

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

KEVIN E POSEKANY
Claimant

**SIXTH JUDICIAL DISTRICT DEPARTMENT
OF CORRECTIONS**
Employer

APPEAL 20A-UI-01685-JC-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 02/02/20
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, Sixth Judicial District Department of Corrections, filed an appeal from the February 19, 2020 (reference 01) Iowa Workforce Development (“IWD”) unemployment insurance decision that allowed benefits. The parties were properly notified about the hearing. A telephone hearing was held on March 12, 2020. The claimant, Kevin E. Posekany, participated personally. Lynne Browkaw attended as an observer on behalf of the claimant and did not testify. The employer participated through Trenton Kilpatrick. Michelle Azevedo and Bruce Vander Sanden testified for the employer.

The administrative law judge took official notice of the administrative records including the fact-finding documents. Claimant Exhibits A-C and Employer Exhibits 1-7 were admitted into evidence. Based on the evidence, the arguments presented, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

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: The claimant was employed full-time as a Division Manager and was separated from employment on February 5, 2020, when he was discharged. The employer stated he violated rules related to employee conduct, honest and attentiveness to duty, the district policy of equal employment opportunity and affirmative action, communication and discrimination (Employer Exhibits 1, 2). At the hearing, the employer stated the claimant was discharged because he allowed sexually harassing comments and was dishonest during an investigation (Azevedo testimony).

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed full-time as a Division Manager and was separated from employment on February 5, 2020, when he was discharged. The employer stated he violated rules related to employee conduct, honest and attentiveness to duty, the district policy of equal employment opportunity and affirmative action, communication and discrimination (Employer Exhibit 1). At the hearing, the employer stated the claimant was discharged because he allowed sexually harassing comments and was dishonest during an investigation (Azevedo testimony).

The claimant in his role was responsible for managing employee conduct, subordinate employees and even a human resources officer. He was aware of the employer rules and procedures. This included an expectation that employees were honest and did not withhold information related to any investigation (Employer Exhibit 4), management being responsible for communicating and working with employees on workplace issues (Employer Exhibit 5), and that the director has the "ultimate responsibility for the overall administration of the Equal Employment Opportunity/Affirmative Action Program which (Employer Exhibit 7).

The employer reported the claimant had been previously counseled on the importance of acting on workplace issues in February 2019, by way of his performance review. The claimant was sent to a training class called "crucial conversations" in response. The performance review was not furnished for the hearing. No evidence was presented that the claimant was formally disciplined or on a performance improvement plan before discharge.

When an employee resigned in early January 2020, he raised issues about the claimant. Namely, he stated the claimant had not treated him fairly, and that inappropriate comments were made by another coworker in front of the claimant, who had not responded or reprimanded the employee. The complaints of the departing employee initiated an investigation by the employer. The employer interviewed five employees including the claimant as part of the investigation. Only Ms. Azevedo and the claimant participated in the hearing. No written statements, interviews or investigative reports by the employer were provided for the hearing.

The claimant was questioned about a single comment made by a male coworker to him and a female in May 2019, in which a male coworker commented the claimant and the female coworker "acted like a married couple" and insinuated a personal relationship between him and the coworker. It was alleged the female employee reportedly asked the claimant to address or respond to the comment and he would not. Originally, the claimant denied the comment was made before changing his response to remembering it had been made and he immediately addressed it as inappropriate on the spot with the coworker, in the presence of the female employee. He denied being asked three times to address it by the female employee, which is what the departing male coworker told the employer. The claimant believed it was the departing coworker who actually made the inappropriate comment, not another male coworker. The female coworker in question did not attend the hearing or provide a written statement in lieu of participation.

The claimant was also questioned about his handling of conflict between the female coworker and Ms. Azavedo, which involved one of their spouses flipping off the other employee in a parking lot. The employer had reported the female coworker had complained of a toxic environment and cried, and the claimant responded that they didn't get along, but that it didn't interfere with work getting done.

The third issue was whether the claimant was truthful about favoritism towards a male coworker that had less seniority than the departing male coworker. The claimant at first denied discussing promoting the less senior coworker before changing his response.

The claimant stated he was blindsided by the interview, and his memory was not fresh regarding the incident in May 2019. The employer asserted the claimant should have had coaching notes or complaint notes regarding the first and second issues. The claimant didn't believe the incidents referenced by the employer warranted an investigation, constituted sexual harassment or required written documentation. He was subsequently discharged.

The administrative record reflects that claimant has received unemployment benefits in the amount of \$2,590.00, since filing a claim with an effective date of February 2, 2020. The administrative record also establishes that the employer did participate in the fact-finding interview or make a witness with direct knowledge available for rebuttal. Bruce Vander Sanden attended and the employer supplemented participation with documentation.

