

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

---

**ANNA N SOMTCH**  
Claimant

**4JMN LLC**  
Employer

**APPEAL 21A-UI-13529-CS-T**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**OC: 03/14/21  
Claimant: Respondent (1)**

---

Iowa Code §96.5(2)a-Discharge/Misconduct  
Iowa Code §96.5(1)- Voluntary Quit  
Iowa Code § 96.3(7) – Recovery of Benefit Overpayment  
Iowa Admin. Code r. 871-24.10 – Employer/Representative Participation Fact-finding Interview  
PL116-136, Sec. 2104 – Federal Pandemic Unemployment Compensation (FPUC)

**STATEMENT OF THE CASE:**

On June 7, 2021, the employer/appellant filed an appeal from the June 2, 2021, (reference 02) unemployment insurance decision that allowed benefits based on claimant being discharged but the conduct was not willful or deliberate misconduct. The parties were properly notified about the hearing. A telephone hearing was held on August 10, 2021. Claimant participated at the hearing. Employer participated through Owner, Michael Earp. Exhibits 1, 2, 3, 4, 5, 6, 7, and 8 were admitted into the record. Administrative notice was taken of claimant's unemployment benefits records.

**ISSUES:**

Was the separation a layoff, discharge for misconduct, or voluntary quit without good cause?

Should claimant repay benefits?

Should the employer be charged due to employer participation in fact finding?

Is the claimant overpaid benefits?

Is the claimant eligible for FPUC?

**FINDINGS OF FACT:**

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant began working for employer on February 1, 2019. Claimant last worked as a full-time massage therapist. Claimant was separated from employment on August 27, 2020, when she was discharged by the employer.

On July 28, 2020, the employer received a survey where the client reported she did not get the full sixty minute session from the claimant. (Exhibit 5, pg. 2). On August 8, 2020, the employer received a survey where the client complained the claimant was late to the appointment by 15 minutes. (Exhibit 6). The employer received other complaints but they did not deal with the reason for claimant's termination. (Exhibits 2, 3, and 4).

On or about August 27, 2020, the employer and claimant's supervisor, Terri Tudor, called the claimant and notified her that she was terminated. The employer had received complaints from customers and employees that claimant was negatively speaking about the employer. The employer could not testify with specificity the nature of the negative talk the claimant said to customers and employees. The employer also terminated claimant because of the complaints that claimant was not giving customers their full sessions and she was late to the appointments.

The employer had a policy on ensuring customers their full service time. Claimant acknowledged she receive the policy when she was hired. Claimant did not receive a verbal or written warning notifying her that her job was in jeopardy if she continued receiving customer complaints regarding not receiving full allotment of their session.

Claimant never received a verbal or written warning regarding talking negatively about the employer.

The employer was not contacted for a fact finding interview and did not receive a questionnaire for fact finding prior to the representative's decision.

Claimant received state unemployment benefits prior to this separation. Claimant began a claim on March 15, 2020. Claimant filed continuing weekly claims each week and reported income during the weeks she was working for the employer. Claimant also received FPUC benefits.

#### **REASONING AND CONCLUSIONS OF LAW:**

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

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).

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.

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 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).

In an at-will employment environment an employer may discharge an employee for any number of reasons or no reason at all if it is not contrary to public policy, but if it fails to meet its burden of proof to establish job related misconduct as the reason for the separation, it incurs potential liability for unemployment insurance benefits related to that separation. 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 employer testified that the primary reason claimant was terminated was because she spoke negatively about the employer to customers and employees. The employer could not testify with specificity the nature of the negative statements. The employer testified that when an employee is hired they are given a document which sets forth the expectations of the employee. One of the expectations is that they will provide a "drama free environment." Claimant had never been previously warned for speaking negatively regarding the employer. 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. Inasmuch as employer had not previously warned claimant about the issue leading to the separation, it has not met the burden of proof to establish that claimant acted deliberately or with recurrent negligence in violation of company policy, procedure, or prior warning. Since the employer could not provide specific details regarding the substance of the negative statements allegedly made by the claimant, and the claimant was never previously warned about her comments, the employer had not met its burden of proof establishing the discharge was for job-related misconduct that disqualified the claimant from state unemployment benefits. Accordingly, no disqualification pursuant to Iowa Code § 96.5(2)a is imposed. Benefits are allowed provided she is otherwise eligible.

The issue of whether claimant should repay benefits, whether she has been overpaid benefits, whether claimant is eligible for FPUC is moot because it has been determined she is allowed benefits, provided she is otherwise eligible.

The issues of whether the employer participated in fact finding and whether its account should be charged is moot since the claimant is not disqualified for state unemployment benefits.

**DECISION:**

The June 02, 2021, (reference 02) unemployment insurance decision is affirmed. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided she is otherwise eligible. Any benefits claimed and withheld on this basis shall be paid.

The issue of whether claimant should repay benefits, whether she has been overpaid benefits, whether claimant is eligible for FPUC is moot.

The issues of whether the employer participated in fact finding and whether its account should be charged is moot.



---

Carly Smith  
Administrative Law Judge  
Unemployment Insurance Appeals Bureau

August 16, 2021  
Decision Dated and Mailed

cs/kmj