

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

STACY J ROWE
Claimant

APPEAL NO. 20A-UI-07792-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

MLY INVESTMENTS LLC
Employer

OC: 02/23/20
Claimant: Respondent (2R)

Iowa Code Section 96.5(2)(a) – Discharge for Misconduct
Iowa Code Section 96.3(7) – Recovery of Overpaid Regular Benefits
Public Law 116-136, Section 2104(b) – Federal Pandemic Unemployment Compensation

STATEMENT OF THE CASE:

The employer filed a timely appeal from the July 14, 2020, reference 02, decision that held the claimant was eligible for benefits provided she met all other eligibility requirements and that employer's account could be charged for benefits, based on the Benefits Bureau deputy's conclusion that the claimant was discharged on February 22, 2020 for no disqualifying reason. This hearing was initially set for August 14, 2020 and the parties were properly notified. The hearing set for August 14, 2020 was rescheduled due to the claimant having a conflicting mental health appointment. The hearing was reset to August 26, 2020. Claimant Stacy Rowe appeared by telephone on August 26, 2020. The employer appeared through Mike Young and Steven Young. The hearing set for August 26, 2020 had to be rescheduled because the hearing notice was mailed to the parties less than 10 days prior to the hearing and the claimant declined to waive the 10-day notice requirement. The appeal hearing began in earnest on September 15, 2020. On that date, the claimant appeared with the assistance of counsel Stuart Logan Higgins and the employer appeared through Mike Young and Steven Young. Due to issues with exhibits, the September 15, 2020 hearing had to be adjourned to recommence on September 16, 2020. All parties appeared on September 16, 2020, but the hearing again had to be adjourned due exhibit issues. All parties appeared again on September 17, 2020 and the appeal hearing concluded on September 17, 2020. Exhibits 1, 2, 3, A, B and C were received into evidence. The administrative law judge took official notice of the Agency's administrative record of benefits disbursed to the claimant (DBRO and KPYX) and of the scheduling information for the July 13, 2020 fact-finding interview (KFFV). However, the actual fact-finding materials were unavailable at the time of the appeal hearing.

ISSUES:

Whether the claimant was discharged for misconduct in connection with the employment that disqualifies the claimant for unemployment insurance benefits.

Whether the claimant was overpaid regular benefits.

Whether the claimant was overpaid Federal Pandemic Unemployment Compensation benefits.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Stacy Rowe was employed by MLY Investments, L.L.C., doing business as Freddy's Frozen Custard & Steakburgers from 2016 until February 22, 2020. During most of the employment and to the end of the employment, Ms. Rowe was a Shift Supervisor at the employer's Waterloo restaurant. On February 22, 2020, Steven Young, Director of Operations, discharged Ms. Rowe from the employment for engaging in a sexual relationship with a subordinate without disclosing the relationship to the employer, in violation of the employer's written harassment and fraternization policy. The policy prohibited supervisory staff from engaging in a romantic/sexual relationship with a subordinate employee without disclosing the relationship to the employer. Under the policy, once the relationship was disclosed, the employer would take appropriate steps to ensure the relationship did not undermine the employer's operations. Such steps could include transferring the supervisor to a different store. Ms. Rowe was well familiar with the employer's harassment and fraternization policy. Ms. Rowe had received and acknowledged receipt of the policy on multiple occasions. In late 2019, Ms. Rowe had invoked the policy in response to her previous supervisor's unwelcome advances and her report had led to the supervisor, at that point a district manager, being discharged from the employment. Ms. Rowe had reported another peer-equal supervisor for engaging in an undisclosed romantic/sexual relationship with a subordinate and Ms. Rowe's report led to that other supervisor being discharged from the employment. Ms. Rowe at all relevant times had access to the policy in the workplace. Ms. Rowe fully understood policy, understood that the policy governed her actions and the actions of others in the workplaces, and understood that violation of the policy would subject her to discharge from the employment.

