

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

ANITA M VAN DORN
Claimant

VVS INC
Employer

APPEAL NO. 19A-UI-10032-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

**OC: 11/10/19
Claimant: Respondent (2)**

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

STATEMENT OF THE CASE:

The employer filed a timely appeal from the December 9, 2019, reference 02, decision that allowed benefits to the claimant provided she was otherwise eligible and that held the employer's account could be charged for benefits, based on the deputy's conclusion that the claimant was discharged on November 1, 2019 for no disqualifying reason. After due notice was issued, a hearing was held on January 15, 2020. Claimant Anita Van Dorn did not provide the Appeals Bureau with a telephone number for the hearing and did not participate. Ashley Stithem represented the employer and presented additional testimony through Molly Rowe. The administrative law judge took official notice of the Agency's record of benefits disbursed to the claimant and received Exhibits 1 through 6 and 8 through 12 into evidence. Exhibits 2 and 9 through 12 were received into evidence only with regard to the overpayment of benefits issue. The administrative law judge took official notice of the fact-finding materials for the limited purpose of determining whether the employer participated in the fact-finding interview and, if not, whether the claimant engaged in fraud or intentional misrepresentation in connection with the fact-finding interview.

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 unemployment insurance benefits.

Whether the claimant must repay 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: Anita Van Dorn was employed by VVS, Inc. as a full-time cashier at the VVS food service establishment located in Tyson production facility in Perry from September 2018 until

November 3, 2019, when the employer discharged her for the employment. The discharge occurred after Ms. Van Dorn twice failed to follow the required handwashing protocol after using the restroom. Ms. Van Dorn had been properly trained in the proper handwashing protocol. The violations occurred on October 28, 2019 and October 30, 2019. The restroom Ms. Van Dorn used in both instances was within the Tyson health services department. The handwashing sink was located outside that restroom within direct sight of the health services nurses' station. A Tyson supervisor brought the October 28 conduct to the employer's attention. After that incident, the employer discussed the matter with Ms. Van Dorn and reinforced that failure to use the handwashing sink immediately after using the restroom was a violation of public health law and the employer's policies. During that discussion, Ms. Van Dorn stated she did not feel it was necessary to wash her hands in the handwashing sink after using the restroom because she felt it was sufficient to put her hands in the soapy dish water she used to wash dishes once she returned from the restroom. A nurse in the Tyson health services department brought the final incident to the employer's attention after the nurse directly observed Ms. Van Dorn not washing her hands in the handwashing sink.

Ms. Van Dorn established an original claim for benefits that was effective November 10, 2019 and received \$1,450.00 in benefits for the weeks between November 17, 2019 and December 21, 2019. VVS, Inc. is a base period employer for purposes of Ms. Van Dorn's claim.

On December 6, 2019, an Iowa Workforce Development Benefits Bureau deputy held a fact-finding interview that addressed Ms. Van Dorn's separation from the employment. Ashley Stithem, VVS, Inc. payroll administrator represented the employer at the fact-finding interview.

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).

Continued failure to follow reasonable instructions constitutes misconduct. See *Gilliam v. Atlantic Bottling Company*, 453 N.W.2d 230 (Iowa App. 1990). An employee's failure to perform a specific task may not constitute misconduct if such failure is in good faith or for good cause. See *Woods v. Iowa Department of Job Service*, 327 N.W.2d 768, 771 (Iowa 1982). The administrative law judge must analyze situations involving alleged insubordination by evaluating the reasonableness of the employer's request in light of the circumstances, along with the worker's reason for non-compliance. See *Endicott v. Iowa Department of Job Service*, 367 N.W.2d 300 (Iowa Ct. App. 1985).

The evidence in the record establishes a discharge for misconduct in connection with the employment. The employer reasonably expected Ms. Van Dorn to follow the proper handwashing protocol after using the restroom and before returning to her duties. Ms. Van Dorn violated public health safety law and the employer's handwashing policy by unreasonably failing to wash her hands in the handwashing sink adjacent to the restroom immediately after using the restroom on October 28 and October 30, 2019. The second violation followed a day after the employer met with Ms. Van Dorn about the first violation and specifically reminded her that she needed to follow the handwashing protocol. Ms. Van Dorn's actions in both instances demonstrated an intentional and substantial disregard for the employer's interests and the interests of the Tyson employees Ms. Van Dorn served as an employee of VVS. The pattern of conduct demonstrated insubordination. Ms. Van Dorn 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. Van Dorn must meet all other eligibility requirements.

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

Ms. Van Dorn received \$1,450.00 in benefits for the weeks between November 17, 2019 and December 21, 2019, but this decision disqualifies her for those benefits. Accordingly, the benefits Ms. Van Dorn received constitute an overpayment of benefits. Because the employer participated in the fact-finding interview, Ms. Van Dorn is required to repay the overpaid benefits. The employer's account will be relieved of liability for benefits, including liability for benefits already paid.

DECISION:

The December 9, 2019, reference 02, decision is reversed. The claimant was discharged 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 claimant is overpaid \$1,450.00 in benefits for the weeks between November 17, 2019 and December 21, 2019. The claimant must repay the overpaid benefits. The employer's account will be relieved of liability for benefits, including liability for benefits already paid.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

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