

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

KRISTINA HOEWING
Claimant

BURLINGTON STAGE LINES LTD
Employer

APPEAL 20A-UI-00978-DB-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 01/05/20
Claimant: Appellant (2)

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Code § 96.3(7) – Recovery of Benefit Overpayment
PL 116-136 Section 2104(B) – Federal Pandemic Unemployment Compensation

STATEMENT OF THE CASE:

The claimant/appellant filed an appeal from the January 24, 2020 (reference 01) unemployment insurance decision that denied unemployment insurance benefits to the claimant based upon her discharge from employment. The parties were properly notified of the hearing. A telephone hearing was held on April 27, 2020. Both parties waived due notice of the potential issue of overpayment of unemployment insurance benefits pursuant to Iowa Code § 96.3(7) and overpayment of Federal Pandemic Unemployment Compensation pursuant to PL 116-136 Section 2104(B).

The claimant, Kristina Hoewing, participated personally. The employer, Burlington Stage Lines LTD, participated through witness Caylie Cherry. Robert Sheffield represented the employer. Trevor Olson, Brenda Grant, Robert Berry, Rick Tansey, Katie Smith, and Marstin Bradley testified as witnesses. Mark Moore observed on behalf of the employer. Claimant's Exhibit A was admitted. Employer's Exhibit 1 was admitted. The administrative law judge took administrative notice of the claimant's unemployment insurance benefits records.

ISSUES:

Was the claimant discharged for disqualifying job-related misconduct?
Has the claimant been overpaid any unemployment insurance benefits?
Has the claimant been overpaid any Federal Pandemic Unemployment compensation?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed full-time beginning on November 8, 1989. She was discharged on January 6, 2020. She worked as an accounting auditor. Celia Vandenberg was claimant's immediate supervisor at the time she was discharged.

The final incident leading to discharge occurred on December 19, 2019. The claimant and Marstin Bradley had a telephone call wherein they referenced sexual comments and being

recorded by management. The claimant made the telephone call to Mr. Bradley by accident, yet they spoke for over thirty minutes. This phone call only included a few minutes of work related issues, the other minutes were spent by the claimant and Mr. Bradley discussing personal matters or the claimant's frustrations with management. This was done during the claimant's working hours.

Ms. Cherry, human resources director, learned of the call on December 19, 2019 as she was driving Mr. Bradley when he was speaking to the claimant. Ms. Cherry did not know at the time that he was speaking to the claimant. She heard Mr. Bradley state "you must have got some last night" while she was driving. This prompted her to review the telephone call between the claimant and Mr. Bradley.

Ms. Cherry reported the telephone call to her supervisor, Ronald Moore, on December 27, 2019. She waited to report this to her supervisor until December 27, 2019 due to her having meetings and her and Mr. Moore being out of the office for a few days. Ms. Cherry met with Mr. Moore on December 19, 2019 at lunch but did not speak to him about the telephone conversation she overheard while driving Mr. Bradley.

Claimant had received two previous written warnings for insubordination. One warning was given on August 2, 2019 and another on October 10, 2019. Both warnings involved disrespect towards a supervisor. Claimant was never interviewed about the December 19, 2019 incident prior to her discharge. She was never notified prior to January 6, 2020 that her job was in jeopardy due to a December 19, 2019 telephone call, or that the employer was conducting an investigation into the matter.

Claimant has received \$3,832.00 in gross unemployment insurance benefits since filing her claim with an effective date of January 5, 2020. Claimant has received \$1,200.00 in gross Federal Pandemic Unemployment Compensation benefits since filing her claim with an effective date of January 5, 2020.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment for an incident that was not a current act of misconduct. Benefits are allowed, provided the claimant is otherwise eligible.

Iowa Code § 96.5(2)a provides:

An individual shall be disqualified for benefits:

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).

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.

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). 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.*

The audio call in Exhibit 1 clearly establishes that the claimant was intentionally making inappropriate sexual comments to a co-worker, on company time. See Exhibit 1. It further establishes that the claimant was intentionally wasting company time by talking to a co-worker about non-work related issues for an extended period of time. See Exhibit 1. However, a claimant cannot be discharged for a past act of misconduct.

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.

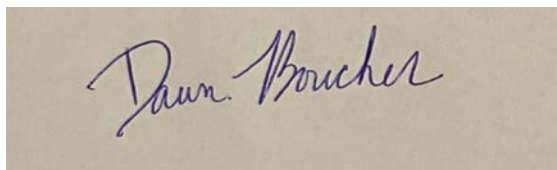
The purpose of this rule is to assure that an employer does not save up acts of misconduct and spring them on an employee when an independent desire to terminate arises. For example, an employer may not convert a lay off into a termination for misconduct by relying on past acts. *Milligan v. EAB*, No. 10-2098 (Table)(Iowa App. June 15, 2011)(finding that ten business days after the employer learned of the act did not make the act a past act of misconduct, especially since the employer was conducting a second interview).

The date the employer notifies the claimant that their actions may lead to discharge is the date used in determining whether the act was a current act. *Greene v. Employment Appeal Bd.*, 426 N.W.2d 659 (Iowa Ct.App 1988). In *Greene*, the claimant was notified two days after the employer became aware of the act that the conduct may be grounds for dismissal. Therefore, despite the claimant was discharged seven business days after the conduct, it did not make the act a previous act of misconduct. *Id.* at 662. Further, placing an impractically short period of time between notification and termination would place undue pressure on employers to rush to termination. *Milligan*, 802 N.W.2d at *5.

In this case, the claimant was not interviewed about the call on December 19, 2019 and there was no evidence presented that the employer was in the process of conducting interviews or engaging in any ongoing investigation. Ms. Cherry learned about the telephone call the day it occurred, because she was in the car with Mr. Bradley. The employer allowed the claimant to work until it discharged her on January 6, 2020. The employer cannot argue on the one hand that the conduct of the claimant was so egregious that it warranted discharge instead of a lesser penalty, but then allow the claimant to continue working for 18 days before determining that she should be discharged. As such, benefits are allowed, provided the claimant is otherwise eligible. Because benefits are allowed, the issues of overpayment of benefits and overpayment of Federal Pandemic Unemployment compensation are moot. The employer's account may be charged for benefits paid.

DECISION:

The January 24, 2020 (reference 01) unemployment insurance decision is reversed. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided she is otherwise eligible.

A rectangular box containing a handwritten signature in blue ink that reads "Dawn Boucher".

Dawn Boucher
Administrative Law Judge

April 28, 2020
Decision Dated and Mailed

db/scn