

**IOWA DEPARTMENT OF INSPECTIONS AND APPEALS
ADMINISTRATIVE HEARINGS DIVISION, UI APPEALS BUREAU**

LISA J SMITH
Claimant

ACCESSIBLE MEDICAL SERVICES INC
Employer

APPEAL NO. 22A-UI-15114-JT-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 06/05/22
Claimant: Respondent (1)

Iowa Code Section 96.5(2)(a) – Discharge

STATEMENT OF THE CASE:

On July 15, 2022, the employer filed a timely appeal from the July 6, 2022 (reference 02) decision that allowed benefits to the claimant, provided the claimant met all other eligibility requirements, and that held the employer's account could be charged for benefits, based on the deputy's conclusion that the claimant was discharged on May 19, 2022 for no disqualifying reason. After due notice was issued, a hearing was held on August 22, 2022. Lisa Smith (claimant) did not comply with the hearing notice instructions to call the designated toll-free number at the time of the hearing and did not participate. Marianne Trotter represented the employer. The administrative law judge took official notice of the Agency's record of benefits disbursed to the claimant and received Exhibits 1, the online appeal, 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.

ISSUE:

Whether the claimant was discharged for misconduct in connection with the employment,

FINDINGS OF FACT:

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

Accessible Medical Services, Inc. is a temporary staffing agency that provides temporary nurses, nursing assistants, and health aides to healthcare facilities. Lisa Smith (claimant) was employed by Accessible Medical Services, Inc. from 2009 until May 19, 2022, when Marianne Trotter, owner and President, discharged her from the employment. During the last three years of the employment, the claimant worked in the employer's West Des Moines office in administrative duties.

The claimant became the full-time, salaried office manager for the West Des Moines office effective September 1, 2021. The claimant's scheduled work hours were 8:00 a.m. to 4:30 p.m., with a 30-minute lunch. The claimant's duties as office manager included supervising two staffing coordinators, scheduling and supervising field staff, initiating and maintaining appropriate contact with staff, and maintaining appropriate contact with clients. The claimant's

duties included checking the payroll reports prepared by one of the staffing coordinators and calculating office personnel bonuses, including her own bonus, prior to forwarding the payroll information to the employer's third-party payroll processor. During most of the claimant's time in the office manager position, Ms. Trotter functioned as the claimant's immediate supervisor. About two months before the claimant's discharge, the employer hired an operations director, P.J. Wesson, who then became the claimant's supervisor. Ms. Trotter and Ms. Wesson were both located outside Iowa.

The employer's decision to discharge the claimant was based on sundry concerns that arose at different times during the claimant's tenure in the office manager position. The employer decided to discharge the claimant from the employment after the employer concluded the claimant was padding/inflating her bonus. The claimant was entitled to a bonus with each 100 hours of business booked or if an employee responded outside the claimant's work hours to accepted a temporary work assignment. The employer alleges that sometime during the last two weeks of the employment one of the staffing coordinators shared a text message showing an employee had accepted an assignment during the claimant's work hours, but that the claimant had documented the assignment as accepted outside the claimant's work hours so it could be factored in the claimant's bonus. The employer asserts the text message is preserved on an office phone. The employer did not provide the text message as evidence for the appeal hearing. Prior to this alleged padded/inflated bonus concern, the employer suspected the claimant might be padding/inflating her bonus, but did not investigate and did not address the concern with the claimant.

When Ms. Trotter arrived at the West Des Moines office on May 19, 2022 for the purpose of discharging the claimant from the employment, she observed the claimant had the light in her office turned off. Ms. Trotter turned the light on and asked the claimant why the light was off. The claimant replied that the light made it too warm in the office. One or more staffing coordinators alleged to the employer that the claimant was in the habit of being in her office with the light off.

The employer alleges that the claimant was not appropriately supervising the staffing coordinators and that the staffing coordinators had to take affirmative steps to enlist the claimant to perform her assigned duties. The employer does not have dates or details. The staffing coordinators continue with the employer.

The employer alleges that Ms. Wesson commenced engaging with the claimant on a daily basis to establish a daily list of duties to be performed. The employer alleges the claimant did not appropriately follow through. The employer lacks dates and details.

The employer references additional concerns early in the claimant's tenure as office manager. The employer was concerned in September 2021 when the employer learned the claimant was assisting a person with home-based dialysis during the claimant's lunch break. The employer was concerned in part because the claimant was not a licensed nurse. The employer was also concerned the assistance provided during the claimant's lunch break might expose the employer to liability, even though the assistance was not related to the employment. The claimant ended the arrangement when the employer expressed concern. The employer was concerned in October 2021, when the employer contacted a client about an issue and the client asserted the client had sent an email to the claimant about the issue. The employer asserts the employer found several client emails the claimant failed to open or respond to. The employer lacks dates and details regarding these additional emails.

The employer considered allegations, made by one or more staffing coordinators, that the claimant spent hours on her office computer studying for her nursing board exams. The employer did investigate and acknowledges the hearsay, unsubstantiated nature of the allegations.

In November 2021, the employer spoke to the claimant about the need to work her scheduled hours and to minimize late arrivals, early departures, and absences to attend to non-work related matters. The employer acknowledges the claimant amended her conduct after the discussion.

