

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

TINA M DYER
Claimant

APPEAL 18A-UI-02944-CL-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

MANPOWER INTERNATIONAL INC
Employer

**OC: 01/21/18
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 February 23, 2018, (reference 03) unemployment insurance decision that allowed benefits based upon claimant's separation from employment. The parties were properly notified about the hearing. A telephone hearing was held on March 29, 2018. Claimant participated. Employer participated through recruiter Jenny Herrera. Employer's Exhibit 1 was received.

ISSUES:

Was the claimant discharged for disqualifying job-related misconduct?
Has the claimant been overpaid unemployment insurance benefits, and if so, can the repayment of those benefits to the agency be waived?
Can 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: Employer is a temporary staffing agency. Claimant was last assigned to work at Ajinimoto as a full-time general laborer. The assignment ended on January 19, 2018.

Employer has an anti-harassment policy. Claimant was aware of the policy.

On January 17, 2018, claimant was in the break room with other employees on break. An employee who was employed by Ajinimoto asked claimant if she wanted to see a picture. Claimant said she did not want to see the picture if it was inappropriate. The Ajinimoto employee said it was not. The Ajinimoto employee showed claimant his phone, which displayed a picture that had been posted on Facebook. There was a dildo in the picture. Claimant stated she had seen that picture before and made no other comment. Other employees were also engaging in the conversation. Someone reported the incident to Ajinimoto's human resource department. Ajinimoto investigated.

On January 19, 2018, Ajinimoto contacted employer and explained its investigation findings and stated it did not want claimant to return to its workplace. Employer did its own investigation and determined claimant could be reassigned to work for another client.

On or about January 23, 2018, Ajinimoto informed employer that it was having problems with employer's employees showing up for work. Ajinimoto asserted claimant sent text messages or called employees and stated the contract between Ajinimoto and employer ended. The contract had not been terminated. Employer sent a message to its employees stating its contract with Ajinimoto had not ended and they were still expected to appear for work.

Employer called claimant and confronted her about the alleged communications. Claimant denied sending the alleged messages and/or phone calls, and asked employer if she could come into the office and see the alleged text messages. Employer did not have copies of the messages, so it declined claimant's request. Employer then informed claimant she was not eligible for reassignment.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from the assignment for no disqualifying reason.

Iowa Code § 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 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.

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 to prove the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law. *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). 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). The law limits disqualifying misconduct to substantial and willful wrongdoing or repeated carelessness or negligence that equals willful misconduct in culpability. *Lee v. Emp't Appeal Bd.*, 616 N.W.2d 661 (Iowa 2000).

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). When based on carelessness, the carelessness must actually indicate a "wrongful intent" to be disqualifying in nature. *Id.* Negligence does not constitute misconduct unless recurrent in nature; a single act is not disqualifying unless indicative of a deliberate disregard of the employer's interests. *Henry v. Iowa Dep't of Job Serv.*, 391 N.W.2d 731 (Iowa Ct. App. 1986). Poor work performance is not misconduct in the absence of evidence of intent. *Miller v. Emp't Appeal Bd.*, 423 N.W.2d 211 (Iowa Ct. App. 1988).

In this case, claimant was separated from her assignment at the client's request. Claimant was present when one of the client's employees showed an inappropriate picture in the break room. Claimant did not show inappropriate pictures or make inappropriate comments. When employer looked into the issue, it determined claimant was still eligible for reassignment. Employer failed to establish claimant was removed from the assignment due to misconduct.

Since the employer has not established misconduct with respect to the separation from the assignment, benefits are allowed on that basis. The next question is whether claimant's separation from the temporary agency employer is disqualifying.

Employer asserts claimant sent messages and other communication to its employees stating that the contract with Ajinomoto had ended and employees were no longer required to report to the assignment. Other than hearsay, employer did not provide any evidence that this actually occurred. Employer could have presented copies of text messages or testimony from the individuals who received the text messages or phone calls, if the conduct occurred. Claimant denies engaging in the conduct. Since no firsthand evidence corroborating employer's allegations was presented, I find claimant's testimony more credible and conclude the conduct did not occur. Therefore, employer failed to establish claimant's separation from the temporary staffing agency is disqualifying.

Since claimant is not disqualified from receiving benefits, the issues regarding overpayment of benefits are moot and will not be discussed further in this decision.

DECISION:

The February 23, 2018, (reference 03) unemployment insurance decision is affirmed. The claimant's separation from the assignment was not disqualifying and her separation from the temporary staffing agency is not disqualifying. Benefits are allowed, provided the claimant is otherwise eligible.

Christine A. Louis
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Decision Dated and Mailed

cal/scn