

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

CARISSA N DAGGETT

Claimant

APPEAL 18A-UI-08871-AW-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

THE EASTER SEAL SOCIETY OF IA INC

Employer

OC: 07/29/18

Claimant: Respondent (2)

Iowa Code § 96.5(2) – Discharge for Misconduct

Iowa Code § 96.3(7) – Recovery of Overpayment of Benefits

Iowa Admin Code r. 871-24.32(1) – Discharge for Misconduct

Iowa Admin Code r. 871-24.10 – Employer Participation in Fact-Finding Interviews

STATEMENT OF THE CASE:

The Easter Seal Society of Iowa, Inc., Employer, filed an appeal from the August 13, 2018, (reference 01) unemployment insurance decision that allowed benefits because claimant was discharged from work with The Easter Seal Society of Iowa, but not for misconduct. The parties were properly notified of the hearing. A telephone hearing was held on September 11, 2018 at 2:00 p.m. Claimant participated. Employer participated through Kristi Sterling, Chief Talent Officer, and employer's witness, Thom Short, Director of 24-hour Supportive Community Living. No exhibits were admitted.

ISSUES:

Whether claimant's separation was a discharge for disqualifying job-related misconduct.

Whether claimant was overpaid benefits.

Whether claimant should repay benefits and/or whether employer should be charged for benefits.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed full-time as a Direct Support Professional from August 13, 2015 until her employment ended on July 27, 2018. (Short Testimony) Claimant was discharged from employment because she became ineligible for employment with the Easter Seal Society of Iowa due to state law. (Short Testimony) Claimant's ineligibility for employment was the employer's main reason for terminating claimant's employment. (Short Testimony) Claimant's ineligibility for employment is a violation of a company policy. (Short Testimony)

Claimant's ineligibility for employment was a result of her intravenous use of an illegal drug. (Short Testimony) Claimant admitted using this drug, but did not report when the drug use occurred. (Claimant Testimony; Short Testimony) Employer does not know of any instances

when claimant used or was under the influence of illegal drugs while at work. (Short Testimony)
Employer has a policy that provides team members must report to work free of the influence of drugs and alcohol. (Short Testimony)

Claimant has received unemployment benefits in the amount of \$2,335.00, since filing a claim with an effective date of July 29, 2018, for the five weeks ending August 4, 2018 through September 1, 2018. (Claimant Testimony) The employer participated in the fact-finding interview by Thom Short, Director of 24-hour Supportive Community Living, and Kristi Sterling, Chief Talent Officer. (Short Testimony)

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes that the claimant was discharged for disqualifying job-related misconduct. Benefits are denied. Claimant was overpaid benefits in the amount of \$2,335.00. Claimant must repay the overpayment. The employer's account will not be charged due to its participation in the fact-finding interview.

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. (emphasis added)

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).

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

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). 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. Misconduct must be substantial in nature to support a disqualification from unemployment benefits. *Gimbel v. Emp't Appeal Bd.*, 489 N.W.2d 36, 39 (Iowa Ct. App. 1992). The focus is on deliberate, intentional, or culpable acts by the employee. *Id.* Disqualification for a single misconduct incident must be a deliberate violation or disregard of standards of behavior which employer has a right to expect. *Diggs v. Emp't Appeal Bd.*, 478 N.W.2d 432 (Iowa Ct. App. 1991).

Under the definition of misconduct for purposes of unemployment benefit disqualification, the conduct in question must be "work-connected." *Diggs v. Emp't Appeal Bd.*, 478 N.W.2d 432 (Iowa Ct. App. 1991). The court has concluded that some off-duty conduct can have the requisite element of work connection. *Kleidosty v. Emp't Appeal Bd.*, 482 N.W.2d 416, 418 (Iowa 1992). Under similar definitions of misconduct, for an employer to show that the employee's off-duty activities rise to the level of misconduct in connection with the employment, the employer must show by a preponderance of the evidence that the employee's conduct (1) had some nexus with the work; (2) resulted in some harm to the employer's interest, and (3) was conduct which was (a) violative of some code of behavior impliedly contracted between employer and employee, and (b) done with intent or knowledge that the employer's interest would suffer. See also, *Dray v. Director*, 930 S.W.2d 390 (Ark. Ct. App. 1996); *In re Kotrba*, 418 N.W.2d 313 (SD 1988), quoting *Nelson v. Dept of Emp't Security*, 655 P.2d 242 (WA 1982); 76 Am. Jur. 2d, Unemployment Compensation §§ 77-78.

