit amount at \$466.00. Hy-Vee is a base period employer. IWD paid Ms. Gorsline \$3,262.00 in benefits for seven weeks between December 24, 2023 and February 10, 2024.

On January 12, 2024, Iowa Workforce Development held a fact-finding interview that addressed Ms. Gorsline's separation from the employment. Ms. Gorsline participated and provided a statement that did not include willful misrepresentation of material facts. Indeed, Ms. Gorsline told the deputy she was discharged "because I bought weed on the property..." The employer did not participate. IWD mailed notice of the January 12, 2024 fact-finding interview on January 8, 2024. The employer's address of record for unemployment insurance correspondence is a post box in Londonderry, New Hampshire. The employer's representative of record did not receive notice of the fact-finding interview until January 16, 2023, four days after the scheduled fact-finding interview.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code section 96.5(2)(a) and (d) provides as follows:

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.

...

d. For the purposes of this subsection, "misconduct" means a deliberate act or omission by an employee that constitutes a material breach of the duties and obligations arising out of the employee's contract of employment. Misconduct is 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. Misconduct by an individual includes but is not limited to all of the following:

...

(2) Knowing violation of a reasonable and uniformly enforced rule of an employer.

...

(4) Consumption of alcohol, illegal or nonprescribed prescription drugs, or an impairing substance in a manner not directed by the manufacturer, or a combination of such substances, on the employer's premises in violation of the employer's employment policies.

(5) Reporting to work under the influence of alcohol, illegal or nonprescribed prescription drugs, or an impairing substance in an off-label manner, or a combination of such substances, on the employer's premises in violation of the employer's employment policies, unless the individual is compelled to work by the employer outside of scheduled or on-call working hours.

(6) Conduct that substantially and unjustifiably endangers the personal safety of coworkers or the general public.

...

See also Iowa Admin. Code r. 871-24.32(1)(a) (repeating the text of the statute).

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 establishes a discharge based on a “current act” of misconduct in connection with the employment. The drug activity Ms. Gorsline admitted to during the December 18, 2023 meeting with the employer constituted a knowing, intentional violation of the employer’s policy prohibiting the possession or transfer of controlled substances on the employer’s premises. The evidence indicates Ms. Gorsline was aware she was violating the employer’s policy at the time she engaged in the conduct. The drug activity Ms. Gorsline admitted to on December 18, 2023 also amounted to an indictable criminal offense under Iowa Code section 124.401. In other words, Ms. Gorsline engaged in, and conspired to engage in, criminal conduct on the employer’s premises. The conduct demonstrated a willful and wanton disregard of the employer’s interests in maintaining a safe, drug-free workplace. Ms. Gorsline had no reasonable basis to expect that the employer would offer a reprimand short of discharge under the circumstances. Because the conspiracy to engage in prohibited and illegal drug activity involved Ms. Gorsline and her supervisor, Mr. Byers, the determination that the activity was a “current act” is based on the employer not learning of the joint criminal conduct until December 18, 2023. The employer discharged the claimant within a week of learning about the criminal conduct.

Ms. Gorsline is disqualified for benefits until she has worked in and been paid wages for insured work equal to 10 times her weekly benefit amount. Ms. Gorsline must meet all other eligibility requirements.

Iowa Code section 96.3(7) provides in relevant part as follows:

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. 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. If the department determines that an employer's failure to respond timely or adequately was due to insufficient notification from the department, the employer's account shall not be charged for the overpayment.

(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.

Ms. Gorsline received \$3,262.00 in benefits for seven weeks between December 24, 2023 and February 10, 2024, but this decision disqualifies her for those benefits. The benefits Ms. Gorsline received are an overpayment of benefits. The employer's absence from the fact-finding interview was caused by IWD giving the employer insufficient notice of the fact-finding interview. Ms. Gorsline did not engage in fraud or willful misrepresentation of material fact in connection with the fact-finding interview. The employer's account is relieved of charges, including charge for benefits already paid. Ms. Gorsline is not required to repay the overpaid benefits.

