

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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

RAMONA K KUCERA
Claimant

APPEAL NO. 19A-UI-04846-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

ADVANCE SERVICES INC
Employer

OC: 05/19/19
Claimant: Appellant (3)

Iowa Code Section 96.5(2)(a) – Discharge for Misconduct
Iowa Code Section 96.4(3) – Able & Available

STATEMENT OF THE CASE:

Ramona Kucera filed a timely appeal from the June 10, 2019, reference 01, decision that disqualified her for benefits and that relieved the employer's account of liability for benefits, based on the deputy's conclusion that Ms. Kucera was discharged on December 20, 2018 for misconduct in connection with the employment. After due notice was issued, a hearing began on July 10, 2019 and concluded on July 23, 2019. Ms. Kucera participated personally and was represented by attorney Erik Luthens. Melissa Lewien represented the employer and presented additional testimony through Keesha Bruce. Exhibits 1 through 4 and A through I were received into evidence. The administrative law judge took official notice of the Agency's administrative record of Ms. Kucera's weekly unemployment insurance claims.

ISSUES:

Whether Ms. Kucera was discharged for misconduct in connection with the employment that disqualifies the claimant for unemployment insurance benefits.

Whether Ms. Kucera has been able to work and available for work since she established the original claim that was effective May 19, 2019.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Advance Services, Inc. (ASI) is a temporary employment firm. ASI has a branch office in Ames. Kimberley Warnick is Branch/Office Manager for the Ames ASI office. Claimant Ramona Kucera began her employment with ASI in August 2018. At that time, the employer had Ms. Kucera electronically sign to acknowledge multiple employer policies including a conduct policy and a work rules policy. The work rules policy listed work rule violations that would lead to discipline up to and including discharge from the employment. Those list of violations included "Falsifying employment application or any other employee records."

On October 1, 2018, Ms. Kucera suffered a workplace injury while working in a temporary work assignment at Iowa State University. ASI had Ms. Kucera working as a cook at ISU.

Ms. Kucera suffered injury to her right shoulder and bicep when she slipped on a greasy floor. The shoulder injury was subsequently diagnosed as two tears in Ms. Kucera's right rotator cuff. Ms. Kucera was born left-handed, but is conditioned to be right-hand dominant. Ms. Kucera's workplace injury gave rise to a worker's compensation claim. ASI had Ms. Kucera evaluated by a physician at Story County Medical Center. Ms. Kucera was released to return to work with a 20-pound lifting restriction and with a further medical restriction that be allowed to take a five-minute break every 90 minutes as needed. On October 10, 2018, ISU elected to end the assignment after the physician amended Ms. Kucera's work restrictions to lifting no more than 10 pounds with both hands and further restricted her from performing work that required her to move her arms to shoulder level or that required her to reach overhead. ASI immediately placed Ms. Kucera in a light-duty assignment performing work at the ASI Ames office, wherein ASI had Ms. Kucera listen to local businesses' help-wanted radio ads to generate marketing leads for ASI.

Ms. Kucera had a follow-up appointment with the physician on or before October 30, 2018. At that time, the doctor amended Ms. Kucera's work restrictions to lifting, pushing and pulling no greater than 30 pounds and further restricted her to limited overhead work. ASI renewed the light-duty assignment at the ASI office.

Ms. Kucera had a follow-up appointment with the physician on or before November 14, 2018. At that time, the doctor amended Ms. Kucera's work restrictions to lifting, pushing and pulling not greater than 40 pounds and further restricted her from repetitive overhead work. ASI again renewed the light-duty assignment at the ASI office. As of November 26, 2018, the same restrictions were in place and ASI modified the light-duty assignment at the ASI office so that Ms. Kucera just performed the radio auditing work in the morning and worked in the afternoon as a Salvation Army donation bell ringer. As of November 28, 2018, the restrictions remained in place and ASI continued Ms. Kucera in the dual light-duty assignment arrangement. From October 10, 2018 through November 28, 2018, the physician reviewing Ms. Kucera's medical status was the physician associated with Story County Medical Center. In connection with those evaluations, the healthcare provider provided Patient Status Reports directly to ASI.

