

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

SAMANTHA J WOLFF
Claimant

PURE FISHING INC
Employer

APPEAL 17A-UI-12358-LJ-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 12/18/16
Claimant: Respondent (1)

Iowa Code § 96.5(2)a – Discharge for Misconduct
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 November 22, 2017 (reference 01) unemployment insurance decision that allowed benefits based upon a determination that claimant was discharged and the employer did not base the discharge on a current act of misconduct. The parties were properly notified of the hearing. A telephone hearing was held on December 22, 2017. The claimant, Samantha J. Wolff, participated. The employer, Pure Fishing, Inc., participated through Karla Jones, HR Manager. Employer's Exhibits 1 through 5 were received and admitted into the record without objection. 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?
Can charges to the employer's account be waived?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed full time, most recently as a flexible molding operator, from September 19, 2013, until October 30, 2017, when she was discharged. Claimant was absent from work on October 2, 3, 4, and 5. She called in and reported that she was using approved FMLA leave for those absences. Unbeknownst to claimant, the employer had hired a private investigator to follow her, as it suspected she was misusing her FMLA time. On October 4, the private investigator documented claimant visiting several stores: Fareway, Shopko, and Bomgaars. The private investigator reported back to the employer on October 5 and provided photographs of claimant visiting the stores.

When claimant returned to work on October 6, the employer interviewed claimant about her absence. Claimant reported that she had stayed home and rested while she was away from work. She also disclosed that she had gone to Fareway to get medicine. Claimant was then permitted to return to work. On October 19, Jones brought claimant in for a second interview.

At this point, Jones confronted claimant with the photographs that the private investigator took of her. Claimant admitted that she went to Shopko for medicine, as Fareway did not have what she needed. She also reported going to Bomgaars to buy dog food. Claimant was suspended at that time. The employer called claimant in on October 30 and discharged her for misusing her FMLA time. Claimant had never been warned for using her FMLA time inappropriately or otherwise misusing approved leave time.

The administrative record reflects that claimant has received unemployment benefits in the amount of \$3,066.00, since filing a claim with an effective date of December 18, 2016, and an additional date of October 29, 2017, for the seven weeks ending December 16, 2017. The administrative record also establishes that the employer did not participate in the fact-finding interview. The employer submitted documentation but did not provide a participant or rebuttal witness.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided she is otherwise eligible.

Iowa Code § 96.5(2)a provides:

An individual shall be disqualified for benefits:

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 individual shall be disqualified for benefits 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).

Iowa Admin. Code r.871-24.32(8) provides:

(8) Past acts of misconduct. While past acts and warnings can be used to determine the magnitude of a current act of misconduct, a discharge for misconduct cannot be based on such past act or acts. The termination of employment must be based on a current act.

A lapse of 11 days from the final act until discharge when claimant was notified on the fourth day that his conduct was grounds for dismissal did not make the final act a “past act.” Where an employer gives seven days’ notice to the employee that it will consider discharging him, the date of that notice is used to measure whether the act complained of is current. *Greene v. Emp’t Appeal Bd.*, 426 N.W.2d 659 (Iowa Ct. App. 1988). An unpublished decision held informally that two calendar weeks or up to ten work days from the final incident to the discharge may be considered a current act. *Milligan v. Emp’t Appeal Bd.*, No. 10-2098 (Iowa Ct. App. filed June 15, 2011). In reviewing past acts as influencing a current act of misconduct, the ALJ should look at the course of conduct in general, not whether each such past act would constitute disqualifying job misconduct in and of itself. *Attwood v. Iowa Dep’t of Job Serv.*, No. __-__, (Iowa Ct. App. filed __, 1986).

In this case, the employer had all of the information related to claimant’s alleged misconduct on October 5, 2017. Jones first spoke with claimant on October 6, and she could have confronted claimant with the photographs at that time. The employer did not adequately explain the lengthy delay between the first interview and the ultimate discharge from employment. It remains unclear why the employer waited two weeks before interviewing claimant a second time and why it waited an additional ten days after suspending claimant before discharging her. The employer has not established a current or final act of misconduct, and, without such, the history of other incidents need not be examined. Accordingly, benefits are allowed. As claimant’s separation from employment is not disqualifying, the issues of overpayment, repayment, and chargeability are moot.

DECISION:

The November 22, 2017 (reference 01) 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, repayment, and chargeability are moot.

Elizabeth A. Johnson
Administrative Law Judge

Decision Dated and Mailed

lj/rvs