

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**JUSTIN P CERVETTI**  
Claimant

**APPEAL NO. 17A-UI-09709-JTT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**IOWA STATE ASSN OF COUNTIES**  
Employer

**OC: 08/20/17**  
**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 September 14, 2017, reference 02, decision that allowed benefits to the claimant provided he was otherwise eligible and that held the employer's account could be charged for benefits, based on the claims deputy's conclusion that the claimant was discharged on August 10, 2017 for no disqualifying reason. After due notice was issued, a hearing was held on October 18, 2017. Claimant Justin Cervetti participated. Kristi Harshbarger, General Counsel, represented the employer and presented testimony through Jeanine Scott, Andrea Jansen, William Peterson, and Brad Holtan. The administrative law judge took official notice of the Agency's record of benefits disbursed to the claimant. Exhibits A through F, B-1, H and J and Department Exhibits D-1, D-2 and D-3 were received into evidence. The administrative law judge did not receive into the hearing record, and did not consider, Exhibits G or I, which materials came to the employer's attention subsequent to Mr. Cervetti's discharge from the employment and, therefore, could not have factored in the employer's decision to end the employment.

**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 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: Justin Cervetti was employed by Iowa State Association of Counties (ISAC) as a full-time Information Technology (IT) Technician 1 from July 2016 until August 10, 2017, when William "Bill" Peterson, Executive Director discharged him from the employment. Mr. Cervetti's immediate supervisor at the start of the employment was Jeanine Scott, IT Manager. Within two or three

months of Mr. Cervetti's start date, Andrea Jansen, IT Program Manager, became responsible for assigning work to Mr. Cervetti and managing his work load. Thereafter, Ms. Jansen and Ms. Scott exercised shared supervisory authority over Mr. Cervetti's work. Mr. Cervetti's established work hours were 8:00 a.m. to 4:30 p.m. On Tuesdays, Wednesdays and Thursdays, Mr. Cervetti was required to work from ISAC's office in West Des Moines. On Mondays and Friday, Mr. Cervetti was allowed to perform his work duties from home. Mr. Cervetti's annual salary was approximately \$50,000.00.

Mr. Cervetti's primary duties involved providing IT help desk support for Iowa attorneys and support staff utilizing ProLaw, a Thomson Reuters legal case management software. Mr. Cervetti's duties also included creating virtual servers for use by participating Iowa counties and other technical projects in support of participating Iowa counties. Mr. Cervetti's duties included using SQL database management software. In connection with the application process, the employer provided Mr. Cervetti with a job description described the above duties as the duties of the position. Mr. Cervetti brought to the employment substantial IT help desk support experience. Mr. Cervetti had completed an associate of arts degree and additional coursework. Mr. Cervetti lacked a computer science degree. In connection with the application and hiring process, Mr. Cervetti expressed to Ms. Scott and another ISAC representative concern that he might not possess the level of expertise the position required. Ms. Scott recommended that Mr. Cervetti be hired for the position. Ms. Scott and Mr. Cervetti understood that Mr. Cervetti's mastery of the job duties would include a learning curve.

Mr. Cervetti's work duties included a requirement that Mr. Cervetti accurately record his work hours. This included accurately reporting the time he had spent on various work projects versus time he had spent on help desk activities. Ms. Jansen assigned projects to Mr. Cervetti via an ASANA project management program. Mr. Cervetti was required to document time spent on projects and provide project written updates through the Adana project management program and through the Everhour timekeeping system. Mr. Cervetti knew how to use and communicate through both systems, but preferred not to provide information through the Adana program. Ms. Jansen needed these updates as part of her preparation for speaking with ISACS governing board. As a full-time employee, Mr. Cervetti was expected to work a 37.5 hour work week. Mr. Cervetti was allowed an unpaid one-hour lunch break.