Ms. Rowe's undisclosed sexual relationship with the subordinate came to the employer's attention a couple days before the discharge, after Ms. Rowe mentioned it in a text message to another supervisor. Ms. Rowe explicated stated "we f**ked last night." The other supervisor was taken aback by Ms. Rowe's statement and asked for clarification. Ms. Rowe confirmed her earlier message. See Exhibit 3. The other supervisor promptly reported the matter up the chain of command in keeping with his obligation under the harassment and fraternization policy. On February 21, 2020, Steven Young interviewed six Waterloo employees, including the subordinate in question. The subordinate with whom Ms. Rowe had sex confirmed that the sexual relationship had been ongoing since November 2019 and that it had become a factor in the workplace. See Exhibit 1. As Mr. Young interviewed the other five store employees, he heard consistent stories about Ms. Rowe engaging in a pattern of harassment and intimidation directed at subordinates. Each of those employees independently and voluntarily prepared and signed a voluntary statement. See Exhibit 2. On February 22, 2020, Mr. Young confronted Ms. Rowe regarding the undisclosed sexual relationship with the subordinate and the reports of harassing and intimidating behavior. Ms. Rowe denied the sexual relationship and asserted the employees who reported harassing and intimidating behavior were all lying. Ms. Rowe took the opportunity to level more a dozen allegations regarding other employees' misdeeds, all of which alleged information she had previously withheld from the employer. Mr. Young did not ask Ms. Rowe to prepare a written statement. Mr. Young discharged Ms. Rowe from the employment at that time. The employer followed up on Ms. Rowe's allegations. Ms. Rowe provided an exhibit for the hearing that includes a text message exchange between herself and a former coworker two weeks after her discharge from the employment. In that message, Ms. Rowe once again confirms that she had sex with the subordinate. See EX C, first page.

Ms. Rowe established an original claim for benefits that was effective February 23, 2020. Freddy's is a base period employer. Iowa Workforce Development set Ms. Rowe's weekly benefit amount at \$414.00. Ms. Rowe received \$9,679.03 in regular benefits for the 24

consecutive weeks between February 23, 2020 through the benefit week that ended August 8, 2020, at which time she exhausted regular benefits. Ms. Rowe received \$600.00 in Federal Pandemic Unemployment Compensation (FPUC) benefits for each of the 17 weeks between March 29, 2020 and July 25, 2020, for a total of \$10,200.00 in FPUC benefits. After Ms. Rowe's regular benefits ran out, she received Pandemic Emergency Unemployment Compensation (PEUC) benefits totaling \$3,726.00 for the nine consecutive weeks between August 9, 2020 and October 10, 2020. In addition, Ms. Rowe received \$1,800.00 in Lost Wage Assistance (LWA) benefits for the six weeks between July 26, 2020 and September 5, 2020.

A fact-finding interview was set for 1:40 p.m. July 13, 2020. The employer had provided a telephone number for the fact-finding interview and was available at that number, but did not receive a call from the deputy. Ten minutes after the scheduled start of the fact-finding interview, the employer attempted to call Iowa Workforce Development, but was in a calling cue with more than 100 callers ahead of the employer. On that same afternoon, the employer sent an email to Iowa Workforce Development to inquire about the fact-finding interview. Ms. Rowe answered the deputy's call and provided a statement to the deputy. Ms. Rowe's statement was not available to the administrative law judge at the time of the appeal hearing.

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 871 IAC 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).

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 Ct. 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 evidence in the record establishes a discharge for misconduct in connection with the employment. Ms. Rowe knowingly and intentionally violated the employer's harassment and fraternization policy by engaging in an ongoing, undisclosed sexual relationship with a subordinate over the course of three months. The evidence establishes that Ms. Rowe knowingly and intentionally withheld information from her superiors regarding the sexual relationship with the subordinate and that that matter only came to the employer's attention when Ms. Rowe made the mistake of telling a shocked fellow supervisor who followed the employer's policy in promptly reporting the matter to the employer. Ms. Rowe was intentionally dishonest when Mr. Young confronted her about the relationship with the subordinate. Ms. Rowe knew the policy and the consequences of violating the policy. The policy was indeed uniformly enforced, as reflected by Ms. Rowe's two prior invocations of the policy and the resulting discharges. The employer cannot uniformly enforce that which is withheld from the employer. Ms. Rowe's testimony demonstrated a pattern of brazen, inept prevarication, even in the face of multiple instances wherein her own vulgar text messages contradict her to tell the truth regarding her sexual relationship with the subordinate. Ms. Rowe also knowingly and intentionally violated the employer's harassment policy by engaging in a pattern of harassing and intimidating subordinates. All of the conduct in question demonstrated a willful and wanton disregard for the employer's interests by undermining the employer's operation and exposing

