

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

68-0157 (9-06) - 3091078 - EI

**HILLARY L KARBEN**  
Claimant

**APPEAL NO: 19A-UI-00554-JC-T**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**DAGUE DENTAL SOLUTIONS P.C.**  
Employer

**OC: 12/09/18**  
**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 filed an appeal from the January 8, 2019, (reference 01) unemployment insurance decision that allowed benefits. The parties were properly notified about the hearing. A telephone hearing was held on February 4, 2019. The claimant participated personally. The employer participated through Dr. Jolene Dague, owner. Employer Exhibits 1-11 and Claimant Exhibits A-F 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 worked as a full-time dental hygienist with dentist, Dr. McCool, for sixteen years, until Dr. Dague purchased the practice. On December 4, 2018, the claimant began computer training under the new ownership/management. The claimant attended training December 4, 5 and 6, 2018. No patients were seen during this time. At the time of separation, Dr. Dague had not yet presented the claimant with rules, expectations or employer handbook. The claimant had no warnings or discipline, verbally or in writing, and was unaware that her job was in any jeopardy.

On December 10, 2018, the claimant learned her co-worker had been discharged. On December 11, 2018, the claimant was asked to meet privately with Dr. Dague. The claimant asked if she was also going to be discharged, and when Dr. Dague stated yes, the claimant left

without hearing the reasons for discharge. Dr. Dague stated at the hearing that she discharged the claimant due to fear of her neglecting patients based upon comments made during training.

Specifically, Dr. Dague took into consideration comments made by the claimant about Medicaid patients being “rude, loud and obnoxious” and for the claimant’s disrupting training with questions. Dr. Dague did not confront or acknowledge any of the comments at the time they were made, or tell the claimant the comments were unprofessional or inappropriate. The final incident occurred when the claimant referenced needing to brush up on “probing” as it related to periodontal charting of patients.

The charting refers to a series of measurements done by a dental hygienist to determine if certain treatment or special cleaning would be needed. Unbeknownst to the claimant, she had not been performing the charting as she should have under Dr. McCool’s management. Dr. Dague did not follow up with the claimant to ask if she could not perform the charting, refused to do charting or why she had made the comment. She discharged the claimant without discussing the matter.

The administrative record reflects that claimant has received unemployment benefits in the amount of \$3,380.00, since filing a claim with an effective date of December 9, 2018. The administrative record also establishes that the employer did participate in the January 7, 2019 fact-finding interview or make a witness with direct knowledge available for rebuttal. Dr. Jolene Dague attended for the employer.

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

For the reasons that follow, the administrative law judge concludes the claimant was not discharged for disqualifying job-related misconduct. Benefits are allowed, provided she is otherwise eligible.

Iowa unemployment insurance 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 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 establishing disqualifying job related 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 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 Dep't of Job Serv.*, 351 N.W.2d 806 (Iowa Ct. App. 1984). The focus of the administrative code definition of misconduct is on deliberate, intentional or culpable acts by the employee. *Id.*

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 not 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.

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). In this case, the claimant was discharged after three days of training under new ownership/management. She had sixteen years of experience with the prior owner, and was unaware she was not handling periodontal charting as she should have been. When she made a comment about needing practice, it concerned Dr. Dague. This comment, combined with other comments made informally during the training, led to discharge. At no time did Dr. Dague inform the claimant of her expectations, rules or procedures, and at no time, as Dr. Dague encountered concerning comments, did she put the claimant on notice that her conduct was not acceptable, or that further conduct of that nature could lead to discharge. Accordingly, the claimant had no way to reasonably know that her behavior was unacceptable or could lead to discharge. Nor did Dr. Dague inquire about why the claimant needed practice in periodontal cleaning. Rather, she assumed based on the comments that the claimant would not perform expected job duties.

Based on the evidence presented, the administrative law judge is not persuaded the claimant's comments during training, including about periodontal charting, were so egregious that it warranted immediate discharge. Inasmuch as the employer had not previously warned the claimant about any issue leading to the separation, it has not met the burden of proof to

establish that the claimant acted deliberately or with recurrent negligence in violation of company policy, procedure, or prior warning.

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. Training or general notice to staff about a policy is not considered a disciplinary warning. If an employer expects an employee to conform to certain expectations or face discharge, appropriate (preferably written), detailed, and reasonable notice should be given.

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.

**DECISION:**

The January 8, 2019, (reference 01) unemployment insurance decision is affirmed. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided she is otherwise eligible.

---

Jennifer L. Beckman  
Administrative Law Judge

---

Decision Dated and Mailed

jlb/scn