Prior to the time of Mr. Cervetti's first performance review in January 2017, Ms. Scott had discerned some strengths in Mr. Cervetti's work performance but a greater number of deficiencies. In January 2017, Ms. Scott completed a written performance evaluation that identified three general areas in which Mr. Cervetti needed to improve: These areas included accuracy, initiative, and dependability. In the area of dependability, Mr. Scott gave Mr. Cervetti the lowest possible performance rating of unacceptable. Ms. Scott noted in the performance evaluation that Mr. Cervetti was personable and courteous when providing phone-based IT support and that he appeared to genuinely like helping users solve their technology issues. Ms. Scott identified three areas that Mr. Cervetti needed to work on, as follows:

1. Time management – Justin struggles to meet the deadlines of his tasks
2. Following directives – Justin needs frequent prompts to work on and complete tasks as assigned
3. Initiative – Justin tends to do the minimal amount of work needed to complete a task

In the evaluation form, Ms. Scott indicated an expectation that Mr. Cervetti would meet all project deadlines going forward unless adjustment of the deadline was adjusted by Ms. Jansen and approved by Ms. Scott. Ms. Scott set forth an expectation that Mr. Cervetti would provide

accurate and timely time tracking going forward. Ms. Scott asked Ms. Jansen to prepare a statement of measurable objectives that Mr. Cervetti would have to meet within the next six months of the employment.

On February 7, 2017, Ms. Scott and Ms. Jansen met with Mr. Cervetti to present him with a written six-month performance improvement plan. The plan stated as follows:

During Justin's 6-month review on 1.26.17, there were areas that were at an unsatisfactory level based on his job description. This performance plan is being put in place to identify steps and deliverables for Justin to reach the satisfactory level in the areas of accountability, initiative, and judgment within the next six months of employment. Steps to help him succeed are as follows:

1. Utilize ASANA and Everhour daily to manage weekly/monthly tasks.
2. Prioritize tasks – specifically time spent on projects vs. support.
3. Ask for feedback in the middle of a tasks [sic] to assure that expectations are being met.

Deliverables:

1. Meet 100% of ASANA deadlines. Exceptions to due dates can be made at minimum 1 week before the due date.
2. Adhere to task time estimates in ASANA and prioritize support time based on task deadlines.
3. Assigned tasks with estimates over 6 hours, must have a touch base meeting with the assignee [the person assigning the project] half way through the task estimate.
4. Weekly status updates entered in all tasks with time estimates in ASANA.
5. Weekly updates entered in all tickets – this includes the Thomson Reuters Portal and Mojo Help Desk.
6. Enter time into Everhour on a daily basis to accurately reflect time being spent on tasks.
7. Minimum time entry in Everhour will not be below 35 hours/week except for cases of sick/vacation time being used.

Ms. Scott and/or Ms. Jansen provided Mr. Cervetti with a copy of the Six-Month Performance Plan. Mr. Cervetti elected not to read it or retain a copy for a reminder of the employer's expectations.

Mr. Cervetti's work performance did not improve in response to implementation of the Six-Month Performance Plan. After Ms. Scott reviewed Mr. Cervetti's ASANA and Everhour metrics, and after conferring with Ms. Jansen about Mr. Cervetti's work performance, Ms. Scott determined another meeting with Mr. Cervetti was necessary. Mr. Cervetti had become dissatisfied with the employment. He was dissatisfied that Ms. Jansen, rather than Ms. Scott, functioned as his primary supervisor and felt that he was missing out of mentoring he expected to receive from Ms. Scott when he accepted the employment. Ms. Scott met with Mr. Cervetti on May 10, 2017. During the meeting, Ms. Scott reviewed each of the "deliverables" expectations with Mr. Cervetti and asked him to advise whether he was meeting the "deliverables" expectations set out in the February 6 performance plan. Mr. Cervetti shared at that time that he had not read the Six-Month Performance Plan that was provided to him in February. When Ms. Scott reviewed the "deliverables" expectations with Mr. Cervetti, he advised that he believed he was meeting several of the expectations, but that he could improve his performance. Mr. Cervetti advised that he was not providing updates to Ms. Jansen regarding tasks expected to take greater than six hours because most of the tasks did not have time estimates and he preferred to wait for