On December 17, 2018, Ms. Kucera was evaluated by an orthopedic surgeon at Iowa Ortho. Ms. Kucera's daughter accompanied her to the appointment. The surgeon diagnosed Ms. Kucera with a torn right bicep and determined that Ms. Kucera needed surgery. The orthopedist released Ms. Kucera to return to work with a 10-pound lifting restriction. The orthopedist further restricted Ms. Kucera from repetitive lifting, pulling, pushing, climbing, reaching above head, and working above shoulder level. The orthopedist did not restrict Ms. Kucera from repetitive sitting. The orthopedist completed a Patient Status Report, kept the original, and sent a carbon copy with Ms. Kucera. Ms. Kucera took a photo of the carbon copy of the Patient Status Report with her phone and sent that photo to Ms. Warnick. Soon thereafter, Ms. Warnick had Ms. Kucera provide her with the actual carbon copy document. Both the photo of the carbon copy and the actual carbon copy included marks roughly in the shape of an "X" next to the word "sitting" to indicate that Ms. Kucera was restricted from repetitive sitting. Those marks differed from the forward slash marks the orthopedist had placed on the form.

The employer communicated with an Iowa Ortho representative to obtain a copy of the original December 17, 2018 Patient Status Report and to confirm that the original report did not include a mark restricting Ms. Kucera from sitting. The employer did not question Ms. Kucera regarding the discrepancy between the original Patient Status Report and photo and carbon copy Ms. Kucera provided to the employer. Ms. Kucera had just begun a new light-duty assignment at the time the employer was investigating the discrepancy between the Patient Status Report

forms. Keesha Bruce, Risk Management Director, directed Ms. Warnick to discharge Ms. Kucera from the assignment and from the employment, based on the employer's conclusion that Ms. Kucera had altered the Patient Status Report to include a restriction against sitting. On December 20, 2018, Ms. Warnick notified Ms. Warnick that she was discharged from the assignment. Ms. Kucera was uncertain why she was discharged from the assignment. Ms. Warnick did not discuss the matter with Ms. Kucera beyond asserting in vague terms that Ms. Kucera knew why the discharge was taking place. Ms. Kucera was initially unclear that she had been discharged entirely from the employment.

Ms. Kucera underwent a right shoulder rotator cuff repair on January 29, 2019 to repair two tears. The surgeon subsequently characterized the surgery as a failure.

Ms. Kucera established a claim for unemployment insurance benefits that was effective May 19, 2019. Ms. Kucera has made weekly claims since that time. For each week of the claim, Ms. Kucera reported making two employer job contacts.

At the time, Ms. Kucera established her unemployment insurance claim she had been released to perform modified work with the following medical restrictions applicable to her right arm and shoulder. Ms. Kucera was restricting from lifting more than 10 pounds. Ms. Kucera was restricted from repetitive lifting, pulling, pushing, climbing, reaching overhead, and working above shoulder level.

The medical restrictions that were in place at the time Ms. Kucera established her claim continued in place until the medical provider updated the restrictions on June 10, 2019 to the following. Ms. Kucera was thereafter restricted from lifting more than 15 pounds with her right hand and arm. Ms. Kucera continued to be restricted from repetitive lifting, pulling, pushing, climbing, reaching overhead, and working above shoulder level.

Ms. Kucera's work search activities had been as follows. During the week that ended May 25, 2019, Ms. Kucera applied for a telemarketing job, for a sales representative job, for a short-order cook job and two other positions.

During the week that ended June 1, 2019, Ms. Kucera applied for a job at a coffee shop and for a nanny recruiter position.

During the week that ended June 8, 2019, Ms. Kucera applied for a job at Panera bread, and for receptionist jobs at a dental office and a chiropractic clinic.

During the week that ended June 15, 2019, Ms. Kucera applied for a job with a State Farm agent and at a printing shop.

During the week that ended June 22, 2019, Ms. Kucera applied for a job at Dunkin Donuts and for a home and garden center type job.

During the week that ended June 29, 2019, Ms. Kucera applied for receptionist work at a different State Farm office and at a Century 21 office.

During the week that ended July 6, 2019, Ms. Kucera applied for prep cook work at Boulder Tap House and a baker position.

During the week that ended July 13, 2019, Ms. Kucera applied for at work Orange Leaf in Ames and for a job at Dairy Queen in Boone. Ms. Kucera lives in Story City, but is planning to relocate to Boone.

During the week that ended July 20, 2019, Ms. Kucera applied for two nanny positions in Ames and to work as an assistant daycare teacher in Story City, where she would be caring for babies, toddlers and children up to four years old.

REASONING AND CONCLUSIONS OF LAW:

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).

The employer has the burden of proof in this matter. See Iowa Code section 96.6(2). Misconduct must be substantial in order to justify a denial of unemployment benefits. Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of unemployment benefits. See *Lee v. Employment Appeal Board*, 616 N.W.2d 661 (Iowa 2000). The focus is on deliberate, intentional, or culpable acts by the employee. See *Gimbel v. Employment Appeal Board*, 489 N.W.2d 36, 39 (Iowa Ct. App. 1992).

