

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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**MICHELLE R SCHMITZ**  
Claimant

**DEERE & COMPANY**  
Employer

**APPEAL 18A-UI-05306-NM-T**  
**ADMINISTRATIVE LAW JUDGE  
DECISION**

**OC: 04/15/18**  
**Claimant: Respondent (1)**

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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 filed an appeal from the May 2, 2018, (reference 01) unemployment insurance decision that allowed benefits. The parties were properly notified of the hearing. A telephone hearing was held on May 25, 2018. The claimant participated and testified. The employer participated through labor relations representative Michael Marquart.

**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 laborer from November 6, 2017, until this employment ended on April 13, 2018, when she was discharged.

At the time of her orientation claimant was trained on the employer's policy prohibiting cell phone usage anywhere but the break room. On January 11, 2018, claimant was in a morning huddle and had her cell phone out. Claimant was asked by a supervisor to put her phone away, which she did. Claimant testified several other people were also on their phones, but she was singled out, as she was still a probationary employee. Nothing further was said about the incident to claimant until her 50 day review, when she was told the incident was noted on her probationary card.

Marquart testified, on March 22, 2018, claimant's supervisor heard music coming from her hat and when claimant took her hat off, it was discovered she was listening to music on her cell phone. The incident was reported by the supervisor to wage administration. After several communications back and forth between wage administration, claimant's supervisors, and labor relations, the decision was made to discharge her from employment for violating the cell phone policy. Claimant was notified of this decision on April 13, 2018.

Claimant testified she was not using her cell phone on March 22, but that her supervisor had fabricated the entire incident. According to claimant her supervisor was retaliating against her for rebuffing his romantic advances, challenging him on some of his decision making, and reporting to another supervisor that she had not received training in a particular area. Claimant's acknowledged the January 11 incident with her phone, but testified at no point in time did anyone advised her that further incidents would lead to her termination. Claimant testified she had no idea her job was in jeopardy until the time of her termination meeting.

The claimant filed a new claim for unemployment insurance benefits with an effective date of May 2, 2018. The claimant filed for and received a total of \$2,160.00 in unemployment insurance benefits for the weeks between April 15 and May 19, 2018. Both the employer and the claimant participated in a fact finding interview regarding the separation on May 1, 2018. The fact finder determined claimant qualified for benefits.

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

For the reasons that follow, the administrative law judge concludes claimant was discharged from employment for no disqualifying reason.

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 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.

871 IAC 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 Department of Job Service*, 275 N.W.2d 445, 448 (Iowa 1979).

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). Misconduct must be "substantial" to warrant a denial of job insurance benefits. *Newman v. Iowa Dep't of Job Serv.*, 351 N.W.2d 806 (Iowa Ct. App. 1984).

In an at-will employment environment an employer may discharge an employee for any number of reasons or no reason at all if it is not contrary to public policy, but if it fails to meet its burden of proof to establish job related misconduct as the reason for the separation, it incurs potential liability for unemployment insurance benefits related to that separation. 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.

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.

A lapse of 11 days from the final act until discharge when claimant was notified on the fourth day that his conduct was grounds for dismissal did not make the final act a "past act." Where an employer gives seven days' notice to the employee that it will consider discharging him, the date of that notice is used to measure whether the act complained of is current. *Greene v. Emp't Appeal Bd.*, 426 N.W.2d 659 (Iowa Ct. App. 1988). An unpublished decision held informally that two calendar weeks or up to ten work days from the final incident to the discharge may be considered a current act. *Milligan v. Emp't Appeal Bd.*, No. 10-2098 (Iowa Ct. App. filed June 15, 2011). In reviewing past acts as influencing a current act of misconduct, the ALJ should look at the course of conduct in general, not whether each such past act would constitute disqualifying job misconduct in and of itself. *Attwood v. Iowa Dep't of Job Serv.*, No. \_\_\_\_, (Iowa Ct. App. filed \_\_\_\_, 1986).

The fact that the employer knew about the issue on March 22, 2018, but did not confront or otherwise notify claimant she was the subject of an investigation that may result in disciplinary action until April 13, 2018, approximately three weeks later, indicates the employer has not established a current or final act of misconduct. Furthermore, the employer failed to establish misconduct even were it current.

The conduct for which claimant was discharged, if it occurred as reported by the employer, was merely an isolated incident of poor judgment. On January 11, 2018 claimant had been asked to put her cell phone away. Claimant was told during her 50 day review that the incident had been noted on her probation card, but was not formally disciplined or advised that further incidents could lead to termination. 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. Inasmuch as employer had not previously warned claimant about the issue leading to the separation, it has not met the burden of proof to establish that claimant acted deliberately or with recurrent negligence in violation of company policy, procedure, or prior warning. Accordingly, benefits are allowed. As benefits are allowed, the issues of overpayment and participation are moot.

**DECISION:**

The May 2, 2018, (reference 01) unemployment insurance decision is affirmed. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided she is otherwise eligible. Any benefits claimed and withheld on this basis shall be paid. The issues of overpayment and participation are moot.

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Nicole Merrill  
Administrative Law Judge

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Decision Dated and Mailed

nm/rvs