

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

JANEEN BUSCH

Claimant

APPEAL 20A-UI-11452-AW-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

IOWA DERMATOLOGY CLINIC PLC

Employer

OC: 04/05/20

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

PL 116-136, Sec. 2104 – Federal Pandemic Unemployment Compensation

STATEMENT OF THE CASE:

Employer filed an appeal from the September 11, 2020 (reference 01) unemployment insurance decision that allowed benefits. The parties were properly notified of the hearing. A telephone hearing was held on November 10, 2020, at 2:00 p.m. Claimant participated with her attorney, Chip Baltimore. Employer participated through its attorney Kacy Flaherty. Matthew Schemmel, Chief Operating Officer, was a witness for employer. Employer's Exhibits A - E were admitted. Official notice was taken of the administrative record.

ISSUES:

Whether claimant's separation was a discharge for disqualifying job-related misconduct.

Whether claimant was overpaid benefits.

Whether claimant should repay those benefits and/or whether employer should be charged based upon its participation in the fact-finding interview.

Whether claimant is eligible for Federal Pandemic Unemployment Compensation.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed as a full-time Advanced Practice Nurse Practitioner from November 16, 2016 until her employment with Iowa Dermatology Clinic ended on April 1, 2020. Claimant worked Monday through Friday from 8:00 a.m. until 5:00 p.m. Claimant's direct supervisors were Matthew Schemmel, Chief Operating Officer, and Scott Green, Medical Director.

On or about March 19, 2020, employer and claimant had a conversation regarding Covid-19. Claimant expressed some concern about continuing in-person appointments due to Covid-19. On April 1, 2020, employer discharged claimant for refusing to treat patients in person and the "wholesale removal of patients" from her schedule. Claimant did not refuse to treat patients in person. Claimant did not remove all appointments from her schedule; claimant only cancelled appointments at patients' requests. Claimant utilized telehealth for appointments when

appropriate. Claimant received no warnings from employer that her conduct was unacceptable or that it may lead to termination of her employment.

REASONING AND CONCLUSIONS OF LAW:

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

Iowa Code section 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 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:

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 of misconduct has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. *Reigelsberger v. Emp't Appeal Bd.*, 500 N.W.2d 64, 66 (Iowa 1993); *accord Lee v. Emp't Appeal Bd.*, 616 N.W.2d 661, 665 (Iowa 2000). Further, 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).

Iowa Admin. Code r. 871-24.32(4) provides:

(4) Report required. The claimant's statement and employer's statement must give detailed facts as to the specific reason for the claimant's discharge. 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. In cases where a suspension or disciplinary layoff exists, the claimant is considered as discharged, and the issue of misconduct shall be resolved.

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.

Conduct asserted to be disqualifying misconduct must be current. *West v. Emp't Appeal Bd.*, 489 N.W.2d 731 (Iowa 1992); *Greene v. Emp't Appeal Bd.*, 426 N.W.2d 659 (Iowa Ct. App. 1988). Whether the act is current is measured by the time elapsing between the employer's awareness of the misconduct and the employer's notice to the employee that the conduct provides grounds for dismissal. *Id.* at 662.

A determination as to whether an employee's act is misconduct does not rest solely on the interpretation or application of the employer's policy or rule. A violation is not necessarily disqualifying misconduct even if the employer was fully within its rights to impose discipline up to or including discharge for the incident under its policy. 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). What constitutes misconduct justifying termination of an employee and what misconduct warrants denial of unemployment insurance benefits are two separate decisions. *Pierce v. Iowa Dep't of Job Serv.*, 425 N.W.2d 679 (Iowa Ct. App. 1988).

Misconduct serious enough to warrant discharge is not necessarily serious enough to warrant a denial of job insurance benefits. Such misconduct must be "substantial." *Newman v. Iowa Dep't of Job Serv.*, 351 N.W.2d 806 (Iowa Ct. App. 1984). The law limits disqualifying misconduct to substantial and willful wrongdoing or repeated carelessness or negligence that equals willful misconduct in culpability. *Lee v. Employment Appeal Bd.*, 616 N.W.2d 661 (Iowa 2000). A failure in job performance is not misconduct unless it is intentional. *Huntoon*, *supra*; *Lee v. Emp't Appeal Bd.*, 616 N.W.2d 661 (Iowa 2000).

It is the duty of the administrative law judge, as the trier of fact, to determine the credibility of witnesses, weigh the evidence and decide the facts in issue. *Arndt v. City of LeClaire*, 728 N.W.2d 389, 394-395 (Iowa 2007). The administrative law judge may believe all, part or none of any witness's testimony. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996). In assessing the credibility of witnesses, the administrative law judge should consider the evidence using his or her own observations, common sense and experience. *Id.* In determining the facts, and deciding what testimony to believe, the fact finder may consider the following factors: whether the testimony is reasonable and consistent with other evidence you believe; whether a witness has made inconsistent statements; the witness's appearance, conduct, age, intelligence, memory and knowledge of the facts; and the witness's interest in the trial, their motive, candor, bias and prejudice. *Id.*

The findings of fact show how I have resolved the disputed factual issues in this case. I assessed the credibility of the witnesses who testified during the hearing, considering the applicable factors listed above, and using my own common sense and experience. I find the employer's testimony lacked credibility due to internal inconsistencies. For example, employer testified that it terminated claimant's employment because claimant refused to see patients in person in violation of her employment agreement. Employer alleged claimant's refusal is evidenced by her "wholesale removal of patients" from her schedule on or about March 19, 2020. However, employer also testified that it did not know whether claimant had any appointments after March 19, 2020 or how many in-person appointments were cancelled. On cross-examination, employer admitted that it sent an email to nurse practitioners stating that they could provide services via telehealth at their discretion. Employer testified it did not know whether claimant had telehealth appointments with patients after March 19, 2020. Furthermore,

employer had no explanation for why it waited until April 1, 2020 to discharge claimant for conduct employer was aware of on March 19, 2020.

Claimant did not perform a “wholesale removal” of appointments on her schedule. Claimant removed appointments upon patients’ requests. Claimant had telehealth appointments with patients instead of in-person appointments. Claimant was advised by employer that this was within her discretion. There is no evidence that claimant acted in willful or wanton disregard of employer’s interest by deliberately violating or disregarding standards of behavior employer had a right to expect of her. Employer has not met its burden of proving claimant was discharged for a current act of disqualifying job-related misconduct. Claimant was discharged for no disqualifying reason. Benefits are allowed provided claimant is otherwise eligible.

Because claimant’s separation was not disqualifying, the issues of overpayment, repayment and chargeability are moot. Because claimant is eligible for regular unemployment insurance benefits, claimant is also eligible for Federal Pandemic Unemployment Compensation. See PL 116-136 §2104(B).

DECISION:

The September 11, 2020 (reference 01) unemployment insurance decision is affirmed. Claimant was discharged for no disqualifying reason. Benefits are allowed provided claimant is otherwise eligible. The issues of overpayment, repayment and chargeability are moot. Claimant is eligible for Federal Pandemic Unemployment Compensation.



Adrienne C. Williamson
Administrative Law Judge
Unemployment Insurance Appeals Bureau
Iowa Workforce Development
1000 East Grand Avenue
Des Moines, Iowa 50319-0209
Fax (515)478-3528

November 24, 2020
Decision Dated and Mailed

acw/scn