Prior to discharging the claimant from the employment, the employer did not issue any discipline and did not advise the claimant her employment was in jeopardy. The employer discharged the claimant after the employer concluded it was not working out to have the claimant in office manager position.

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 Iowa Admin. Code r.871 -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 evidence in the record establishes a discharge for no disqualifying reasons. The employer presented insufficient evidence to substantiate the various allegations of misconduct. The employer elected not to present the text message correspondence that purportedly documented a bonus padding/inflating concern that triggered the discharge. The employer elected not to present testimony from the staff member who purportedly brought the matter to the employer's attention. The employer presented insufficient evidence to substantiate the employer's earlier suspicions the claimant might be padding/inflating her bonus information. The lack of substantiation was an issue throughout the employer's testimony and in connection with each of the allegations. The employer alleges the claimant failed to supervise, but was unable to provide dates or details and elected not to present testimony from the claimant's subordinates. The employer alleges the claimant failed to follow through in connection with daily oversight from Ms. Wesson, but provided no dates or details and no testimony from Ms. Wesson. The evidence establishes a number of employer concerns, but fails to rise to the level of proof by a preponderance of the evidence of willful and/or wanton disregard of the employer's interests. Accordingly, the claimant is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged for benefits.

DECISION:

The July 6, 2022 (reference 02) decision is affirmed. The claimant was discharged for no disqualifying reason. The claimant is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged.

A handwritten signature in black ink that reads "James E. Timberland". The signature is written in a cursive style and is positioned above a horizontal line.

James E. Timberland
Administrative Law Judge

September 30, 2022
Decision Dated and Mailed

ar

APPEAL RIGHTS. If you disagree with the decision, you or any interested party may:

1. Appeal to the Employment Appeal Board within fifteen (15) days of the date under the judge's signature by submitting a written appeal via mail, fax, or online to:

**Employment Appeal Board
4th Floor – Lucas Building
Des Moines, Iowa 50319
Fax: (515)281-7191
Online: eab.iowa.gov**

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

AN APPEAL TO THE BOARD SHALL STATE CLEARLY:

- 1) The name, address, and social security number of the claimant.
- 2) A reference to the decision from which the appeal is taken.
- 3) That an appeal from such decision is being made and such appeal is signed.
- 4) The grounds upon which such appeal is based.

An Employment Appeal Board decision is final agency action. If a party disagrees with the Employment Appeal Board decision, they may then file a petition for judicial review in district court.

2. If no one files an appeal of the judge's decision with the Employment Appeal Board within fifteen (15) days, the decision becomes final agency action, and you have the option to file a petition for judicial review in District Court within thirty (30) days after the decision becomes final. Additional information on how to file a petition can be found at Iowa Code §17A.19, which is online at <https://www.legis.iowa.gov/docs/code/17A.19.pdf>.

Note to Parties: YOU MAY REPRESENT yourself in the appeal or obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds.

Note to Claimant: It is important that you file your weekly claim as directed, while this appeal is pending, to protect your continuing right to benefits.

SERVICE INFORMATION:

A true and correct copy of this decision was mailed to each of the parties listed.

DERECHOS DE APELACIÓN. Si no está de acuerdo con la decisión, usted o cualquier parte interesada puede:

1. Apelar a la Junta de Apelaciones de Empleo dentro de los quince (15) días de la fecha bajo la firma del juez presentando una apelación por escrito por correo, fax o en línea a:

**Employment Appeal Board
4th Floor – Lucas Building
Des Moines, Iowa 50319
Fax: (515)281-7191
En línea: eab.iowa.gov**

El período de apelación se extenderá hasta el siguiente día hábil si el último día para apelar cae en fin de semana o día feriado legal.

UNA APELACIÓN A LA JUNTA DEBE ESTABLECER CLARAMENTE:

- 1) El nombre, dirección y número de seguro social del reclamante.
- 2) Una referencia a la decisión de la que se toma la apelación.
- 3) Que se interponga recurso de apelación contra tal decisión y se firme dicho recurso.
- 4) Los fundamentos en que se funda dicho recurso.

Una decisión de la Junta de Apelaciones de Empleo es una acción final de la agencia. Si una de las partes no está de acuerdo con la decisión de la Junta de Apelación de Empleo, puede presentar una petición de revisión judicial en el tribunal de distrito.

2. Si nadie presenta una apelación de la decisión del juez ante la Junta de Apelaciones Laborales dentro de los quince (15) días, la decisión se convierte en acción final de la agencia y usted tiene la opción de presentar una petición de revisión judicial en el Tribunal de Distrito dentro de los treinta (30) días después de que la decisión adquiriera firmeza. Puede encontrar información adicional sobre cómo presentar una petición en el Código de Iowa §17A.19, que está en línea en <https://www.legis.iowa.gov/docs/code/17A.19.pdf>.

Nota para las partes: USTED PUEDE REPRESENTARSE en la apelación u obtener un abogado u otra parte interesada para que lo haga, siempre que no haya gastos para Workforce Development. Si desea ser representado por un abogado, puede obtener los servicios de un abogado privado o uno cuyos servicios se paguen con fondos públicos.

Nota para el reclamante: es importante que presente su reclamo semanal según las instrucciones, mientras esta apelación está pendiente, para proteger su derecho continuo a los beneficios.

SERVICIO DE INFORMACIÓN:

Se envió por correo una copia fiel y correcta de esta decisión a cada una de las partes enumeradas.