While claimant's drug use was off-duty conduct, it is still "work-connected" because claimant knew, or should have known, that her illegal drug use would make her ineligible for employment, which is a violation of a company policy and a detriment to her employer's interests. Claimant's ineligibility for employment is a violation or disregard of standards that the employer has a right to expect from its employees. Claimant's ineligibility for employment is disqualifying, work-related misconduct. Claimant is not eligible for benefits.

Iowa Code section 96.3(7) provides, in pertinent part:

7. Recovery of overpayment of benefits.

a. If an individual receives benefits for which the individual is subsequently determined to be ineligible, even though the individual acts in good faith and is not otherwise at fault, the benefits shall be recovered. The department in its discretion may recover the overpayment of benefits either by having a sum equal to the overpayment deducted from any future benefits payable to the individual or by having the individual pay to the department a sum equal to the overpayment.

b. (1) (a) If the department determines that an overpayment has been made, the charge for the overpayment against the employer's account shall be removed and the account shall be credited with an amount equal to the overpayment from the unemployment compensation trust fund and this credit shall include both contributory and reimbursable employers, notwithstanding section 96.8, subsection 5. The employer shall not be relieved of charges if benefits are paid because the employer or an agent of the employer failed to respond timely or adequately to the department's request for information relating to the payment of benefits. This prohibition against relief of charges shall apply to both contributory and reimbursable employers.

(b) However, provided the benefits were not received as a result of fraud or willful misrepresentation by the individual, benefits shall not be recovered from an individual if the employer did not participate in the initial determination to award benefits pursuant to section 96.6, subsection 2, and an overpayment occurred because of a subsequent reversion on appeal regarding the issue of the individual's separation from employment.

Iowa Admin. Code r. 871-24.10, *employer and employer representative participation in fact-finding interviews*, provides:

(1) "Participate," as the term is used for employers in the context of the initial determination to award benefits pursuant to Iowa Code section 96.6, subsection 2, means submitting detailed factual information of the quantity and quality that if un rebutted would be sufficient to result in a decision favorable to the employer. The most effective means to participate is to provide live testimony at the interview from a witness with firsthand knowledge of the events leading to the separation. If no live testimony is provided, the employer must provide the name and telephone number of an employee with firsthand information who may be contacted, if necessary, for rebuttal. A party may also participate by providing detailed written statements or documents that provide detailed factual information of the events leading to separation. At a minimum, the information provided by the employer or the employer's representative must identify the dates and particular circumstances of the incident or incidents, including, in the case of discharge, the act or omissions of the claimant or, in the event of a voluntary separation, the stated reason for the quit. The specific rule or policy must be submitted if the claimant was discharged for violating such rule or policy. In the case of discharge for attendance violations, the information must include the circumstances of all incidents the employer or the employer's representative contends meet the definition of unexcused absences as set forth in 871—subrule 24.32(7). On the other hand, written or oral statements or general conclusions without supporting detailed factual information and information submitted after the fact-finding decision has been issued are not considered participation within the meaning of the statute.

As a result of this decision, the claimant received benefits to which she was not entitled, resulting in an overpayment of \$2,335.00. Employer participated in the fact-finding interview by providing documentation and live testimony from a witness with firsthand knowledge of the

events leading to the separation. Because the employer participated in the fact-finding interview, the claimant is required to repay the overpayment and the employer's account will not be charged for benefits.

DECISION:

The August 13, 2018, (reference 01) unemployment insurance decision is reversed. Benefits are denied until such time as the claimant works in and has been paid wages for insured work equal to ten times her weekly benefit amount. The claimant has been overpaid unemployment insurance benefits in the gross amount of \$2,335.00 to which she was not entitled. The claimant is required to repay the overpayment; employer's account will not be charged.

Adrienne C. Williamson
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Decision Dated and Mailed

acw/rvs