DECISION:

The January 16, 2024 (reference 01) decision is REVERSED. The claimant was discharged on December 22, 2023 for misconduct in connection with the employment. The claimant is disqualified for unemployment benefits until she has worked in and been paid wages for insured work equal to 10 times her weekly benefit amount. The claimant must meet all other eligibility requirements. The employer's account is relieved of charges, including charge for benefits already paid. The claimant is overpaid \$3,262.00 in benefits for seven weeks between December 24, 2023 and February 10, 2024. The claimant is not required to repay the overpaid benefits.



James E. Timberland
Administrative Law Judge

February 20, 2024
Decision Dated and Mailed

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APPEAL RIGHTS. If you disagree with the decision, you or any interested party may:

1. Appeal to the Employment Appeal Board within fifteen (15) days of the date under the judge's signature by submitting a written appeal via mail, fax, or online to:

**Employment Appeal Board
6200 Park Ave Suite 100
Des Moines, Iowa 50321
Fax: (515)281-7191
Online: eab.iowa.gov**

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

AN APPEAL TO THE BOARD SHALL STATE CLEARLY:

- 1) The name, address, and social security number of the claimant.
- 2) A reference to the decision from which the appeal is taken.
- 3) That an appeal from such decision is being made and such appeal is signed.
- 4) The grounds upon which such appeal is based.

An Employment Appeal Board decision is final agency action. If a party disagrees with the Employment Appeal Board decision, they may then file a petition for judicial review in district court.

2. If no one files an appeal of the judge's decision with the Employment Appeal Board within fifteen (15) days, the decision becomes final agency action, and you have the option to file a petition for judicial review in District Court within thirty (30) days after the decision becomes final. Additional information on how to file a petition can be found at Iowa Code §17A.19, which is online at <https://www.legis.iowa.gov/docs/code/17A.19.pdf>.

Note to Parties: YOU MAY REPRESENT yourself in the appeal or obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds.

Note to Claimant: It is important that you file your weekly claim as directed, while this appeal is pending, to protect your continuing right to benefits.

SERVICE INFORMATION:

A true and correct copy of this decision was mailed to each of the parties listed.

DERECHOS DE APELACIÓN. Si no está de acuerdo con la decisión, usted o cualquier parte interesada puede:

1. Apelar a la Junta de Apelaciones de Empleo dentro de los quince (15) días de la fecha bajo la firma del juez presentando una apelación por escrito por correo, fax o en línea a:

**Employment Appeal Board
6200 Park Ave Suite 100
Des Moines, Iowa 50321
Fax: (515)281-7191
Online: eab.iowa.gov**

El período de apelación se extenderá hasta el siguiente día hábil si el último día para apelar cae en fin de semana o día feriado legal.

UNA APELACIÓN A LA JUNTA DEBE ESTABLECER CLARAMENTE:

- 1) El nombre, dirección y número de seguro social del reclamante.
- 2) Una referencia a la decisión de la que se toma la apelación.
- 3) Que se interponga recurso de apelación contra tal decisión y se firme dicho recurso.
- 4) Los fundamentos en que se funda dicho recurso.

Una decisión de la Junta de Apelaciones de Empleo es una acción final de la agencia. Si una de las partes no está de acuerdo con la decisión de la Junta de Apelación de Empleo, puede presentar una petición de revisión judicial en el tribunal de distrito.

2. Si nadie presenta una apelación de la decisión del juez ante la Junta de Apelaciones Laborales dentro de los quince (15) días, la decisión se convierte en acción final de la agencia y usted tiene la opción de presentar una petición de revisión judicial en el Tribunal de Distrito dentro de los treinta (30) días después de que la decisión adquiriera firmeza. Puede encontrar información adicional sobre cómo presentar una petición en el Código de Iowa §17A.19, que está en línea en <https://www.legis.iowa.gov/docs/code/17A.19.pdf>.

Nota para las partes: USTED PUEDE REPRESENTARSE en la apelación u obtener un abogado u otra parte interesada para que lo haga, siempre que no haya gastos para Workforce Development. Si desea ser representado por un abogado, puede obtener los servicios de un abogado privado o uno cuyos servicios se paguen con fondos públicos.

Nota para el reclamante: es importante que presente su reclamo semanal según las instrucciones, mientras esta apelación está pendiente, para proteger su derecho continuo a los beneficios.

SERVICIO DE INFORMACIÓN:

Se envió por correo una copia fiel y correcta de esta decisión a cada una de las partes enumeradas.