the employer to potential liability based on Ms. Rowe's conduct. Ms. Rowe 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. Rowe must meet all other eligibility requirements. The employer's account will not be charged for benefits for the period beginning August 9, 2020.

The unemployment insurance law requires that regular benefits be recovered from a claimant who receives regular benefits and is later denied benefits, even if the claimant acted in good faith and was not at fault. However, a claimant will not have to repay an overpayment of regular when an initial decision to award regular 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 employer failed to participate in the initial proceeding, the employer's account will be charged for the overpaid benefits. Iowa Code § 96.3(7)(a) and (b).

Ms. Rowe received \$9,679.03 in regular benefits for the 24 consecutive weeks between February 23, 2020 through the benefit week that ended August 8, 2020. This decision disqualifies her for those benefits. Accordingly, the regular benefits Ms. Rowe received are an overpayment of benefits. Because the record of the fact-finding interview was unavailable, this matter will be remanded to the Benefits Bureau for determination, consistent with this decision, of whether Ms. Rowe is required to repay the overpaid regular benefits or whether the overpaid regular benefits may be assessed to the employer's account.

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, the claimant is also disqualified from receiving Federal Pandemic Unemployment Compensation (FPUC). The \$10,200.00 in FPUC benefits the claimant received for the 17 weeks between March 29, 2020 and July 25, 2020 constitutes an overpayment of benefits. Claimant must repay the overpaid FPUC benefits.

Though the evidence indicates overpayments of Pandemic Emergency Unemployment Compensation (PEUC) benefits and Lost Wages Assistant (LWA) benefits, those overpayment issues were not before the administrative law judge. Accordingly, this matter will be remanded to the Benefits Bureau for entry of overpayment decisions regarding those benefits.

DECISION:

The July 14, 2020, reference 02, decision is reversed. The claimant was discharged on February 22, 2020 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 shall not be charged for benefits for the period beginning August 9, 2020. The claimant is overpaid \$9,679.03 in regular benefits for the 24 weeks between February 23, 2020 and August 8, 2020. The claimant is overpaid \$10,200.00 in FPUC benefits for the 17 weeks between March 29, 2020 and July 25, 2020 and must repay the overpaid FPUC benefits.

This matter is **remanded** to the Benefits Bureau for determination, consistent with this decision, of whether the claimant must repay the overpaid regular benefits or whether the overpaid regular benefits may be assessed to the employer's account.

This matter is **remanded** to the Benefits Bureau for entry of overpayment decisions regarding the Pandemic Emergency Unemployment Compensation (PEUC) benefits and Lost Wages Assistant (LWA) benefits paid to the claimant.

The administrative law judge notes that he locked this claim for benefits on September 18, 2020, but that another Agency representative subsequently unlocked the claim, which allowed additional PEUC benefits to flow to the claimant.

NOTE TO CLAIMANT:

- This decision determines you are not eligible for regular unemployment insurance benefits under state law. 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.
- If you do not qualify for regular unemployment insurance benefits under state law and are currently unemployed for reasons related to COVID-19, you may qualify for Pandemic Unemployment Assistance (PUA). **You will need to apply for PUA to determine your eligibility under the program.** For more information on how to apply for PUA, go to <https://www.iowaworkforcedevelopment.gov/pua-information>. **If you do not apply for and are not approved for PUA, you may be required to repay the benefits you have received.**



James E. Timberland
Administrative Law Judge

October 15, 2020
Decision Dated and Mailed

jet/scn