

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

KERRY L CLARK
Claimant

APPEAL 19A-UI-09950-JC-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

REM IOWA COMMUNITY SERVICES INC
Employer

**OC: 11/10/19
Claimant: Respondent (2)**

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 December 6, 2019, (reference 01) unemployment insurance decision that allowed benefits. The parties were properly notified about the hearing. A telephone hearing was held on January 14, 2020. The claimant participated personally. The employer participated through Melissa Hill, hearing representative. Amber Glasscock, area director, testified. Employer Exhibits 1-26 were admitted. The administrative law judge took official notice of the administrative records including the fact-finding documents. 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 program director and was separated from employment on November 14, 2019, when she was discharged (Employer Exhibit 1).

The employer company provides support to individuals with mental illness, intellectual disabilities and brain injuries. The claimant as a program director, was responsible for supervising direct support professionals, as well was a mandatory reporter to report suspected abuse or neglect to DHS.

In addition to the state required mandatory reporter course, the claimant was trained on employer rules and procedures. These include reporting conditions or incidents involving individuals which are mistreatment, illegal, dangerous or inhumane (Employer Exhibit 15),

reporting potentially unsafe conditions (Employer Exhibit 22), and to report incidents when they happen (Employer Exhibit 18). The employer's written policy states that regulations do not require actual harm to the consumer in order for a condition or incident to be reportable (Employer Exhibit 16). The employer's policies also alert employees to "over report of potentially abusive conditions/incidents than the contrary" (Employer Exhibit 16). Employees are told to contact their supervisor promptly regarding incidents, and questions or concerns (Employer Exhibit 21).

Prior to separation, the claimant had been placed on a performance improvement plan effective October 31, 2019 (Employer Exhibits 4-8) in response to numerous policy infractions. The claimant was also placed a final warning effective September 11, 2019 for failure to follow employer rules and procedures (Employer Exhibits 2-3).

The final incident occurred on November 4, 2019 when the claimant notified Ms. Glasscock regarding concerns about a client. The client had discussed having fantasies involving children. The claimant had been aware of the client's comments in October, but did not notify her manager or DHS or law enforcement at the time. The claimant stated she did not think it was a risk in October, because she did not think the client would have access to children and was aware he was under doctor's care. The employer asserted the claimant was not in a position to evaluate the risk and should have notified DHS within 24 hours of learning, or notified her manager for guidance. The claimant did not notify her manager until November 4, 2019 because at that time she learned the client had access to children, which she felt then made the issue reportable. She was subsequently discharged.

The administrative record reflects that claimant has received unemployment benefits in the amount of \$3,108.00, since filing a claim with an effective date of November 10, 2019. The administrative record also establishes that the employer did not participate live in the fact-finding interview or make a witness with direct knowledge available for rebuttal. The employer waited for the phone call at the scheduled time but she did not receive one and did not receive a voicemail. It does appear from the administrative records that the employer did supplement the fact-finding with written documentation as well.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged for disqualifying job-related misconduct.

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).

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.* Assessing the credibility of the witnesses and reliability of the evidence in conjunction with the applicable burden of proof, as shown in the factual conclusions reached in the above-noted findings of fact, the administrative law judge concludes that the employer has satisfied its burden to establish by a preponderance of the evidence that the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law.

The question of whether the refusal to perform a specific task constitutes misconduct must be determined by evaluating both the reasonableness of the employer's request in light of all circumstances and the employee's reason for noncompliance. *Endicott v. Iowa Dep't of Job Serv.*, 367 N.W.2d 300 (Iowa Ct. App. 1985).

In this case, the claimant was a program supervisor. She was trained on employer rules and procedures and expected to enforce them. She was also a mandatory reporter. While the claimant's final incident was isolated compared to other discipline she had, her disciplinary history does reveal a pattern on non-compliance with employer rules and procedures, which led to her being put on a performance improvement plan effective October 31, 2019. In addition to being a mandatory reporter, the employer's policies clearly state that employees are expected to report, and over report concerns involving clients if they include mistreatment, illegal,

dangerous behavior. The administrative law judge recognizes the concern at hand is not common inasmuch as it involves the client potentially as the one initiating illegal or danger behavior, the administrative law judge is persuaded the claimant had the knowledge and training to know to at a minimum notify her supervisor for guidance on handling, as well as report the concern to DHS for investigation.

The administrative law judge concludes the employer's expectation was reasonable, given the severe consequences that may occur if she did not, and given her duty as a mandatory reporter. The claimant's response that she did not find the risk to warrant reporting until she confirmed the client's access to children does not mitigate her non-compliance and delay in notifying management and DHS. The administrative law judge is persuaded the claimant knew or should have known her conduct was contrary to the best interests of the employer. The employer has established the claimant was discharged for disqualifying job related misconduct.

The next issues to resolve are the overpayment and employer's relief from charges.

Iowa Code § 96.3(7)a-b provides:

7. Recovery of overpayment of benefits.

a. If an individual receives benefits for which the individual is subsequently determined to be ineligible, even though the individual acts in good faith and is not otherwise at fault, the benefits shall be recovered. The department in its discretion may recover the overpayment of benefits either by having a sum equal to the overpayment deducted from any future benefits payable to the individual or by having the individual pay to the department a sum equal to the overpayment.

b. (1) (a) If the department determines that an overpayment has been made, the charge for the overpayment against the employer's account shall be removed and the account shall be credited with an amount equal to the overpayment from the unemployment compensation trust fund and this credit shall include both contributory and reimbursable employers, notwithstanding § 96.8, subsection 5. The employer shall not be relieved of charges if benefits are paid because the employer or an agent of the employer failed to respond timely or adequately to the department's request for information relating to the payment of benefits. This prohibition against relief of charges shall apply to both contributory and reimbursable employers.

(b) However, provided the benefits were not received as the result of fraud or willful misrepresentation by the individual, benefits shall not be recovered from an individual if the employer did not participate in the initial determination to award benefits pursuant to § 96.6, subsection 2, and an overpayment occurred because of a subsequent reversal on appeal regarding the issue of the individual's separation from employment.

(2) An accounting firm, agent, unemployment insurance accounting firm, or other entity that represents an employer in unemployment claim matters and demonstrates a continuous pattern of failing to participate in the initial determinations to award benefits, as determined and defined by rule by the department, shall be denied permission by the department to represent any employers in unemployment insurance matters. This subparagraph does not apply to attorneys or counselors admitted to practice in the courts of this states pursuant to § 602.10101.