Ms. Jansen to ask him for updates. Ms. Scott shared with Mr. Cervetti that his ASANA time keeping entries since the start of the year should be about 700 in total, based on the 35 hour per week expectation, but totaled only 551 hours. Ms. Scott told Mr. Cervetti that many of the tasks assigned to him through ASANA either had not target dates or were past due. Ms. Scott shared with Mr. Cervetti Ms. Jansen's concern that many of his IT help desk tickets in the Mojo software appeared to be unresolved and as much as 18 days old, with no information from Mr. Cervetti regarding the status of Mr. Cervetti's response to the user's problem. Under the circumstances, it was hard for the employer to know whether, when, or to what extent Mr. Cervetti had addressed the user's problem with the ProLaw software. Mr. Cervetti had not appropriate documented resolution of the issue, had not resolved the issue, or had erroneously generated a duplicate ticket.

During the discussion on May 10, Ms. Scott commended Mr. Cervetti for work he had performed supporting the internal servers, internal network and its users during a recent six-week period. Ms. Scott noted that Mr. Cervetti had properly documented that internal server/network support work in ASANA. In other words, Mr. Cervetti demonstrated that he was fully capable of appropriately documenting his work ASANA, but was most motivated to do so when performing preferred tasks. Ms. Scott and Mr. Cervetti discussed Mr. Cervetti's desire to move from the ProLaw IT support position to a network administrator position. Ms. Scott told Mr. Cervetti that any such move would be conditioned upon him meeting the expectations set forth in the Six-Month Performance Plan and warned him that his employment would be in jeopardy if he did not satisfy those expectations.

Mr. Cervetti's performance did not improve following the May 10 meeting. After Ms. Scott again reviewed Mr. Cervetti's ASANA and Everhour metrics, and after she spoke with Ms. Jansen regarding Mr. Cervetti's continue to meet deadlines and account for his time, Ms. Scott determined that another meeting with Mr. Cervetti was necessary. On June 21, 2017, Ms. Scott, Ms. Jansen, and Mr. Peterson met with Mr. Cervetti to discuss the lack of progress in meeting the "deliverables" set forth in the Six-Month Performance Plan. The employer had notified Mr. Cervetti of the impending meeting at least a couple days before the meeting occurred. Mr. Cervetti came to the meeting unprepared to discuss the status of assigned projects. When Mr. Peterson asked Mr. Cervetti why he was not meeting project deadlines, Mr. Cervetti stated that he did not have an explanation right then, but that asserted there were reasons for delay in completing assignment projects. Mr. Cervetti expressed frustration with having Ms. Jansen, rather than an IT manager as his immediate supervisor. Mr. Cervetti asked that the employer identify areas where the employer thought he needed for training. Mr. Cervetti expressed an interest in additional training related to SQL. Ms. Scott reminded Mr. Cervetti that he had been offered web-based training and had been asked to submit a request for other training he believed he needed to perform his duties. Mr. Cervetti asserted that he did not learn well through online training. Mr. Peterson asked Mr. Cervetti to review the performance metrics and prepare for another meeting to be scheduled during the second week of July.

After June 21, 2017, Mr. Cervetti's work performance declined. Ms. Scott noticed that Mr. Cervetti had started coming to work late, disappearing for substantial periods, and leaving early without communicating with Ms. Scott or Ms. Jansen about these changes to his work schedule. On July 13, 2017, Ms. Scott and Mr. Peterson met again with Mr. Cervetti. At the time of that meeting, Mr. Cervetti was behind on a number of projects. Due to Mr. Cervetti's lack of progress on the assigned projects, and lack of communication regarding action he had taken on the projects, ISAC could not properly serve its member counties. At the July 13, 2017 meeting, Mr. Peterson gave Mr. Cervetti the option of being discharged from the employment immediately or being discharged effective August 11, 2017 and complying with performance

expectations in the interim. On July 14, 2017, Mr. Cervetti notified Mr. Peterson that he wanted to continue in the employment until August 11. However, Mr. Cervetti's work performance subsequently declined further.

