

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

KATRINA E SCULL
Claimant

REM IOWA COMMUNITY SERVICES INC
Employer

APPEAL 22A-UI-05112-AW-T
ADMINISTRATIVE LAW JUDGE
DECISION

OC: 01/09/22
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:

Employer filed an appeal from the February 10, 2022 (reference 01) unemployment insurance decision that allowed benefits finding claimant was discharged on January 4, 2022 for no disqualifying reason. The parties were properly notified of the hearing. A telephone hearing was held on April 8, 2022. Claimant participated. Employer participated through Connie Hickerson, Hearing Representative. Program Directors Jessica Heimer and Tamsen Hodson were witnesses for employer. No exhibits were admitted. Official notice was taken of the administrative record.

ISSUES:

Whether claimant's separation was a discharge for disqualifying job-related misconduct.
Whether claimant was overpaid benefits.
Whether claimant should repay those benefits and/or whether employer should be charged based upon its participation in the fact-finding interview.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds:

Claimant was employed as a full-time Program Supervisor from May 10, 2021 until her employment with REM Iowa Community Services ended on January 4, 2022. Claimant's direct supervisor was Tamsen Hodson, Program Director.

Employer has a medication administration policy that states schedule II medications can only be administered by certified employees – not supervisors. The policy is included in the employee handbook. Claimant received a copy of the handbook and completed medication administration training. The policy is important because employer could incur state sanctions if uncertified employees pass schedule II medications. The employee handbook also contains a Code of Conduct and information regarding the Health Insurance Portability and Accountability Act (HIPAA).

On December 4, 2021, employer learned that claimant directed an employee, who is not certified, to pass a schedule II medication to a client. Employer investigated the matter and learned that claimant passed schedule II medications 16 times between September 17, 2021 and November 5, 2021. Claimant is not certified to pass schedule II medication. Employer discussed the issue with claimant who stated that she did not know about the policy. Employer did not issue a warning or tell claimant that she may be subject to further discipline including termination. Claimant had no prior warnings for passing schedule II medications. Claimant did not pass schedule II medications after her conversation with employer.

On December 15, 2021, a client complained to employer about claimant and asked that the claimant no longer work in her house. The client reported that claimant yelled at her on one occasion, contacted her on her personal cell phone instead of the house phone and told her confidential information about other clients. Employer investigated the allegations. Claimant was removed from duty pending the investigation.

On December 13, 2021 or December 14, 2021, claimant yelled at the client over speaker phone because the client gave her phone bill to Hodson instead of claimant. Claimant raised her voice during the phone call. The manner in which claimant spoke to the client violates employer's code of conduct. Claimant had no prior warnings for violating the code of conduct.

Claimant had the client's personal cell phone number and contacted the client on her personal cell phone. The dates of contact are unknown. Any contact was work-related. Employer does not have a policy prohibiting employees from contacting clients on their personal cell phones. Claimant had no prior warnings regarding contacting clients on their personal cell phones.

The client told employer that she was uncomfortable with claimant telling her confidential information about other clients because claimant could tell other clients confidential information about her too. The client did not tell employer what confidential information claimant told her. Claimant had no prior warnings regarding releasing confidential information about clients.

On January 4, 2022, employer discharged claimant for releasing schedule II medication without certification and violating the code of conduct.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes:

Iowa Code section 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 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:

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 of misconduct has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. *Reigelsberger v. Emp't Appeal Bd.*, 500 N.W.2d 64, 66 (Iowa 1993); *accord Lee v. Emp't Appeal Bd.*, 616 N.W.2d 661, 665 (Iowa 2000). 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).

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. (emphasis added)

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 cannot be based on such past act or acts. The termination of employment must be based on a **current act**. (emphasis added)

Conduct asserted to be disqualifying misconduct must be current. *West v. Emp't Appeal Bd.*, 489 N.W.2d 731 (Iowa 1992); *Greene v. Emp't Appeal Bd.*, 426 N.W.2d 659 (Iowa Ct. App. 1988). Whether the act is current is measured by the time elapsing between the employer's awareness of the misconduct and the employer's notice to the employee that the conduct provides grounds for dismissal. *Id.* at 662.

The current act requirement prevents an employer from saving up acts of misconduct and springing them on an employee when an independent desire to terminate arises. For example, an employer may not convert a layoff into a termination for misconduct by relying on past acts. *Milligan v. EAB*, 10-2098, slip op. at 8 (Iowa App. June 15, 2011).

If an employer acts as soon as it reasonably could have under the circumstances, then the act is current. A reasonable delay may be caused by a legitimate need to investigate and decide on a course of disciplinary action.

In this case, employer learned that claimant passed schedule II medications in violation of its medication administration policy on December 4, 2021. At that time, employer did not inform claimant that her conduct provided grounds for dismissal. Employer discharged claimant, in

part for passing schedule II medications without certification, on January 4, 2022. A month elapsed between employer learning of the issue and discharging claimant (i.e. claimant's first notice that her actions could result in discharge). The passing of schedule II medications was no longer a current act. Employer learned of the client's allegations about claimant on December 15, 2021 and removed claimant from duty pending an investigation. Claimant's various incidents of client mistreatment are current acts.

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 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). 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).

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.

In this case, employer discharged claimant based upon a client's complaint that claimant yelled at her on one occasion, contacted her on her personal cell phone instead of the house phone and told her confidential information about other clients. Claimant raised her voice to a client in a rebuking manner. Claimant did not use profanity or call the client names. Claimant contacted a client on her personal cell phone, which is not prohibited by employer's policies. Claimant received no prior warnings for yelling at a client or contacting a client on a personal cell phone. Without a prior warning, the current acts that led to claimant's discharge do not rise to the level of disqualifying, job-related misconduct. There is no evidence supporting the allegation that claimant disclosed confidential information. Without additional evidence, an allegation is not sufficient to result in disqualification. Employer has not met its burden of proving disqualifying, job-related misconduct. Benefits are allowed, provided claimant is otherwise eligible.

Because claimant's separation is not disqualifying, the issues of overpayment, repayment and charges are moot.

DECISION:

The February 10, 2022 (reference 01) unemployment insurance decision is affirmed. Claimant was discharged for no disqualifying reason. Benefits are allowed provided claimant is otherwise eligible. The issues of overpayment, repayment and charges are moot.



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April 18, 2022
Decision Dated and Mailed

acw/ACW