

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

68-0157 (9-06) - 3091078 - EI

DENNIS UDORVICH
Claimant

APPEAL NO. 18A-UI-08003-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

FEDERAL EXPRESS CORP
Employer

OC: 06/24/18
Claimant: Respondent (2)

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

STATEMENT OF THE CASE:

The employer filed a timely appeal from the July 16, 2018, reference 01, decision that allowed benefits to the claimant provided he was otherwise eligible and that held the employer's account could be charged for benefits, based on the Benefits Bureau deputy's conclusion that the claimant was discharged on May 29, 2018 for no disqualifying reason. After due notice was issued, a hearing was held on August 16, 2018. Claimant Dennis Udorvich participated. Lesley Buhler of Equifax represented the employer and presented additional testimony through Chuck Williams. The administrative law judge took official notice of the Agency's record of benefits disbursed to the claimant and received Exhibits 1 through 4 into evidence. 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 Mr. Udorvich was discharged for misconduct in connection with the employment that disqualifies him for unemployment insurance benefits.

Whether Mr. Udorvich was overpaid unemployment insurance benefits.

Whether Mr. Udorvich 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: Dennis Udorvich was employed by Federal Express Corporation (FedEx) as a full-time non-DOT carrier from 1981 until May 29, 2018, when Operations Manager Kady Egan and the employer's human resources personnel discharged him from the employment for receiving three warning letters during a twelve-month period. Mr. Egan was Mr. Udorvich's immediate supervisor. Under the employer's written policy, an employee who received three written warnings in a twelve-month period is subject to discharge from the employment.

The final incident that triggered the discharge occurred on May 18, 2018. On that day, an off-duty FedEx manager visiting from another state observed Mr. Udorvich commit three FedEx policy violations in connection with a delivery stop Mr. Udorvich made in Ankeny. The delivery stop occurred in what Mr. Udorvich describes as a very exclusive neighborhood at a time where many people and cars were present for ongoing garage sales. Mr. Udorvich had to double park the FedEx van to make the delivery and stepped away from the van for Mr. Udorvich was “vaping” or “smoking” an “e-cigarette” in the employer’s van in violation of the employer’s written policy prohibiting tobacco product use. Mr. Udorvich was aware of the employer’s written policy prohibiting tobacco use, had received a prior verbal warning for similar behavior, but assumed the conduct would only prompt a verbal warning. Mr. Udorvich had unsecured freight, a cellphone, in the cab of the van in violation of the employer’s written policy that freight be secured in the back of the van. Mr. Udorvich was aware of the policy, but placed the cell phone in the cab to expedite delivery of the phone to the customer. Mr. Udorvich left the van running while he walked 20 feet or about 10 steps away to deliver a package to a waiting customer. Mr. Udorvich was aware of the employer’s written policy that required him to turn off the van when he exited the vehicle unless there were extenuating circumstances such as frigid weather coupled with the risk the battery would fail. There was no such concern on May 18, 2018. The off-duty FedEx manager confronted Mr. Udorvich about the policy violations at the time of the delivery stop. Mr. Udorvich elected not to engage with the FedEx manager and continued on his route. The off-duty FedEx manager reported the violations to the employer. Mr. Udorvich conceded the violations when Ms. Egan addressed the incident with him. Ms. Egan issued a warning letter to Mr. Udorvich on May 23, 2018 regarding the May 18 conduct. The discharge followed six days later, after the Memorial Day holiday.

The two earlier warnings during the 12-month period included two incidents in November 2017, wherein the same Ankeny customer complained to the employer about Mr. Udorvich’s behavior and language during separate delivery stops at the customer’s home. On November 3, Mr. Udorvich delivered a tool box to the customer in cardboard box that Mr. Udorvich describes as “totally beat up really bad.” The contents of the box were exposed. When the customer complained about the condition of the delivered box, Mr. Udorvich directed the customer to contact the toll free number to make a claim. On November 30, Mr. Udorvich delivered a cell phone to the same customer. Upon delivery, the customer stated, “I can’t believe I finally get my phone.” Mr. Udorvich responded, “It’s just another damn phone.” Ms. Egan issued a reprimand to Mr. Udorvich on December 15, 2017 for the November 2017 incidents.

The third warning that factored in the discharge concerned a customer complaint in July 2017. The customer, a healthcare provider, complained that Mr. Udorvich had made inappropriate comments and engaged in inappropriate behavior that made female employees uncomfortable. Specifically, the customer complained that Mr. Udorvich had hugged and pinched one or more female employees. The employer is at this point unfamiliar with the particulars of the matter giving rise to the reprimand. Mr. Udorvich denies that he hugged or pinched anyone. Mr. Udorvich asserts that his comments were directed at a 13-year-old boy in an adjacent juvenile probation office who was acting out. Mr. Udorvich commented that, “The only thing that kid deserves is a spanking.” On August 21, 2017, Operations Manager Gabriel Rice issued a written warning to Mr. Udorvich based on the customer’s allegations.

