

**IOWA DEPARTMENT OF INSPECTIONS AND APPEALS
ADMINISTRATIVE HEARINGS DIVISION, UI APPEALS BUREAU**

ASHLEY L EVANS

Claimant

APPEAL 23A-UI-04099-S2

**ADMINISTRATIVE LAW JUDGE
DECISION**

INTEGRITY BUILDERS & SUPPLY INC

Employer

OC: 03/12/23

Claimant: Respondent (1)

Iowa Code § 96.5(2)a – Discharge for Misconduct

Iowa Code § 96.5(1) – Voluntary Quit

Iowa Code § 96.3(7) – Recovery of Benefit Overpayment

Iowa Admin. Code r. 871-24.10 – Employer/Representative Participation Fact-finding Interview

STATEMENT OF THE CASE:

The employer filed an appeal from the April 10, 2023, (reference 02) unemployment insurance decision that allowed benefits based upon a finding that claimant was discharged for unsatisfactory work which is not misconduct. The parties were properly notified about the hearing. An in-person hearing was held on May 23, 2023, in West Burlington, Iowa. Claimant Ashley L. Evans participated and testified. Christina Welker observed on claimant's behalf. Employer Integrity Builders & Supply, Inc. participated through human resources employee Lorie Streeter, accountant/CFO Kristy Westfall, and general manager Nick Stellern. Claimant's Exhibits A – G were received. Employer's Exhibits 1 – 7 were received. The administrative law judge took official notice of the administrative record.

ISSUES:

Was the claimant discharged for disqualifying job-related misconduct?

Has the claimant been overpaid unemployment insurance benefits, and if so, can the repayment of those benefits to the agency be waived?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed full-time as an accounting assistant from February 21, 2022, and was separated from employment on March 13, 2023, when she was discharged.

During claimant's performance review on December 2, 2022, employer raised issues of claimant's poor work performance due to mistakes she made when entering information into the computer.

Claimant frequently had downtime at work and when this occurred, she used the work computer to visit websites for personal reasons, such as banking and social media. She used her personal cell phone at her desk, and employer spoke to her on at least two or three occasions, about using her phone and the computer for personal use, and claimant responded that she

only did so when there was no other work to do. When members of management witnessed claimant engaging in these activities, no one told her in the moment to stop doing these activities. Employer has a policy allowing personal calls so long as they are limited and contained to break times unless there is an emergency. When claimant had downtime in the past she would ask Ms. Westfall if there was any work she could do, but Ms. Westfall was usually too busy to give claimant a new project. Claimant was told by Beth Way at one point to stop bothering Ms. Westfall with questions because she was too busy and needed to focus on her own work. Claimant performed personal tasks only when there was no work available for her.

Claimant was not given any disciplinary action for performing personal tasks during work time nor was she told her job was in jeopardy due to these actions.

During claimant's December 2, 2022, performance review, employer discussed frequent errors made by claimant. Employer shared its expectation that claimant work on paying more attention to detail and checking more carefully for errors. She was also instructed to work on communication with others in the office. Human Resources followed up with claimant on December 22, 2022, to reiterate that she needed to be more thorough and consistent and detailed with her work to avoid making errors.

On February 2, 2023, employer met with claimant to discuss her job performance. She was placed on a performance improvement plan (PIP) due to making errors, not handling criticism well, and poor communication with her supervisor. On one occasion, employer discovered in January that claimant failed to complete a task assigned to her in October. Claimant needed additional assistance with the task, and after asking Ms. Westfall for help when she was busy, claimant did not follow up. On March 9, 2023, employer met with claimant to follow up on her performance since the implementation of the PIP. Employer noted improvement with claimant's communication with her supervisor and that she was asking for work to do when she had downtime, but claimant continued to make errors. She was told to slow down with her work and look over her work more carefully. The PIP was extended for two additional weeks.

Employer discovered claimant made an additional error after the March 9, 2023, PIP follow-up meeting, where claimant erred when entering a part number on a service ticket. At that time, employer decided to terminate claimant's employment because of the continued mistakes. On March 13, 2023, employer decided to not continue with the PIP and terminated claimant's employment due to poor performance and for conducting personal tasks on work time. Employer is not sure whether claimant was capable of performing the job to employer's expectations.