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.

Iowa law disqualifies individuals who are discharged from employment for misconduct from receiving unemployment insurance benefits. Iowa Code § 96.5(2)a. They remain disqualified until such time as they requalify for benefits by working and earning insured wages ten times their weekly benefit amount. *Id.*

Iowa Administrative Code rule 871-24.32(1)a provides:

"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).

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. The employer has the burden of proof in establishing disqualifying job misconduct. *Cosper v. Iowa Department of Job Service*, 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. IDJS*, 364 N.W.2d 262 (Iowa 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. IDJS*, 425 N.W.2d 679 (Iowa 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 Department of Job Service*, 351 N.W.2d 806 (Iowa App. 1984). Failure in job performance due to inability or incapacity is not considered misconduct because the actions were not volitional. *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.

Honesty is a reasonable, commonly accepted duty owed to the employer, and certainly as a member of upper management, the claimant's honest and integrity were paramount to his job duties. Based on the evidence presented, the administrative law judge is not persuaded the claimant was dishonest, misleading or purposefully omitted information when being interviewed in January 2020. In this case, a departing (possibly disgruntled) employee complained to the employer as he was leaving about various matters. It cannot be ignored that the employees involved in the “sexual harassment” comment or interpersonal conflict were not the ones to bring up the issues, which occurred approximately eight months prior, or why he, the departing employee had not brought them up sooner.

The administrative law judge is also persuaded the claimant's on-the-spot handling of the “married couple” comment in May 2019 was appropriate, given the circumstances. The claimant's explanations for the other issues raised were reasonable, given his position and discretion to handle employee matters as he saw fit. The evidence provided did not support that the claimant willfully refused to investigate issues of bullying or sexual harassment in the workplace, or that even such issues actually existed. Further, the administrative law judge is not persuaded the claimant purposefully misled the employer when being questioned, but that he legitimately did not remember the details of a single, offhand comment made months prior.

Cognizant that he as a leader could have been more proactive in documentation, the administrative law judge is not persuaded any of the issues raised by the employer at the hearing would have warranted the claimant needing to document. Further, the employer stated it discharged the claimant for dishonesty, not a lack of documentation. In analyzing a claimant's conduct for the purposes of unemployment insurance benefit eligibility, and whether a claimant's actions are misconduct, 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).

In essence, this case hinges on what actually happened in the three incidents reported by the employer, and then whether the claimant's explanation about those incidents was truthful, when questioned. Based on the evidence presented, the employer failed to establish what actually happened or likely happened. It presented no written statements or witnesses who were involved in the three scenarios, except Ms. Azevedo.

Notably missing from the hearing was the female coworker who was involved with two of the three issues raised in the interview by the employer. The issues involving her had been reported through another coworker to the employer. It is unclear why the employer did not present her testimony, either at the hearing or through a statement, to support that she had

been crying in the workplace or repeatedly asked the claimant to address possible sexual harassment. Reasonably, her testimony would have been firsthand testimony to refute the claimant's recollection of events that occurred, and then whether he was truthful in the responses given when questioned about the circumstances. In contrast, the claimant appeared personally, provided sworn testimony, answered questions, and subjected himself to cross-examination. In the absence of any other evidence of equal weight either explaining or contradicting the claimant's testimony, it is held that the weight of evidence is established in favor of the claimant. The employer has failed to furnish sufficient and available evidence to corroborate its allegation that the claimant was dishonest.

The question before the administrative law judge in this case is not whether the employer has the right to discharge this employee, but whether the claimant's discharge is disqualifying under the provisions of the Iowa Employment Security Law. While the decision to terminate the claimant may have been a sound decision from a management viewpoint, for the above stated reasons, the administrative law judge concludes that the employer has not sustained its burden of proof in establishing that the claimant's discharge was due to a final or current act of job related misconduct. Accordingly, benefits are allowed provided the claimant is otherwise eligible.

Because the claimant is eligible for benefits, the issues of overpayment and relief of charges are moot.

The parties are reminded that under Iowa Code § 96.6-4, a finding of fact or law, judgment, conclusion, or final order made in an unemployment insurance proceeding is binding only on the parties in this proceeding and is not binding in any other agency or judicial proceeding. This provision makes clear that unemployment findings and conclusions are only binding on unemployment issues, and have no effect otherwise.

DECISION:

The unemployment insurance decision dated February 19, 2020, (reference 01) is affirmed. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided he is otherwise eligible.



Jennifer L. Beckman
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March 25, 2020
Decision Dated and Mailed

jlb/scn