

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

**TIFFANY L HEIN**  
Claimant

**REM IOWA COMMUNITY SERVICES INC**  
Employer

**APPEAL 21A-UI-24143-AW-T**  
**ADMINISTRATIVE LAW JUDGE  
DECISION**

**OC: 09/05/21**  
**Claimant: Appellant (2)**

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

**STATEMENT OF THE CASE:**

Claimant filed an appeal from the October 20, 2021 (reference 01) unemployment insurance decision that denied benefits finding claimant was discharged from employment on September 7, 2021 for violation of a known company rule. The parties were properly notified of the hearing. A telephone hearing was held on December 22, 2021. Claimant participated. Employer participated through Jackie Boudreaux, Hearing Representative. Melissa Diarra, Program Director, and Brittany Bush, Program Director, were witnesses for employer. No exhibits were admitted.

**ISSUE:**

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

**FINDINGS OF FACT:**

Having reviewed all of the evidence in the record, the administrative law judge finds:

Claimant was employed as a full-time Program Supervisor from January 3, 2020 until her employment with REM Iowa ended on September 7, 2021. Claimant's schedule varied. Claimant's direct supervisor was Melissa Diarra, Program Director.

Employer has an employee handbook. Claimant received a copy of the handbook. The handbook includes a transportation policy which prohibits employees from leaving clients in a running vehicle. Claimant was aware of the transportation policy. Employer also has a policy that requires on-call employees to answer an on-call phone and resolve the issue presented by the caller.

On August 23, 2021, claimant was working on-call. After claimant's on-call period ended, the on-call phone rang. Claimant answered the call as there was no one else available. Claimant informed the caller that she was no longer on-call and instructed the caller to address the issue with her supervisor. Claimant intended to notify the director as well but was called into a meeting.

On August 24, 2021, employer learned of claimant's failure to properly address the on-call issue. Employer questioned claimant about the August 23, 2021 call. Claimant explained that she forgot

about the call after attending the meeting. Claimant believed the issue was resolved. Employer did not tell claimant that it would continue investigating the matter or that it may result in disciplinary action up to and including termination. Claimant had no prior warnings for violating the on-call policy.

On August 24, 2021, claimant was transporting two clients in a car and left the clients in the car while she went inside employer's office. The car was in accessory mode so the radio was playing but the engine was not running. Claimant took the key fob with her when she left the clients in the car. When claimant entered the office, employer confronted claimant about leaving the clients in the car. Claimant explained that the engine was not running and that she had the key fob with her. Employer told claimant that it did not matter and that the clients could not be left in the car. Claimant retrieved the clients from the vehicle immediately. Claimant believed the issue was resolved. Employer did not tell claimant that it would continue investigating the matter or that it may result in disciplinary action up to and including termination. Claimant had no prior warnings for violating the transportation policy.

On September 7, 2021, employer discharged claimant for various issues that occurred during her employment. Employer identified the August 23, 2021 and August 24, 2021 incidents as the final acts of misconduct leading to termination of employment. Prior to September 7, 2021, claimant did not believe that her job was in jeopardy. Claimant had prior warnings for not keeping the house clean, for not completing checklists and for not following employer's procedures when a client eloped.

#### **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).

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 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.

Employer was immediately aware of claimant's actions on August 23, 2021 and August 24, 2021. Employer asked claimant about her actions but did not notify her that it provided grounds for dismissal. Employer discharged claimant on September 7, 2021. Two weeks lapsed between employer's awareness of the misconduct and employer's notice to claimant that her conduct provided grounds for dismissal. The August 23, 2021 and August 24, 2021 incidents were no longer current acts.

Furthermore, claimant's actions do not rise to the level of disqualifying job-related misconduct. There is no evidence that claimant deliberately violated or disregarded the standards of behavior employer had a right to expect of her. Claimant had no prior warnings for the actions that led to her termination. Employer has not met its burden of proving claimant was discharged for a current act of disqualifying, job-related misconduct. Benefits are allowed provided claimant is otherwise eligible.

**DECISION:**

The October 20, 2021 (reference 01) unemployment insurance decision is reversed. Claimant was discharged for no disqualifying reason. Benefits are allowed provided claimant is otherwise eligible.



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December 30, 2021  
Decision Dated and Mailed

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