The administrative record reflects that claimant has received unemployment benefits in the amount of \$4,200.00, since filing a claim with an effective date of March 12, 2023, for the ten weeks ending May 20, 2023. Employer participated in the fact-finding interview through witness Lorie Streeter.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged for no disqualifying reason. Benefits are allowed.

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 establishing disqualifying job misconduct. *Cosper v. Iowa Dep't of Job Serv.*, 321 N.W.2d 6 (Iowa 1982). The issue is not whether the employer made a correct decision in separating claimant, but whether the claimant is entitled to unemployment insurance benefits. *Infante v. Iowa Dep't of Job Serv.*, 364 N.W.2d 262 (Iowa Ct. App. 1984). The Iowa Court of Appeals found substantial evidence of misconduct in testimony that the claimant worked slower than he was capable of working and would temporarily and briefly improve following oral reprimands. *Sellers v. Emp't Appeal Bd.*, 531 N.W.2d 645 (Iowa Ct. App. 1995). Generally, continued refusal to follow reasonable instructions constitutes misconduct. *Gilliam v. Atlantic Bottling Co.*, 453 N.W.2d 230 (Iowa Ct. App. 1990). Misconduct must be "substantial" to warrant a denial of job insurance benefits. *Newman v. Iowa Dep't of Job Serv.*, 351 N.W.2d 806 (Iowa Ct. App. 1984). Poor work performance is not misconduct in the absence of evidence of intent. *Miller v. Emp't Appeal Bd.*, 423 N.W.2d 211 (Iowa Ct. App. 1988).

The first reason employer gave for discharging claimant was for poor job performance. While poor job performance may be a reason to terminate employment, it does not constitute disqualifying job-related misconduct for unemployment benefit purposes unless it is intentional.

There is no evidence that claimant's failure in performing her job was intentional. Claimant attempted to perform the job to the best of her ability. Claimant simply consistently failed to meet their standards. As such, the employer has not proven intentional misconduct.

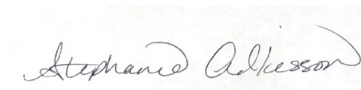
The second reason employer provided for discharging claimant was that she completed personal tasks on the clock. Claimant did spend time sending text and Facebook messages and visiting websites on the work computer. There is no policy in place prohibiting visiting non-related worksites or using social media during work hours. Employer referred to a policy prohibiting using company property for personal gain; however, it presented no evidence claimant used the computer for personal gain, but rather to pass time when she had no work to complete. The administrative law judge does not condone claimant's conduct, but it does not rise to the level of disqualifying misconduct.

An employee is entitled to fair warning that the employer will no longer tolerate certain performance and conduct. Without fair warning, an employee has no reasonable way of knowing that there are changes that need to be made in order to preserve the employment. If an employer expects an employee to conform to certain expectations or face discharge, appropriate (preferably written), detailed, and reasonable notice should be given. Training or general notice to staff about a policy is not considered a disciplinary warning. Here, the evidence presented is that claimant spent time on her personal calls during the workday. Employer maintains a policy providing for employees to take personal calls only during breaks. Employer raised the issue of claimant's personal phone calls with her and asked her to use her phone only during breaks; however, it did not issue any disciplinary action to claimant for cell phone use to place her on notice that her job was in jeopardy as a result of taking personal calls at her desk. Inasmuch as employer had not previously warned claimant about the issue leading to the separation, it has not met the burden of proof to establish that claimant acted deliberately or with recurrent negligence in violation of company policy, procedure, or prior warning.

Because claimant is eligible for benefits, the issues of overpayment of regular unemployment insurance benefits and relief of charges are moot.

DECISION:

The April 10, 2023, (reference 02) unemployment insurance decision is affirmed. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided she is otherwise eligible. The issues of overpayment of regular unemployment insurance benefits and relief of charges are moot.



Stephanie Adkisson
Administrative Law Judge

May 31, 2023
Decision Dated and Mailed

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
4th Floor – Lucas Building
Des Moines, Iowa 50319
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> or by contacting the District Court Clerk of Court <https://www.iowacourts.gov/iowa-courts/court-directory/>.

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
4th Floor – Lucas Building
Des Moines, Iowa 50319
Fax: (515)281-7191
En línea: 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 se encuentra en línea en <https://www.legis.iowa.gov/docs/code/17A.19.pdf> o comunicándose con el Tribunal de Distrito Secretario del tribunal <https://www.iowacourts.gov/iowa-courts/court-directory/>.

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.