

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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

PAIGE E GABRIEL

Claimant

APPEAL NO. 19R-UI-06139-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

AREA RESIDENTIAL CARE INC

Employer

OC: 05/19/19

Claimant: Respondent (1)

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

STATEMENT OF THE CASE:

This matter is before administrative law judge pursuant to the Employment Appeal Board's remand order in Hearing Number 19B-UI-04889. The employer filed a timely appeal from the June 6, 2019, reference 01, decision that allowed benefits to the claimant provided she 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 May 9, 2019 for no disqualifying reason. After due notice was issued, a new appeal hearing was held on August 28, 2019. Claimant Paige Gabriel participated. Catherine Kutka represented the employer. The administrative law judge took official notice of the Agency's record of benefits disbursed to the claimant. The administrative law judge took official notice of the fact-finding materials.

ISSUES:

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

Whether the claimant has been 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: Paige Gabriel was employed by Area Residential Care Inc. as a full-time Instructor/Direct Support Professional from 2016 and last performed work for the employer on April 29, 2019. At that time, the employer suspended Ms. Gabriel from the employment based on a coworker's emailed allegation that Ms. Gabriel had verbally abused a dependent adult client. The employer was subsequently unable to substantiate the abuse allegation. However, the employer elected to discharge Ms. Gabriel from the employment, effective May 9, 2019, based on same coworker's emailed allegation that Ms. Gabriel had slept at work on April 28, 2019. Ms. Gabriel denies that she was sleeping on the job on April 28, 2019. In making the decision to discharge Ms. Gabriel from the employment, the employer considered earlier allegations that Ms. Gabriel had slept at

work in violation of the employer's work rules. The employer alleges a next most recent incident of sleeping on the job occurred on March 23, 2019.

Ms. Gabriel established an original claim for benefits that was effective May 19, 2019 and received \$3,458.00 in benefits for seven weeks between May 19, 2019 and July 6, 2019. This employer is the sole base period employer in connection with the claim.

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).

Sleeping on the job may constitute misconduct that would disqualify a claim for unemployment insurance benefits. See *Hurtado v. IDJS*, 393 N.W.2d 309 (Iowa 1986). In *Hurtado*, the employer had discovered the employee sleeping on the job twice, with the instances occurring approximately one year apart.

The weight of the evidence in the record establishes a discharge for no disqualifying reason. The employer’s sole witness for the hearing lacked personal knowledge of the alleged conduct that triggered the suspension and discharge and of the earlier alleged conduct. The employer presented insufficient evidence to rebut the claimant’s denial that she was sleeping on the job on April 28, 2019. The next most recent alleged sleeping incident was from a month earlier. Because the evidence fails to prove a current act of misconduct, the discharge does not disqualify the claimant for benefits or relieve the employer’s account of liability for benefits. Because the evidence fails to prove a current act of misconduct, the administrative law judge need not further consider the earlier allegations. The claimant is eligible for benefits, provided she meets all other eligibility requirements. The employer’s account may be charged.

Iowa Code section 96.3(7) provides that if a claimant receives benefits and is deemed ineligible for the benefits, Workforce Development must recovery the benefits and the claimant must repay the benefits, even if the claimant was not at fault in receiving the benefits.

Because this decision affirms the June 6, 2019, reference 01, decision by concluding the claimant was discharged for no disqualifying reason, the \$3,458.00 in benefits the claimant received for seven weeks between May 19, 2019 and July 6, 2019 are not an overpayment of benefits.

DECISION:

The June 6, 2019, reference 01, decision is affirmed. The claimant was discharged on May 9, 2019 for no disqualifying reason. The claimant is eligible for benefits, provided she meets all other eligibility requirements. The employer’s account may be charged. The claimant is not overpaid \$3,458.00 in benefits for seven weeks between May 19, 2019 and July 6, 2019.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/rvs