

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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**JOSEPH W BAULER**  
Claimant

**JOHN DEERE COMPANY**  
Employer

**APPEAL 17A-UI-09883-JP-T**  
**ADMINISTRATIVE LAW JUDGE  
DECISION**

**OC: 09/10/17**  
**Claimant: Respondent (1)**

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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:**

The employer filed an appeal from the September 25, 2017, (reference 01) unemployment insurance decision that allowed benefits. The parties were properly notified about the hearing. A telephone hearing was held on October 12, 2017. Claimant participated. Tim Frickson and Michael Bauler attended the hearing on claimant's behalf. Employer participated through labor relations administrator Craig Cornwell. Employer Exhibit A was admitted into evidence with no objection. Claimant offered Claimant Exhibit 1 into evidence. The employer objected to Claimant Exhibit 1 because it was not relevant. The employer objection was overruled and Claimant Exhibit 1 was admitted into evidence. Claimant offered Claimant Exhibit 2 into evidence. The employer objected to Claimant Exhibit 2. The employer objection was sustained and Claimant Exhibit 2 was not admitted into evidence.

**ISSUES:**

Was the claimant discharged for disqualifying job-related misconduct?

Has the claimant been overpaid unemployment insurance benefits, and if so, can the repayment of those benefits to the agency be waived?

Can charges to the employer's account be waived?

**FINDINGS OF FACT:**

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed full-time as a production worker/shop chairman for the union from June 23, 1997, and was separated from employment on September 8, 2017, when he was discharged.

The employer has a policy that prohibits distribution of offensive material to coworkers. Claimant was aware of the policy.

Between December 13, 2016, and March 23, 2017, claimant sent seventy-five text/picture messages to multiple co-workers that contained offensive material. Employer Exhibit A. Claimant sent some of the text/picture messages while on company time.

On August 8, 2017, an employee reported to the employer that claimant had been sending offensive text/picture messages to co-workers. August 8, 2017, was the first time the employer became aware claimant had sent offensive text/picture messages. The employee told the employer that he had tried to resolve the issue with the union first, but it was not resolved how he thought it should have been. After the employer received the complaint, the employer's compliance office started an investigation. The compliance office interviewed the employee that made the complaint and reviewed the employee's phone. The compliance office determined the text/picture messages came from claimant's phone. Claimant was not interviewed as a part of the employer's investigation. The employer did not notify claimant about its investigation.

On September 6, 2017, the employer completed its investigation. On September 8, 2017, the employer held a disciplinary action hearing with claimant. September 8, 2017, was the first time the employer notified claimant about its investigation. Claimant was represented by the union president during the disciplinary action hearing. Claimant admitted that he sent some of the text/picture messages to his co-workers. Claimant stated the text/picture messages were meant as jokes. The employer then discharged claimant. Claimant had no prior disciplinary warnings.

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

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

Iowa Code section 96.5(2)a provides:

An individual shall be disqualified for benefits, regardless of the source of the individual's wage credits:

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:

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(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). 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). A lapse of 11 days from the final act until discharge when claimant was notified on the fourth day that his conduct was grounds for dismissal did not make the final act a "past act." An unpublished decision held informally that two calendar weeks or up to ten work days from the final incident to the discharge may be considered a current act. *Milligan v. Emp't Appeal Bd.*, No. 10-2098 (Iowa Ct. App. filed June 15, 2011).

After the employer was informed on August 8, 2017, by an employee about the text/picture messages claimant had sent from December 13, 2016 to March 23, 2017, the employer conducted an investigation by interviewing the employee that made the complaint and looking at the employee's phone. The employer elected not to interview claimant about his conduct. When the employer notified claimant he was being discharged on September 8, 2017, it was the first time claimant was aware of his co-worker's complaint.

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. Although claimant did engage in the final acts of misconduct by sending offensive and inappropriate text/picture messages to his co-workers from December 13, 2016 to March 23, 2017, and inasmuch as employer knew of the incident on August 8, 2017, did not advise the claimant it was an issue that would be investigated, and fired claimant a month later, the act for which claimant was discharged was no longer current. Because the act for which claimant was discharged was not current and claimant may not be disqualified for past acts of misconduct, benefits are allowed.

While the employer may have been justified in discharging claimant, disqualifying job misconduct as defined by the unemployment insurance law has not been established in this

case. Nothing in this decision should be interpreted as a condemnation of the employer's right to discharge claimant. The employer had a right to make a business decision as it determined was in its best interest. However, the analysis of unemployment insurance eligibility does not end there. This ruling simply holds that the employer has not met its burden of proof to establish a current or final act of misconduct, and, without such, the history of other incidents need not be examined. Benefits are allowed.

As benefits are allowed, the issues of overpayment, repayment, and the chargeability of the employer's account are moot.

**DECISION:**

The September 25, 2017, (reference 01) unemployment insurance decision is affirmed. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided claimant is otherwise eligible. Any benefits claimed and withheld on this basis shall be paid.

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Jeremy Peterson  
Administrative Law Judge

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Decision Dated and Mailed

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