

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

COURTNEY M BURK
Claimant

ASSISTED LIVING CONCEPTS LLC
Employer

APPEAL 17A-UI-08413-JP-T
**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 07/02/17
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 August 7, 2017, (reference 02) unemployment insurance decision that allowed benefits. The parties were properly notified about the hearing. A telephone hearing was held on September 5, 2017. Claimant participated. Kimberly Cox and Savannah Belt attended the hearing on claimant's behalf. Employer participated through executive director Tanya Brannan. Community relations manager Angie Armstrong registered for the hearing on behalf of the employer, but she did not attend the hearing. Official notice was taken of the administrative record, including claimant's benefit payment history, with no objection.

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: Claimant was employed full-time as a van driver/resident care partner from October 2014, and was separated from employment on July 5, 2017, when she was discharged.

Claimant testified she was aware of an incident report to use if a resident falls. Claimant testified she was not aware of any policy or procedure she was to follow in the event of a vehicle accident. Claimant testified she was not aware of an incident report if there is a vehicle accident. The employer does not have a disciplinary policy.

Approximately a week or two before July 5, 2017, claimant was picking up a resident that was at another care facility in the employer's vehicle. When claimant picked up the resident, she secured the resident inside the employer's vehicle and shut the doors. When claimant shut the

doors, a flag hanging on a poll attached to the side of the building next the employer's vehicle got trapped in the door. Claimant then started driving away with the flag stuck in the door. As claimant drove away, claimant heard a sound and she stopped the vehicle. Claimant got out and opened the door to free the flag. The flag was not ripped, but had black markings on it from the vehicle's door. The flag was still attached to the pole, but the pole was bent. There was no damage to the building. Claimant took the flag and pole into the administration office. Claimant explained to the administrator what happened and she offered to pay for the damage. The administrator told claimant that they were not worried about it and they would let her know. Claimant then left and finished her shift. Claimant did not contact Ms. Brannan and report what happened. Claimant did not complete an incident report. The resident was not injured in the incident. Claimant did not follow up with the care facility, because she was busy day that day and forgot about it.

On July 5, 2017, Ms. Brannan received a call from the administrator of the building where the accident occurred. The administrator called Ms. Brannan because he had not heard from her. Ms. Brannan then met with claimant regarding the incident. Ms. Brannan asked claimant three times if she had anything to tell Ms. Brannan. Claimant responded not to her knowledge each time. Ms. Brannan then asked claimant what happened at the other care facility. Claimant told Ms. Brannan she had forgotten about it and then told Ms. Brannan what happened. Claimant offered to pay for everything. Ms. Brannan told claimant it was important to report accidents. Ms. Brannan then told claimant she was discharged because she failed to report the incident. The employer paid \$50.00 dollars to cover the damages from the incident.

Claimant did not have any documented warnings in her personnel file. Claimant did not have any prior disciplinary warnings for failing to report accidents/incidents. Ms. Brannan testified claimant had three prior accidents during her employment, but she was not disciplined for those accidents.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes 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(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).

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

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). 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." *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 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.

Claimant was discharged for failing to report an accident to Ms. Brannan. Claimant credibly testified she had a busy day when the accident occurred and forgot to report it to Ms. Brannan; however, claimant immediately reported the accident to the administrator of the building where the flag and the flag pole were damaged. Although claimant had prior accidents with the employer, she was never disciplined for those accidents and she had no prior discipline for failing to report accidents. The employer does not have a disciplinary policy that provided for automatic discharge for failing to report an accident. It is noted that there was no evidence presented that the employer's vehicle or the resident were harmed because of the accident.

The conduct for which claimant was discharged was merely an isolated incident of poor judgment and inasmuch as employer had not previously warned claimant about the issue leading to the separation, it has not met the burden of proof to establish that 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. If an employer expects an employee to conform to certain expectations or face discharge, appropriate (preferably written), detailed, and reasonable notice should be given. Training or general notice to staff about a policy is not considered a disciplinary warning. The employer did not meet its burden of proof in establishing disqualifying job misconduct. Benefits are allowed.

As benefits are allowed, the issues of overpayment, repayment, and the chargeability of the employer's account are moot.

DECISION:

The August 7, 2017, (reference 02) unemployment insurance decision is affirmed. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided claimant is otherwise eligible. Any benefits claimed and withheld on this basis shall be paid.

Jeremy Peterson
Administrative Law Judge

Decision Dated and Mailed

jp/rvs