

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

DAPRE HENDERSON
Claimant

ANNETT HOLDINGS INC
Employer

APPEAL 22A-UI-00355-SN-T
**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 10/18/20
Claimant: Respondent (2)

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Admin. Code r. 871-24.32(1)a – Discharge for Misconduct
Iowa Code § 96.3(7) – Overpayment of Benefits

STATEMENT OF THE CASE:

The employer, Annett Holdings Inc, filed an appeal from the November 18, 2021, (reference 05) unemployment insurance decision that granted benefits based upon the conclusion the claimant was discharged for poor performance during a trial period. The parties were properly notified of the hearing. A telephone hearing was held on January 24, 2022. The claimant did not participate. The employer participated through Billing Manager Renee Stewart. Official notice was taken of the administrative records.

ISSUES:

Whether the claimant was discharged due to work-related misconduct?

Whether the claimant has been overpaid benefits? Whether he is excused from repaying those benefits due to the employer's non-participation at fact-finding?

FINDINGS OF FACT:

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

The claimant was employed full-time as a billing specialist / analyst from May 4, 2021, until this employment ended on July 30, 2021, when he was discharged. The claimant reported directly to Billing Manager Renee Stewart.

The employer has had a Covid19 infection mitigation strategy that has tracked the guidance given by the Centers for Disease Control and Prevention (CDC). Employees who were near someone who tested positive for Covid19 were instructed to get a rapid Covid19 test. Employees who tested positive for Covid19, under certain circumstances, may remain working remotely, but would have to obtain permission to do so.

At 9:00 a.m. on July 26, 2021, the claimant was instructed to leave the office and get a rapid Covid19 test at the employer's expense from GS Labs. The claimant was permitted to work from

home for the rest of the day after undergoing the test. The claimant was instructed to do so because a coworker had reported symptoms of an illness. The claimant did not undergo Covid19 testing as instructed. The claimant continued to work from home despite being told he was to report back at the office on July 27, 2021.

Over the course of the following week, Ms. Stewart asked the claimant about the test results he was supposed to obtain on July 26, 2021. Ms. Stewart's assistant was also asking the claimant about his test results. Both were also asking him why he was not in the office. The claimant did not answer these emails. Ms. Stewart also looked at screen recordings because the claimant's work performance had fallen precipitously since he left the office. When the claimant was in the office, he was able to bill at least \$40,000 per day. After being out of the office prior to his termination, the claimant billed approximately \$7,000 per day.

On July 30, 2021, Ms. Stewart and the claimant exchanged messages regarding his performance. Ms. Stewart also raised the issue that the claimant had not undergone a Covid19 test. The claimant said that he had testing scheduled, but he had not obtained testing yet. Ms. Stewart asked the claimant why he had only performed approximately a tenth of the loads he typically performed from the office. The claimant explained that he talked to someone in the information technology department who told him that his system was having technological difficulties. Ms. Stewart asked the claimant whom in information technology he spoke. The claimant said he could not remember. Ms. Stewart asked the claimant to call back and find out whom spoke. She added that she needed to know before he returned to work.

On July 30, 2021, Ms. Stewart made the determination to terminate the claimant because he failed to be tested for Covid19 as instructed. Ms. Stewart also concluded that the claimant was intentionally not performing in his position while he was working from home. She believed that he was lying about system issues.

The following section describes the findings of fact necessary to resolve the overpayment issue:

The administrative records show the claimant was not paid benefits after the separation date.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes claimant was discharged from employment for work-related misconduct. The overpayment issue is moot because the claimant did not receive benefits after the separation.

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 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.

871 IAC 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 Department of Job Service*, 275 N.W.2d 445, 448 (Iowa 1979).

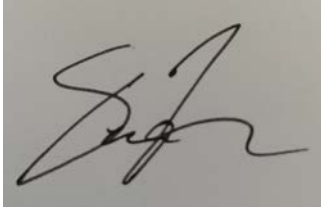
The employer has the burden of proof in establishing disqualifying job misconduct. *Cosper v. Iowa Dep't of Job Serv.*, 321 N.W.2d 6 (Iowa 1982). The issue is not whether the employer made a correct decision in separating claimant, but whether the claimant is entitled to unemployment insurance benefits. *Infante v. Iowa Dep't of Job Serv.*, 364 N.W.2d 262 (Iowa Ct. App. 1984). Misconduct must be "substantial" to warrant a denial of job insurance benefits. *Newman v. Iowa Dep't of Job Serv.*, 351 N.W.2d 806 (Iowa Ct. App. 1984).

Discharge within a probationary period, without more, is not disqualifying. Failure in job performance due to inability or incapacity is not considered misconduct because the actions were not volitional. *Huntoon v. Iowa Dep't of Job Serv.*, 275 N.W.2d 445, 448 (Iowa 1979). Where an individual is discharged due to a failure in job performance, proof of that individual's ability to do the job is required to justify disqualification, rather than accepting the employer's subjective view. To do so is to impermissibly shift the burden of proof to the claimant. *Kelly v. Iowa Dep't of Job Serv.*, 386 N.W.2d 552 (Iowa Ct. App. 1986).

Ms. Stewart provided credible testimony that claimant had a sustained period of time during which he performed his job duties to employer's satisfaction. This marked difference in his production when he was out of the office may have been sufficient to prove disqualifying misconduct on its own. *Cosper v. Iowa Dep't of Job Serv.*, 321 N.W.2d 6 (Iowa 1982). However, the claimant also did not comply with reasonable instructions regarding obtaining Covid19 testing. He also did not communicate with Ms. Stewart regarding concerns the employer had about his performance and his return to the office. The employer can reasonably expect better than that from its employees. Benefits are denied.

DECISION:

The November 18, 2021, (reference 05) unemployment insurance decision is reversed. The claimant was discharged from employment due to job-related misconduct. Benefits are withheld until such time as he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible. The overpayment issue is moot because the claimant was not paid benefits after the separation date.

A handwritten signature in black ink on a light gray background. The signature is stylized and appears to read 'Sean M. Nelson'.

Sean M. Nelson
Administrative Law Judge
Unemployment Insurance Appeals Bureau
1000 East Grand Avenue
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Fax (515) 725-9067

February 22, 2022
Decision Dated and Mailed

smn/scn