

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

68-0157 (9-06) - 3091078 - EI

**KRISTIN A CARSTENSEN**  
Claimant

**APPEAL NO: 13A-UI-12997-DT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**HAND IN HAND DAYCARE**  
Employer

**OC: 01/06/13**

**Claimant: Appellant (2)**

Section 96.5-2-a – Discharge  
Section 96.7-2-a(2) – Charges Against Employer’s Account

**STATEMENT OF THE CASE:**

Kristin A. Carstensen (claimant) appealed a representative’s November 13, 2013 decision (reference 02) that concluded she was not qualified to receive unemployment insurance benefits after a separation from employment. After hearing notices were mailed to the parties’ last-known addresses of record, a telephone hearing was held on December 16, 2013. The claimant participated in the hearing. Katie Simmons appeared on the employer’s behalf. Based on the evidence, the arguments of the parties, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

**ISSUES:**

Was the claimant discharged for work-connected misconduct? Is the employer’s account subject to charge?

**OUTCOME:**

Reversed. Benefits allowed. Employer’s account not subject to charge in current benefit year.

**FINDINGS OF FACT:**

The claimant started working for the employer on June 18, 2013. Since August 5, 2013 she worked full time as lead preschool teacher in one of the employer’s facilities. Her last day of work was October 23, 2013. The employer discharged her on that date. The reason asserted for the discharge was receiving a third write up and not completing work within the employer’s expectations.

On September 30 the employer gave the claimant the first write up for not completing lesson plans at least three weeks in advance and for negative inter-staff relations. On October 10 the employer gave the claimant a second write up for an incident where the claimant allegedly delayed a four-year-old’s request to go to the bathroom by about a half hour.

On October 23 the employer again accused the claimant of not turning in lesson plans at least three weeks in advance. The claimant had turned in lesson plans for that week at least two weeks in advance, but had been off work for the week of October 14 because of being in the hospital for a heart issue. The employer further concluded on October 23 that the claimant would not be able to meet an October 31 deadline to have an on-line curriculum with class observations completed. The claimant believed that she had sufficient documentation completed that she could have done the necessary on-line work done by October 31, even if it meant that she might work over the weekend, but the employer did not give the claimant the opportunity to attempt to satisfy the requirements by October 31, but rather gave her a third write up and then discharged her on October 23. The employer does not have a policy specifying that an employee will be discharged if they have three write-ups, and the October 10 write up did not advise the claimant that her job was in jeopardy if she had a third write-up.

The claimant established an unemployment insurance benefit year effective June 6, 2013. She reactivated the claim by filing an additional claim effective October 20, 2013.

#### **REASONING AND CONCLUSIONS OF LAW:**

A claimant is not qualified to receive unemployment insurance benefits if an employer has discharged the claimant for reasons constituting work-connected misconduct. Iowa Code § 96.5-2-a. Before a claimant can be denied unemployment insurance benefits, the employer has the burden to establish the claimant was discharged for work-connected misconduct. *Cosper v. IDJS*, 321 N.W.2d 6 (Iowa 1982). The question is not whether the employer was right to terminate the claimant's employment, but whether the claimant is entitled to unemployment insurance benefits. *Infante v. IDJS*, 364 N.W.2d 262 (Iowa App. 1984). What constitutes misconduct justifying termination of an employee and what is misconduct that warrants denial of unemployment insurance benefits are two separate matters. *Pierce v. IDJS*, 425 N.W.2d 679 (Iowa App. 1988).

In order to establish misconduct such as to disqualify a former employee from benefits an employer must establish the employee was responsible for a deliberate act or omission which was a material breach of the duties and obligations owed by the employee to the employer. 871 IAC 24.32(1)a; *Huntoon v. Iowa Department of Job Service*, 275 N.W.2d 445 (Iowa 1979); *Henry v. Iowa Department of Job Service*, 391 N.W.2d 731, 735 (Iowa App. 1986). The conduct must show a 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. 871 IAC 24.32(1)a; *Huntoon*, supra; *Henry*, supra. In contrast, 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. 871 IAC 24.32(1)a; *Huntoon*, supra; *Newman v. Iowa Department of Job Service*, 351 N.W.2d 806 (Iowa App. 1984). The gravity of the incident and the number of prior violations or prior warnings are factors considered when analyzing misconduct. The lack of a current or pertinent warning may detract from a finding of an intentional policy violation.

The reason cited by the employer for discharging the claimant is that she had been given a third write up for failing to complete work to the employer's expectations. Misconduct connotes volition. A failure in job performance is not misconduct unless it is intentional. *Huntoon*, supra.

There is no evidence the claimant intentionally failed to perform her work to the best of her abilities. The employer has not met its burden to show disqualifying misconduct. *Cosper*, supra. Based upon the evidence provided, the claimant's actions were not misconduct within the meaning of the statute, and the claimant is not disqualified from benefits.

The final issue is whether the employer's account is subject to charge. An employer's account is only chargeable if the employer is a base period employer. Iowa Code § 96.7. The base period is "the period beginning with the first day of the five completed calendar quarters immediately preceding the first day of an individual's benefit year and ending with the last day of the next to the last completed calendar quarter immediately preceding the date on which the individual filed a valid claim." Iowa Code § 96.19-3. The claimant's base period began October 1, 2011 and ended September 30, 2012. The employer did not employ the claimant during this time, and therefore the employer is not currently a base period employer and its account is not currently chargeable for benefits paid to the claimant.

**DECISION:**

The representative's November 13, 2013 decision (reference 02) is reversed. The employer did discharge the claimant but not for disqualifying reasons. The claimant is qualified to receive unemployment insurance benefits, if she is otherwise eligible. The employer's account is not subject to charge in the current benefit year.

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Lynette A. F. Donner  
Administrative Law Judge

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Decision Dated and Mailed

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