

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

TABITHA J OLSEN
Claimant

APPEAL NO. 19A-UI-08211-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

SALEM LUTHERAN HOMES
Employer

OC: 09/22/19
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 October 15, 2019, reference 01, 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 September 24, 2019 for no disqualifying reason. After due notice was issued, a hearing was held on November 7, 2019. Claimant Tabitha Olsen did not comply with the hearing notice instructions to register a telephone number for the hearing and did not participate. Deb Anthofer represented the employer and presented additional testimony through Tyler Daringer and Kelley Laswell. The administrative law judge took official notice of the Agency's record of benefits disbursed to the claimant and received Exhibits 1 through 5 into evidence. The administrative law judge took official notice of the fact-finding materials for the limited purpose of documenting the employer's participation in 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 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: Tabitha Olsen was employed by Salem Lutheran Homes as a full-time housekeeper from March 2018 until September 24, 2019, when the employer discharged her from the employment. The employer's decision to discharge Ms. Olsen from the employment followed a series of incidents wherein Ms. Olsen failed to perform her assignment duties in a satisfactory manner despite the ability to perform the duties in a satisfactory manner.

The final incident that triggered the discharge occurred on September 22, 2019. On that day, Ms. Olsen and a coworker were assigned to perform deep cleaning in a physical/occupational

therapy room. The pair failed to perform any of the deep-cleaning specific duties and instead performed only cursory cleaning. During that process, Ms. Olsen sat down, chatted with the coworker, and consumed food and drink that she had at her cleaning cart. Ms. Olsen failed to disinfect a sink and failed to mop the floor.

On August 23, 2019, Ms. Olsen avoided starting her assigned work duties for almost an hour while she assisted a coworker with the coworker's duties. The coworker's duties did not require Ms. Olsen's assistance. Under the employer's established protocol, employees were to complete their assigned duties before assisting a coworker. Ms. Olsen was aware of the protocol. When the employer discovered Ms. Olsen was not performing her assignment duties, the employer redirected Ms. Olsen and Ms. Olsen commenced performing her assigned duties. In connection with this incident, the employer warned Ms. Olsen that future similar conduct would prompt her discharge from the employment.

On July 17, 2019, the employer issued a reprimand to Ms. Olsen after Ms. Olsen skipped required deep cleaning the bathtub rooms where residents were bathed. The employer depended on the deep cleaning activities to prevent the spread of infections in the long-term care facility. The employer issued a reprimand to Ms. Olsen in connection with this incident.

On March 14, 2019, the employer issued a reprimand to Ms. Olsen after Ms. Olsen documented that she had stocked supplies when she had not stocked supplies and after the employer discovered that Ms. Olsen was not performing other assigned cleaning duties.

Ms. Olsen established a claim for benefits that was effective September 22, 2019 and received \$329.00 in benefits for the week that ended September 28, 2019. Salem Lutheran Homes is a base period employer for purposes of Ms. Olsen's unemployment insurance claim.

On October 10, 2019, an Iowa Workforce Development Benefits Bureau deputy held a fact-finding interview that addressed Ms. Olsen's separation from the employment. The employer participated in the fact-finding interview telephone call.

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).

The employer presented sufficient evidence to prove a pattern of conduct wherein Ms. Olsen knowingly and unreasonably failed to perform work duties despite being fully capable of performing the duties in a satisfactory manner. The pattern of conduct demonstrated an intentional and substantial disregard of the employer's interests in maintaining a clean and safe environment for residents and staff. Ms. Olsen 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. Olsen 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. Olsen received \$329.00 in benefits for the week that ended September 28, 2019, but this decision disqualifies her for those benefits. Accordingly, the benefits Ms. Olsen received constitute an overpayment of benefits. Because the employer participated in the fact-finding interview, Ms. Olsen 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 October 15, 2019, reference 01, decision is reversed. The claimant was discharged on September 24, 2019 for misconduct in connection with the employment. The claimant is disqualified for unemployment benefits until she has worked in and paid wages for insured work equal to 10 times her weekly benefit allowance. The claimant must meet all other eligibility requirements. The claimant is overpaid \$329.00 in benefits for the week that ended September 28, 2019. The claimant must repay the overpaid benefits. The employer's account shall be relieved of liability for benefits, including liability for benefits already paid.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/scn