Mr. Udorvich established a claim for benefits that was effective June 24, 2018. Iowa Workforce Development set Mr. Udorvich’s weekly benefit amount at \$455.00. Mr. Udorvich received the full weekly benefit amount for the weeks that ended June 30, July 7, July 14, and August 18, 2018. Mr. Udorvich has received benefits totaling \$1,820.00 those four weeks between June 24, 2018 and August 18, 2018. FedEx is the sole base period employer in connection with the claim.

On July 12, 2018, an Iowa Workforce Development Benefits Bureau deputy held a fact-finding interview that addressed Mr. Udorvich’s separation from the employment. Mr. Udorvich

participated in the fact-finding interview and provided a candid statement devoid of any intention to mislead the deputy or defraud the Agency. The employer's participation in the fact-finding interview took place through the 20 pages of documentation the employer submitted on July 11, 2018. That material included the same documents that were later received into the appeal hearing record as Exhibits 1 through 4 and a cover letter from Equifax outlining the basis for the discharge. The materials submitted by the employer on July 11, 2018 also included a copy of the employer's notice of the fact-finding interview, indicating that the employer had notice of the fact-finding interview. Neither the employer nor the employer's representative of record, Equifax, provided and verbal statement in connection with the fact-finding interview.

REASONING AND CONCLUSIONS OF LAW:

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(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 Dep't of Job Serv.*, 275 N.W.2d 445, 448 (Iowa 1979).

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 Administrative Code rule 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 Iowa Administrative Code rule 871-24.32(4).

The weight of the evidence in the record establishes a discharge for misconduct in connection with the employment. On May 18, 2018, Mr. Udorvich violated three separate company policies that were known to him at the time of the conduct. These included use of a tobacco product in the employer’s van, having unsecured freight in the cab, and leave the van running when he was outside making a delivery. Mr. Udorvich had received an earlier verbal warning about not smoking in the company trucks, but elected to disregard the tobacco product prohibition on May 18, 2018. Mr. Udorvich elected on that same day to disregard safety policies concerning having freight properly secured and about not leaving the van running. Mr. Udorvich minimizes the significance of the violations, but they were policy violations nonetheless. The weight of the evidence establishes an additional policy violation on November 30, 2017, when Mr. Udorvich uttered the “damn phone” comment. The comment was indeed mild profanity. The comment was uncalled for, inappropriate, and contrary to the employer’s interest in maintaining goodwill with its customers. The multiple policy violations on May 18, 2018 were sufficient to demonstrate intentional and substantial disregard of the employer’s interests. The November 30 conduct is but one more instance of the same. The employer presented insufficient evidence to establish misconduct in connection with the July 2017 concern or the November 3, 2017 concern. Mr. Udorvich’s long tenure with the employer is commendable, but does not excuse or mitigate his disregard of the employer’s policies.

Because the evidence in the record establishes a discharge for misconduct in connection with the employment, Mr. Udorvich is disqualified for benefits until he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount. Mr. Udorvich must meet all other eligibility requirements.

The unemployment insurance law requires that benefits be recovered from a claimant who receives benefits and is later deemed ineligible benefits even if the claimant acted in good faith and was not at fault. However, a claimant will not have to repay an overpayment when an initial decision to award benefits on an employment separation issue is reversed on appeal if two conditions are met: (1) the claimant did not receive the benefits due to fraud or willful misrepresentation, and (2) the employer failed to participate in the initial proceeding that awarded benefits. In addition, if a claimant is not required to repay an overpayment because the base period employer failed to participate in the initial proceeding, the base period employer’s account will be charged for the overpaid benefits. Iowa Code § 96.3(7)(a) and (b).

Iowa Administrative Code rule 817-24.10(1) defines employer participation in fact-finding interviews as follows:

Employer and employer representative participation in fact-finding interviews.
24.10(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.

Mr. Udorvich received \$1,820.00 in benefits for four weeks between June 24, 2018 and August 18, 2018, but this decision disqualifies him for those benefits. Accordingly, the benefits Mr. Udorvich received constitute an overpayment of benefits. The substantial documentation submitted by the employer the day before the fact-finding interview was sufficient to meet the participation requirement. Accordingly, Mr. Udorvich must repay the overpaid benefits. The employer's account is relieved of liability for benefits including liability for benefits already paid to Mr. Udorvich.

DECISION:

The July 16, 2018, reference 01, decision is reversed. The claimant was discharged for misconduct in connection with the employment. The claimant is disqualified for unemployment benefits until he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount. The claimant must meet all other eligibility requirements. The claimant was overpaid \$1,820.00 in benefits for four weeks between June 24, 2018 and August 18, 2018. The claimant must repay the overpaid benefits. The employer's account is relieved of liability for benefits including liability for benefits already paid to the claimant.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/rvs