

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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**ROSEMARIE C JOHNSON**  
Claimant

**IMMANUEL**  
Employer

**APPEAL 21A-UI-06442-SC-T**  
**ADMINISTRATIVE LAW JUDGE  
DECISION**

**OC: 02/02/20**  
**Claimant: Respondent (1)**

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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:**

On March 1, 2021, Immanuel (employer) filed an appeal from the February 19, 2021, reference 02, unemployment insurance decision that allowed benefits based upon the determination Rosemarie C. Johnson (claimant) was not discharged for willful or deliberate misconduct. The parties were properly notified about the hearing held by telephone on May 10, 2021. The claimant participated personally. The employer was represented by Amelia Gallagher, and it participated through Stefanie Rawles, Lead UIC for Equifax, Danielle Richardson, HR Business Partner, and Jerimiha Newlon, Environmental Services Manager. The employer offered its code of conduct and proof of claimant's receipt of the same into the record; however, the claimant did not receive the documents and they were not admitted into the record.

**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 and charged to the employer's account?

**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 Housekeeper beginning on April 6, 2020, and was separated from employment on December 31, when she was discharged. The claimant was responsible for cleaning apartments of the residents in the independent living part of the facility. She was required to track the apartments cleaned and the amount of time spent in each apartment. Jerimiha Newlon, Environmental Services Manager and claimant's supervisor, performed a monthly audit of the claimant's work.

On December 8, Newlon audited the claimant's work and discovered on December 1 that she had marked an apartment as cleaned but did not record any labor hours. He spoke with the resident who said the claimant had not cleaned their apartment in a month. He spoke to the

claimant who stated she had performed work in the apartment. Newlon verbally warned her that she needed to make sure she was completing all of the activities on the checklist. He did not tell her that her job was in jeopardy or she could be terminated for the incident.

On December 11, the claimant began a medical leave of absence. On December 21, Newlon contacted Danielle Richardson, HR Business Partner, to discuss the issues he had with the claimant's performance. The claimant returned from leave on December 28. On December 31, the employer discharged the claimant for falsifying documentation during the incident on December 1. The claimant did not know her job was in jeopardy.

The administrative record reflects that claimant has received \$532.00 in unemployment benefits and \$1,200.00 in Federal Pandemic Unemployment Compensation (FPUC), since reactivating the claim effective January 3, 2021, for the four weeks ending January 30. The administrative record also establishes that the employer did not participate in the fact-finding interview because it did not know the fact-finding interview was taking place and did not receive a call from the agency.

#### **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. Benefits are allowed.

Iowa Code section 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 disqualification shall continue 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 provides, in relevant part:

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.

...

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

This definition of misconduct 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 misconduct. *Cosper v. Iowa Dep't of Job Serv.*, 321 N.W.2d 6 (Iowa 1982). 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. However, 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 issue is not whether the employer made a correct decision in separating the 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 discharge is not necessarily serious enough to warrant a denial of job insurance benefits. Such misconduct must be "substantial." When based on carelessness, the carelessness must actually indicate a "wrongful intent" to be disqualifying in nature. *Newman v. Iowa Dep't of Job Serv.*, 351 N.W.2d 806 (Iowa Ct. App. 1984). 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). 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 final act must also be current to be disqualifying. A lapse of 11 days from the final act until discharge when claimant was notified on the fourth day that his conduct was grounds for dismissal did not make the final act a "past act." Where an employer gives seven days' notice to the employee that it will consider discharging him, the date of that notice is used to measure whether the act complained of is current. *Greene v. Emp't Appeal Bd.*, 426 N.W.2d 659 (Iowa Ct. App. 1988). An unpublished decision held informally that two calendar weeks or up to ten work days from the final incident to the discharge may be considered a current act. *Milligan v. Emp't Appeal Bd.*, No. 10-2098 (Iowa Ct. App. filed June 15, 2011)..

Inasmuch as the employer warned the claimant about the final incident on December 8 and there were no incidents of alleged misconduct thereafter, it has not met the burden of proof to establish that claimant acted deliberately or negligently after the most recent warning. Even if the claimant had been not been warned, the final act of misconduct would not be current because it occurred on December 1 and the claimant was not discharged or put on notice she could be discharged for the incident until December 31. The employer has not established a

current or final act of misconduct, and, without such, the history of other incidents need not be examined. Accordingly, benefits are allowed.

As benefits are allowed, the issue of overpayment is moot and charges to the employer's account cannot be waived.

**DECISION:**

The February 19, 2021, reference 02, unemployment insurance decision is affirmed. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided she is otherwise eligible. As benefits are allowed, the issue of overpayment is moot and charges to the employer's account cannot be waived.



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Stephanie R. Callahan  
Administrative Law Judge

May 24, 2021

Decision Dated and Mailed

src/kmj