While past acts and warnings can be used to determine the magnitude of the current act of misconduct, a discharge for misconduct cannot be based on such past act(s). The termination of employment must be based on a current act. See 871 IAC 24.32(8). In determining whether the conduct that prompted the discharge constituted a "current act," the administrative law judge considers the date on which the conduct came to the attention of the employer and the date on which the employer notified the claimant that the conduct subjected the claimant to possible discharge. See also *Greene v. EAB*, 426 N.W.2d 659, 662 (Iowa App. 1988).

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. See 871 IAC 24.32(4).

In considering an understanding or belief formed, or a conclusion drawn, by an employer or claimant, the administrative law judge considers what a reasonable person would have concluded under the circumstances. See *Aalbers v. Iowa Department of Job Service*, 431 N.W.2d 330 (Iowa 1988) and *O'Brien v. Employment Appeal Bd.*, 494 N.W.2d 660 (1993).

The weight of the evidence in the record establishes a discharge on December 20, 2018 that was for misconduct in connection with the employment. The employer reasonably concluded that Ms. Kucera had altered the December 17, 2018 Patient Status Report prior to submitting a copy of the report to the employer. Though the employer did not question Ms. Kucera regarding the matter, comparison of the original Patient Status Report with the carbon copy photo that Ms. Kucera provided to the employer after the appointment provided strong circumstantial evidence that Ms. Kucera had intentionally altered the form. The intentional falsification of the document, and presentation of the falsified document to the employer, demonstrated an intentional and substantial disregard of the employer's interests. Based on the discharge for misconduct in connection with the employment, Ms. Kucera is disqualified for benefits until she has worked in and been paid wages for insured work equal to 10 times her weekly benefit amount. Ms. Kucera must meet all other eligibility requirements. The employer's account shall not be charged for benefits.

Iowa Code section 96.4(3) provides:

An unemployed individual shall be eligible to receive benefits with respect to any week only if the department finds that:

3. The individual is able to work, is available for work, and is earnestly and actively seeking work. This subsection is waived if the individual is deemed partially unemployed, while employed at the individual's regular job, as defined in section 96.19, subsection 38, paragraph "b", unnumbered paragraph (1), or temporarily unemployed as defined in section 96.19, subsection 38, paragraph "c". The work search requirements of this subsection and the disqualification requirement for failure to apply for, or to accept suitable work of section 96.5, subsection 3 are waived if the individual is not disqualified for benefits under section 96.5, subsection 1, paragraph "h".

Iowa Admin. Code r. 871-24.22(1)a provides:

Benefits eligibility conditions. For an individual to be eligible to receive benefits the department must find that the individual is able to work, available for work, and earnestly and actively seeking work. The individual bears the burden of establishing that the individual is able to work, available for work, and earnestly and actively seeking work.

(1) Able to work. An individual must be physically and mentally able to work in some gainful employment, not necessarily in the individual's customary occupation, but which is engaged in by others as a means of livelihood.

a. Illness, injury or pregnancy. Each case is decided upon an individual basis, recognizing that various work opportunities present different physical requirements. A statement from a medical practitioner is considered prima facie evidence of the physical ability of the individual to perform the work required. A pregnant individual must meet the same criteria for determining ableness as do all other individuals.

Iowa Admin. Code r. 871-24.22(2) provides:

Benefits eligibility conditions. For an individual to be eligible to receive benefits the department must find that the individual is able to work, available for work, and earnestly and actively seeking work. The individual bears the burden of establishing that the individual is able to work, available for work, and earnestly and actively seeking work.

(2) Available for work. The availability requirement is satisfied when an individual is willing, able, and ready to accept suitable work which the individual does not have good cause to refuse, that is, the individual is genuinely attached to the labor market. Since, under unemployment insurance laws, it is the availability of an individual that is required to be tested, the labor market must be described in terms of the individual. A labor market for an individual means a market for the type of service which the individual offers in the geographical area in which the individual offers the service. Market in that sense does not mean that job vacancies must exist; the purpose of unemployment insurance is to compensate for lack of job vacancies. It means only that the type of services which an individual is offering is generally performed in the geographical area in which the individual is offering the services.

At the time Ms. Kucera established her unemployment insurance claim she had been released to perform modified work with the following medical restrictions applicable to her right arm and shoulder. Ms. Kucera was restricted from lifting more than 10 pounds. Ms. Kucera was restricted from repetitive lifting, pulling, pushing, climbing, reaching overhead, and working above shoulder level.

The medical restrictions that were in place at the time Ms. Kucera established her claim continued in place until the medical provider updated the restrictions on June 10, 2019. Ms. Kucera was thereafter restricted from lifting more than 15 pounds with her right hand and arm. Ms. Kucera continued to be restricted from repetitive lifting, pulling, pushing, climbing, reaching overhead, and working above shoulder level.

