

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

DARBY D EIBEN-PROKOP
Claimant

APPEAL 21A-UI-18615-CS-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

ACCESS 2 INDEPENDENCE OF THE EAST
Employer

OC: 10/04/20
Claimant: Appellant (2)

Iowa Code §96.5(2)a - Discharge/Misconduct
Iowa Code §96.5(1) - Voluntary Quit

STATEMENT OF THE CASE:

On August 23, 2021, the claimant/appellant filed an appeal from the August 16, 2021, (reference 07) unemployment insurance decision that disallowed benefits based on claimant being discharged on for failure to follow instructions in the performance of her job. The parties were properly notified about the hearing. A telephone hearing was held on October 14, 2021. Claimant participated at the hearing. Employer participated through Sarah Martinez.

ISSUE:

Was the separation a discharge for job-related misconduct?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant began working for employer on November 14, 2019. Claimant last worked as a full-time Independent Living Specialist. Claimant was separated from employment on October 5, 2020, when he was terminated.

When claimant began his employment he was put on a 90-day probationary period. The employer was concerned about the claimant's performance during the probationary period but they continued his employment. Claimant's performance did not improve and on May 5, 2020, claimant was put on a Performance Work Plan. The plan was implemented with the goal of bringing claimant's work performance up to a level that would meet the employer's satisfaction. The Performance Work Plan had goals that claimant was expected to meet.

During this time the employer also had issues with the claimant's attendance. The claimant missed meetings that he was scheduled to meet with clients. Additionally the claimant would not follow the employer's attendance policy when he would need time off due to being ill. The employer expected employees to give them at least two weeks' notice when they needed time off and if an employee was ill they were expected to call in before their shift. The claimant acknowledges that he knew about the policy. On March 31, 2020, claimant was scheduled to

begin his shift at 8:00 a.m. and did not notify the employer that he was ill until 1:46 p.m. In August the claimant was ill and he did not call in and request paid time off until 1:13 p.m.

On October 5, 2020, claimant was notified that he was being terminated because of his performance and his attendance.

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).

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.

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 cannot be based on such past act or acts. The termination of employment must be based on a current act.

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. 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 the discharge of an employee is not necessarily serious enough to warrant a denial of benefits." *Lee v. Employment Appeal Bd.*, 616 N.W.2d 661, 665 (Iowa 2000).

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.

In this case the employer has not established that the claimant's termination was based on a current act of missing work due to attendance. The employer did not provide a specific date of the day that claimant called in late in August. Additionally the day that claimant missed in August was over a month prior to his termination. Denial of unemployment benefits due to job-related misconduct must be based on a current act. The employer had not met its burden of proof to establish that claimant's absences would disqualify him from unemployment benefits.

Next it must be determined if claimant's job performance is considered misconduct that disqualifies him from unemployment benefits.

Iowa Admin. Code r. 871-24.32(5) provides:

(5) *Trial period.* A dismissal, because of being physically unable to do the work, being not capable of doing the work assigned, not meeting the employer's

standards, or having been hired on a trial period of employment and not being able to do the work shall not be issues of misconduct.

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). Where an individual is discharged due to a failure in job performance, proof of that individual's ability to do the job is required to justify disqualification, rather than accepting the employer's subjective view. To do so is to impermissibly shift the burden of proof to the claimant. *Kelly v. Iowa Dep't of Job Serv.*, 386 N.W.2d 552 (Iowa Ct. App. 1986).

Since the employer agreed that claimant had never had a sustained period of time during which he performed his job duties to employer's satisfaction no intentional misconduct has been established, as is the employer's burden of proof. *Cosper v. Iowa Dep't of Job Serv.*, 321 N.W.2d 6 (Iowa 1982). Accordingly, no disqualification pursuant to Iowa Code § 96.5(2)a is imposed.

DECISION:

The August 16, 2021, (reference 07) unemployment insurance decision is REVERSED. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided he is otherwise eligible. Any benefits claimed and withheld on this basis shall be paid.



Carly Smith
Administrative Law Judge
Unemployment Insurance Appeals Bureau

October 21, 2021
Decision Dated and Mailed

cs/kmj