Mr. Cervetti established an original claim for unemployment insurance benefits that was effective August 20, 2017. Iowa Workforce Development set Mr. Cervetti's weekly benefit amount at \$455.00. Mr. Cervetti received \$2,275.00 in unemployment insurance benefits for the five-week period of August 20, 2017 through September 23, 2017. Mr. Cervetti received an additional \$455.00 in benefits for the week that ended October 14, 2017. The total amount of unemployment insurance benefits disbursed in connection with the claim totaled \$2,730.00 for the period of August 20, 2017 through October 14, 2017.

On September 13, 2017, an Iowa Workforce Development claims deputy held a fact-finding interview to address Mr. Cervetti's separation from the employment. Kristi Harshbarger, General Counsel, Bill Peterson, Executive Director, and Brad Holtan, Finance and Human Resources Manager, each participated in the fact-finding interview on behalf of the employer.

#### **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). When it is in a party's power to produce more direct and satisfactory evidence than is actually produced, it may fairly be inferred that the more direct evidence will expose deficiencies in that party's case. See *Crosser v. Iowa Dept. of Public Safety*, 240 N.W.2d 682 (Iowa 1976).

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).

It is the duty of the administrative law judge as the trier of fact in this case, 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 Ct. 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 believable evidence; 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 weight of the evidence in the record establishes a pattern of insubordinate conduct on the part of Mr. Cervetti that demonstrated an intentional and substantial disregard of the employer's interests. The weight of the evidence establishes that aspects of the work duties did indeed present a challenge for Mr. Cervetti in light of limitations in his skill set. For example, it is evident that the SQL-related projects presented a special challenge for Mr. Cervetti. However, other aspects of the work duties did not present similar challenges and, instead, hinged on Mr. Cervetti's cavalier approach to meeting the employer's reasonable performance

expectations. The weight of the evidence establishes that Mr. Cervetti was fully capable of tracking his time on a daily basis, but often elected not to do that. The weight of the evidence establishes that Mr. Cervetti was fully capable of providing the required project updates, but often elected not to do that. In response to the employer's attempt to identify the performance deficiencies and provide guidance to Mr. Cervetti to remedy those deficiencies, Mr. Cervetti, to a substantial degree, ignored the employer's concerns, reduced his investment in the employment, and continued on the same course of doing only what he felt like doing at the moment. It was that ongoing absence of a good faith effort on the part of Mr. Cervetti that prompted the employer to return to the same discussion repeatedly in an attempt to convey to Mr. Cervetti the seriousness of the situation. Mr. Cervetti elected instead to check out of the employment by degrees to the point that, in July, he started showing up late, disappearing during his workday, and leaving early without communicating the basis of his actions to his supervisors. At the same time, Mr. Cervetti was behind on several projects that adversely impacted the employer's operations and obligations to its member counties.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Mr. Cervetti was discharged on August 11, 2017 for misconduct in connection with the employment. Accordingly, Mr. Cervetti is disqualified for benefits until he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount. Mr. Cervetti 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 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 employer failed to participate in the initial proceeding, the employer's account will be charged for the overpaid benefits. Iowa Code § 96.3(7)(a) and (b).

Mr. Cervetti received unemployment insurance benefits, but this decision disqualifies him for those benefits. Accordingly, Mr. Cervetti has been overpaid \$2,730.00 in benefits for the period of August 20, 2017 through October 14, 2017. Because the employer participated in the fact-finding interview, Mr. Cervetti is required to repay the overpaid benefits. The employer's account shall be relieved of liability for benefits, including liability for benefits already paid to Mr. Cervetti.

**DECISION:**

The September 14, 2017, reference 02, decision is reversed. The claimant was discharged effective August 11, 2017 for misconduct in connection with the employment. The claimant is disqualified for unemployment benefits until he has worked in and paid wages for insured work equal to ten times his weekly benefit amount. The claimant must meet all other eligibility requirements. The claimant is overpaid \$2,730.00 in unemployment insurance benefits for the period of August 20, 2017 through October 14, 2017. The claimant must repay the benefits. The employer's account shall be relieved of liability for benefits, including liability for benefits already paid to the claimant.

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James E. Timberland  
Administrative Law Judge

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Decision Dated and Mailed

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