Ms. Kucera has been able to perform work within her medical restrictions since she established her original claim for benefits. On the other hand, Ms. Kucera has not been able to perform work beyond those medical restrictions. Since Ms. Kucera established her claim for benefits, she has been subjected to a lifting restriction impacting use of her right hand and arm. The lifting restriction was initially 10 pounds, but increased to 15 pounds on June 10, 2019. From the time Ms. Kucera established her original claim up to the present, Ms. Kucera has been restricted from repetitive lifting, pulling, pushing, climbing, reaching overhead, and working above shoulder level. Effective June 10, 2019, Ms. Kucera had an additional restriction against climbing.

Ms. Kucera met the work search and the availability for work requirements during some weeks of her claim and did not meet those requirements for other weeks of her claim. Since Ms. Kucera established her claim for benefits, she had applied for some positions that a reasonable person would conclude were within her medical restrictions and other positions that a reasonable person would conclude were outside her medical restrictions.

The telemarketing and sales representative jobs Ms. Kucera applied for during the week that ended May 25, 2019 were within her restrictions. The short-order cook position was not. Through the two applications for clerical positions, Ms. Kucera met the work search and availability requirements for that week and would be eligible for benefits for that week if she met all other eligibility requirements.

The nanny recruiter position Ms. Kucera applied for during the week that ended June 1, 2019 was within her restrictions, but the coffee shop position was not. Ms. Kucera did not engage in an active and earnest search for work within her restrictions that week, was not available for work within the meaning of the law, and therefore is not eligible for benefits for that week.

The two receptionist positions Ms. Kucera applied for during the week that ended June 8, 2019 were within her restrictions, but the Panera Bread position was not. Through the two applications for receptionist positions, Ms. Kucera met the work search requirement, demonstrated availability for work within her medical restrictions, and would be eligible for benefits that week if she met all other eligibility requirements.

The State Farm position Ms. Kucera applied for during the week that ended June 15, 2019 was within her medical restrictions, but the printing shop position was not. Ms. Kucera did not engage in an active and earnest search for work within her restrictions that week, was not available for work within the meaning of the law, and therefore is not eligible for benefits for that week.

The Dunkin Donuts position and the garden center position that Ms. Kucera applied for during the week that ended June 22, 2019 were not within her restrictions. Ms. Kucera did not engage in an active and earnest search for work within her restrictions that week, was not available for work within the meaning of the law, and therefore is not eligible for benefits for that week.

The two receptionist positions that Ms. Kucera applied for during the week that ended June 29, 2019 were within Ms. Kucera's medical restrictions. Through the two applications for clerical positions, Ms. Kucera met the job search and availability requirements for the week and would be eligible for benefits for that week if she met all other eligibility requirements.

The prep cook and baker positions that Ms. Kucera applied for during the week that ended July 6, 2019 were each outside Ms. Kucera's medical restrictions. Ms. Kucera did not engage in an active and earnest search for work within her restrictions that week, was not available for work within the meaning of the law, and therefore is not eligible for benefits for that week.

The Dairy Queen and Orange Leaf positions Ms. Kucera applied for during the week that ended July 13, 2019 were each outside Ms. Kucera's medical restrictions. Ms. Kucera did not engage in an active and earnest search for work within her restrictions that week, was not available for work within the meaning of the law, and therefore is not eligible for benefits for that week.

All three of the childcare positions Ms. Kucera applied for during the week that ended July 20, 2019 were outside Ms. Kucera's medical restrictions. Ms. Kucera did not engage in an active

and earnest search for work within her restrictions that week, was not available for work within the meaning of the law, and therefore is not eligible for benefits for that week.

DECISION:

The June 10, 2019, reference 01, decision is modified as follows. The claimant was discharged on December 20, 2018 for misconduct in connection with the employment. The claimant is disqualified for unemployment benefits until she has worked in and been paid wages for insured work equal to 10 times her weekly benefit amount. The claimant must meet all other eligibility requirements. The employer's account shall not be charged for benefits.

The claimant has been able to work within the meaning of the law since she established her claim for benefits, but that ability has been limited to work within the claimant's medical restrictions.

The claimant met the work search requirement and the availability for work requirement during the weeks that ended May 25, June 8 and June 29, 2019. But for the discharge disqualification, the claimant would have been eligible for benefits for these weeks, provided she met all other eligibility requirements.

The claimant has not met the work search requirement and did not meet the availability for work requirement during the weeks that ended June 1, June 15, June 22, July 6, July 13, and July 20, 2019. Based on the work search and availability disqualification, the claimant is not eligible for benefits for these weeks.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

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