

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

JOSEPH D AVERY

Claimant

APPEAL 20A-UI-05242-DB-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

ANNETT HOLDINGS INC

Employer

OC: 03/29/20

Claimant: Respondent (1)

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Code § 96.3(7) – Overpayment of Benefits
Iowa Admin. Code r. 871-24.10 – Employer Participation in Fact-finding Interview
PL 116-136 Section 2104(B) – Federal Pandemic Unemployment Compensation

STATEMENT OF THE CASE:

The employer/appellant filed an appeal from the May 29, 2020 (reference 02) unemployment insurance decision that found the claimant was eligible for unemployment insurance benefits based upon his discharge from employment. The parties were properly notified of the hearing. A telephone hearing was held on June 24, 2020. The claimant, Joseph D. Avery, participated personally. The employer, Annett Holdings Inc., participated through witnesses Sasha Monthei and Travis Johnson. Employer's Exhibits 1 and 2 were admitted. The administrative law judge took official notice of the claimant's administrative records.

ISSUES:

Was the claimant discharged for disqualifying job-related misconduct?
Is the claimant overpaid benefits?
Is the claimant overpaid Federal Pandemic Unemployment Compensation?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed from August 21, 2013 until April 2, 2020. He worked full-time as a carrier sales specialist. Claimant's work schedule was Monday through Friday from 7:30 a.m. to 5:00 p.m. each week. Claimant's direct supervisor was Jordan Olson.

The employer has a written policy that requires employees to avoid any conduct which is disruptive or adverse to the best interests of the employer. See Exhibit 1. The claimant received a copy of the policy. On or about April 2, 2020, the claimant and another co-worker exchanged messages through the employer's instant message system on the employer's computer software. The claimant reported to his co-worker that there were "2 more cases at work" referring to cases of Covid 19. See Exhibit 2. The co-worker asked the claimant for the names of the people he was referring to and the claimant gave the co-worker two individual names. Claimant then states "thats just what I was told" to his co-worker. See Exhibit 2.

Claimant did not divulge this information to other co-workers besides the one he instant messaged. The co-worker the claimant spoke to then sent this conversation to Mr. Johnson. Mr. Johnson reported that many other co-workers heard this information as well, and he was unable to determine how the other co-workers received the information. The other co-worker that the claimant was having a conversation with via instant messaging was not disciplined. Claimant had one other warning regarding performance issues in November of 2019.

Prior to this incident, claimant's friend had posted information about the employer on his Facebook page stating that the employer was requiring employees who had been exposed to Coronavirus to come into work. The claimant did not ask his friend to post this information on his Facebook page. The claimant did not have control of his friend's Facebook page. Once the claimant learned that it was posted, the claimant asked the friend to take the post off his Facebook page. No discipline was given to the claimant about his friend's Facebook post.

Claimant's administrative records establish that he has received unemployment insurance benefits of \$4,810.00 from March 29, 2020 through June 20, 2020. Claimant has also received \$6,000.00 in Federal Pandemic Unemployment Compensation benefits from March 29, 2020 through June 20, 2020. The employer did not participate in the initial fact-finding interview by telephone. Its statement of protest states that the claimant was discharged for postings made to Facebook about co-workers and spreading false information about co-workers.

REASONING AND CONCLUSIONS OF LAW:

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

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.

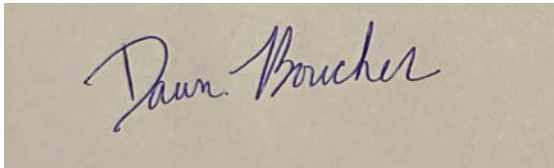
Further, the employer has the burden of proof in establishing disqualifying job misconduct. *Cosper v. Iowa Dep't of Job Serv.*, 321 N.W.2d 6 (Iowa 1982). The issue is not whether the employer made a correct decision in separating claimant, but whether the claimant is entitled to unemployment insurance benefits. *Infante v. Iowa Dep't of Job Serv.*, 364 N.W.2d 262 (Iowa Ct. App. 1984). 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). The focus of the administrative code definition of misconduct is on deliberate, intentional or culpable acts by the employee. *Id.* 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). Further, 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). The law limits disqualifying misconduct to substantial and willful wrongdoing or repeated carelessness or negligence that equals willful misconduct in culpability. *Lee v. Employment Appeal Bd.*, 616 N.W.2d 661 (Iowa 2000). 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).

In this case, claimant's actions were not misconduct. Claimant was talking to another co-worker and there is no evidence that he intended to cause or caused disruption in the workplace. If anything, claimant's actions were an isolated incident of poor judgment and claimant is guilty of no more than "good faith errors in judgment." 871 IAC 24.32(1)(a). Instances of poor judgment are not misconduct. *Richers v. Iowa Dept. of Job Services*, 479 N.W.2d 308 (Iowa 1991); *Kelly v. IDJS*, 386 N.W.2d 552, 555 (Iowa App. 1986).

The employer has failed to establish any intentional and substantial disregard of the employer's interest which rises to the level of substantial and willful misconduct. As such, benefits are allowed, provided the claimant is otherwise eligible. The employer may be charged for benefits paid. Because benefits are allowed, the issues of overpayment of regular benefits and overpayment of Federal Pandemic Unemployment Compensation benefits are moot.

DECISION:

The May 29, 2020 (reference 02) unemployment insurance decision is affirmed. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided he is otherwise eligible.



Dawn Boucher
Administrative Law Judge

July 2, 2020
Decision Dated and Mailed

db/scn