

State of Wisconsin



RECEIVED  
MAR 1 2021  
JEFF SCOTT-PLATA

Labor and Industry Review Commission

<div data-bbox="146 483 527 556" style="border: 1px solid black; height: 35px; width: 235px;"></div> <p>Employee</p> <div data-bbox="162 609 714 672" style="border: 1px solid black; height: 30px; width: 340px;"></div> <p>Employer</p> <p>Hearing No. 20008988MD</p>	<p><b>Unemployment Insurance Decision<sup>1</sup></b></p> <p><b>Dated and Mailed:</b> <b>FEB 26 2021</b></p> <hr/> <p>Kempgr_usd.doc:145</p>
---	--

The commission **modifies and affirms** the appeal tribunal decision. Accordingly, the employee is ineligible for benefits beginning in the week of the discharge and until seven weeks have elapsed since the end of the week of discharge and the employee has earned wages in covered employment performed after the week of discharge equaling at least 14 times the weekly benefit rate that would have been paid had the discharge not occurred. The employee is **NOT** required to repay the sum of \$7,982 to the unemployment reserve fund. This matter is **remanded** to the department for a determination as to whether the employee received Federal Pandemic Unemployment Compensation (FPUC), and if so, whether those payments should be waived.

By the Commission:

  
Michael H. Gillick, Chairperson

David B. Falstad, Commissioner

  
Georgia E. Maxwell, Commissioner

<sup>1</sup> **Appeal Rights:** See the blue enclosure for the time limit and procedures for obtaining judicial review of this decision. If you seek judicial review, you **must** name the following as defendants in the summons and the complaint: the Labor and Industry Review Commission, all other parties in the caption of this decision or order (the boxed section above), and the Department of Workforce Development. Appeal rights and answers to frequently asked questions about appealing an unemployment insurance decision to circuit court are also available on the commission's website, <http://lic.wisconsin.gov>.

### **Procedural Posture**

This case is before the commission to consider the employee's eligibility for unemployment insurance benefits. An administrative law judge (ALJ) of the Unemployment Insurance Division of the Department of Workforce Development held a hearing and issued a decision. The commission received a timely petition for review. The commission has considered the petition and the positions of the parties, and it has reviewed the evidence submitted at the hearing.

### **Findings of Fact and Conclusions of Law**

The commission makes the same findings of fact and conclusions of law as stated in the appeal tribunal decision and incorporates them by reference into the commission's decision with the following modifications:

### **Modifications**

Delete the fifth paragraph on page 4 of the appeal tribunal decision and substitute:

Here, the employee was paid benefits totaling \$7,982 for weeks 12 through 38 of 2020 in error. The determination in this matter indicated that it found a discharge not for misconduct or substantial fault because the employer discharged the employee for creating a disturbance in the employer's restaurant. It further indicated "A FINDING OF MISCONDUCT OR SUBSTANTIAL FAULT CANNOT BE MADE BECAUSE THE EMPLOYEE DENIES THE ALLEGATIONS AND THE EMPLOYER FAILED TO PROVIDE EVIDENCE THAT HE DID CREATE A DISTURBANCE AT WORK."

However, the employer's statement to the department definitively asserts that the employee was creating a disturbance at work. It also gave specific examples of the employee's alleged conduct from a person who was present during some of the time that the incident occurred. Because the employer provided information from which it could be determined the employee created a disturbance at work, the initial determination was based upon a mistake of fact.

The employee also provided information regarding his view of the incident. The employee indicated he was "having an episode because I am autistic, and I have stemming (sic) episodes." He indicated that he was stressed out and he voiced his concerns that the employer should not be open because people were dying all around the country. He also indicated that he told the employer to stop bullying him and to leave him alone. He further indicated that the employer was aware of his health situation and he had prior "outbursts" and had to go to the back to calm down. While the employee denied certain things, such as swearing at the employer, he did not deny that he created a "disturbance" at work. Because the overpayment was the result of



departmental error and the employee was not at fault, the overpayment is waived.

Delete the second full paragraph on page 5 of the appeal tribunal decision and substitute:

The appeal tribunal further finds that the employee was paid benefits in the amount of \$7,982 for which the employee was not eligible and to which the employee was not entitled, within the meaning of Wis. Stat. § 108.03(1) and the entire amount is waived because the overpayment was the result of departmental error within the meaning of Wis. Stats. §§ 108.22(8) (a) and (c).

Delete the final sentence of the DECISION paragraph and substitute:

The employee is **not** required to repay the sum of \$7,982 to the unemployment reserve fund.

Delete the NOTE which appears on page 6 of the appeal tribunal decision.

#### **Memorandum Opinion**

The employee, in his petition for commission review, argued that he disagreed with the ALJ's finding that the overpayment was not the result of departmental error. The commission agrees with the employee's position. The employer told the adjudicator he received a call requesting him to come to the restaurant because people were concerned with the employee's behavior. The employer further indicated that when he got to the restaurant the employee was yelling and screaming that people were going to die. Therefore, the determination's statement that misconduct or substantial fault "CANNOT" be found because the employer failed to provide "evidence" of a disturbance is incorrect.

The commission remanded this matter for a determination as to whether the claimant also received FPUC during this time and, if so, the amount of those benefits and whether those benefits should be waived. The record is not sufficient to permit meaningful review of the issue of whether there is an overpayment of FPUC and whether that overpayment should be waived as a non-fraud FPUC overpayment which was not the fault of the claimant and whether requiring repayment would be against equity and good conscience. See Unemployment Insurance Program Letter No. 15-20 Change 2, June 15, 2020.