

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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**JANET L CAREW**  
Claimant

**AREA SUBSTANCE ABUSE COUNCIL INC**  
Employer

**APPEAL 18A-UI-08914-DB**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**OC: 07/22/18**  
**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

**STATEMENT OF THE CASE:**

The employer/appellant filed an appeal from the August 20, 2018 (reference 01) unemployment insurance decision that allowed benefits to the claimant based upon her discharge from employment. The parties were properly notified of the hearing. An in-person hearing was held on November 1, 2018 in Cedar Rapids, Iowa. The claimant, Janet L. Carew, participated personally and was represented by attorney Alisa Diehl. The employer, Area Substance Abuse Council Inc., participated through witnesses Samantha Rogers, Shar Jones, and Mannyane Muzo. Gayle Kelley was in attendance at the hearing on behalf of the employer. Employer's Exhibits 1 – 3 were admitted. The administrative law judge took official notice of the claimant's unemployment insurance benefits records including the fact-finding documents.

**ISSUES:**

Was the claimant discharged for disqualifying job-related misconduct?  
Has the claimant been overpaid any unemployment insurance benefits, and if so, can the repayment of those benefits to the agency be waived?  
Can any charges to the employer's account be waived?

**FINDINGS OF FACT:**

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

Claimant was employed full-time as a patient support staff worker from June 30, 2014, until her employment ended on July 18, 2018. Her last day physically worked on the job was July 18, 2018. Claimant's direct supervisor was Mannyane Muzo. This employer operates an in-patient rehabilitation facility for women and their children. Claimant's job duties included helping patients and their children with medications, doctor appointments, daily living care, transportation, and any other support that patients may have while they reside at the facility. Claimant's job duties did not involve dispensing medication to patients or their children; rather, the claimant was responsible for observing the patient dispense their own medication (or

medication to their children) and properly documenting the date, time, patient name, type and dose of medication taken. The facility does not have a license to administer medication.

Claimant was discharged due to a final incident that occurred on July 17, 2018. The employer does have a written policy providing that employees should be respectful of each other in the workplace.

On July 17, 2018, claimant was working with a co-worker named Carrie. Claimant was responsible for adult patients and Carrie worked as a childcare teacher. In the morning, Carrie had sat in a chair that had been designated for another co-worker named Angie. This specific chair and stool had been arranged for Angie due to her disability. Angie became upset and began crying when Carrie would not move out of her chair. Claimant asked Carrie to move to a different seat and she refused. Claimant reported Carrie's behavior to Shar Jones, who is the Director of Program Support Services. Carrie then told claimant, "you didn't have to go tell the director about me" in an angry tone of voice.

Later in the day, claimant had agreed to pick up a patient from an area off-site. The employer's van is typically used to transport patients. It is part of claimant's job duties to transport patients when the driver is not available. Claimant attempted to go pick up a patient; however, the employer's van was not available for use. Claimant was unable to use her own vehicle for transportation. Claimant contacted Carol, who is the apartment coordinator. Carol told claimant that she was coming to the apartment. When Carol arrived, she stated that she was not going to transport the patient. By this time, several minutes had passed and the patient called to inquire when someone would be there. Claimant told the patient that she was arranging for someone to pick up and claimant explained to the patient that the van was unavailable and the claimant was unable to use her personal car for transportation. After the claimant hung up the telephone call, claimant asked Carrie if she drove to work that day and was able to help out by going to pick up the patient. Carrie took this comment as an insult because Carrie had a broken foot. Claimant never told Carrie "shut up". No other patients were in the area to overhear this conversation between Carrie and claimant. No profane language was used. No threats of violence were made.

Claimant was discharged from employment on July 18, 2018. Claimant was told that she was being discharged due to medication errors. The most recent alleged medication error by the employer was on May 29, 2018, when claimant failed to properly document the time a patient took Benadryl. Ms. Muzo gave claimant a verbal coaching for this incident and instructed her about the proper procedure in documenting medications that patients have taken. Claimant had also received a previous verbal warning on March 18, 2018, regarding documentation errors and a written warning regarding absenteeism on May 9, 2018.

Claimant's administrative records establish that she has received \$4,308.00 in unemployment insurance benefits since filing her claim with an effective date of July 22, 2018 and October 27, 2018. The employer did participate in the fact-finding interview by providing information regarding claimant's discharge from employment.

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

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

As a preliminary matter, the administrative law judge finds that the Claimant did not quit. Claimant was discharged from employment.

Iowa Code § 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 individual shall be disqualified for benefits 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).

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.

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). 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). When based on carelessness, the carelessness must actually indicate a "wrongful intent" to be disqualifying in nature. *Id.* Negligence does not constitute misconduct unless recurrent in nature; a single act is not disqualifying unless indicative of a deliberate disregard of the employer's interests. *Henry v. Iowa Dep't of Job Serv.*, 391 N.W.2d 731 (Iowa Ct. App. 1986).

Further, a claimant cannot be discharged for a past act of misconduct. 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.

The purpose of this rule is to assure that an employer does not save up acts of misconduct and spring them on an employee when an independent desire to terminate arises. For example, an employer may not convert a lay off into a termination for misconduct by relying on past acts. *Milligan v. EAB*, 802 N.W.2d 238 (Table)(Iowa App. June 15, 2011).

The decision in this case rests, at least in part, upon the credibility of the parties. 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 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.* I have carefully weighed the credibility of the witnesses and the reliability of the evidence considering the applicable factors listed above. I find that the claimant's testimony regarding the events that occurred with Carrie on July 17, 2018 is more credible than Exhibit 1. Exhibit 1 includes several generalities rather than specific facts regarding the encounter, in comparison to the claimant's detailed testimony.

The disagreement between co-workers on July 17, 2018 does not rise to the level of misconduct. There was no profane language or threats of violence. The encounter did not occur in front of clients. Claimant was not disrespectful towards another co-worker; rather, she simply asked Carrie if she could help with a job task. This is not job-related misconduct.

Further, any alleged medication errors are too remote to be considered a current act of misconduct. As such, the employer has failed to meet its burden of proof in establishing a current act of disqualifying job-related misconduct. Benefits are allowed, provided claimant is otherwise eligible. Because benefits are allowed, the issue of overpayment is moot. The employer's account may be charged for benefits paid.

**DECISION:**

The August 20, 2018 (reference 01) unemployment insurance decision is affirmed. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided claimant is otherwise eligible.

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Dawn Boucher  
Administrative Law Judge

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Decision Dated and Mailed

db/scn