IN THE IOWA ADMINISTRATIVE HEARINGS DIVISION
UNEMPLOYMENT INSURANCE APPEALS BUREAU

HEIDI S WESTLAKE Claimant **BICKFORD SENIOR LIVING GROUP LLC** Employer	**APPEAL 24A-UI-02144-PT-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 01/21/24** **Claimant: Respondent (1)**

Iowa Code § 96.5(2)a – Discharge
Iowa Code § 96.3(7) – Overpayment of Benefits
Iowa Admin. Code r. 871-24.10 – Employer Participation in Fact-finding Interview

STATEMENT OF THE CASE:

The employer, Bickford Senior Living Group LLC, filed an appeal from a decision of a representative dated February 12, 2024, (reference 01) that held the claimant eligible for unemployment insurance benefits after a separation from employment. After due notice, a telephone hearing was held on March 25, 2024. The claimant, Heidi Westlake, participated personally. The employer participated through Human Resources Generalist Jason Hopper, Recruiting Specialist Samantha Summers, and Director of Operations Amy LeMarie. The administrative law judge took official notice of the administrative record.

ISSUES:

Was the claimant discharged for disqualifying, job-related misconduct?
Has the claimant been overpaid any unemployment insurance benefits, and if so, can the repayment of those benefits to the agency be waived?
Can any charges to the employer's account be waived?

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds: The claimant began working as a full-time executive director for Bickford Senior Living Group LLC on April 18, 2017. The claimant was separated from employment on January 23, 2024, when she was discharged.

As an executive director, the claimant was responsible for supervising employees, overseeing daily operations, and ensuring all day-to-day functions of the branch were performed correctly. The employer has an employee manual that contains guidelines for how to code and report expenditures. The claimant had access to the employee manual and was generally familiar with the employer's work rules and policies.

During claimant's first six years of employment, the claimant performed her job duties well and was considered a good, if not exceptional, employee. However, in March 2023, the claimant's supervisor, the Director of Operations, left her employment and was replaced by a new director.

The claimant felt the new director watched her unusually closely and was overly critical of her every minor mistake.

Sometime in the fall of 2023, an employee reported to the claimant that the previous day, the employee had witnessed another employee sleeping on the job. The claimant told the employee that, moving forward, if she ever saw an employee sleeping on the job, she needed to inform the claimant immediately so that the claimant could catch the employee in the act and confirm that the employee was sleeping. Approximately three weeks later, an employee reported to the claimant that the employee was again asleep on the job. The claimant found the employee, confirmed he was sleeping, and terminated the employee effective immediately. The employer did not express any issues or concerns with how the claimant handled the situation.

When the claimant was first hired, her predecessor told her that on days where the claimant worked in the kitchen preparing food for events, the claimant could categorize the food costs as "marketing" because the events were promotional. Throughout the claimant's employment with Bickford Senior Living Group LLC, whenever she worked in the kitchen, she categorized the food costs as "marketing." The employer never instructed the claimant that this was incorrect and she never received any warnings or discipline for categorizing the food costs as "marketing."

In December 2023, the director contacted the claimant and informed her that several employees had charged lunches to the company credit card and had categorized the expenditures as "marketing." The claimant told the director that it was her understanding of the policy that, if employees were out of the office engaged in marketing activities, they could expense their lunches to the employer and categorize it as "marketing." The director informed the claimant that her understanding of the policy was incorrect and that employees should not be purchasing lunches with the company credit card. After speaking with the director, the claimant informed her branch that they could no longer purchase lunch with the company credit card. There were no further issues concerning the company credit card.

In early December 2023, the director contacted the claimant and requested to see employee acknowledgements from the previous year confirming that all employees had completed their mandatory fire drills. The claimant knew the acknowledgements had been completed, because she had provided copies of them to the State as she was legally required to do. However, when the claimant went to retrieve the acknowledgements for the director, she was unable to find them. On December 6, 2023, the employer issued the claimant a written warning for failing to provide the records.

In early-January 2023, an employee reported to the director that the claimant had not required her to participate in a fire drill. On January 17, 2023, the director called the claimant and asked whether she had allowed some employees to opt out of fire drills. The claimant explained that it was her understanding that the rules allowed certain employees to choose whether to participate in the group drill or to complete the drill on their own time. The director disagreed with the claimant's interpretation and instructed her that moving forward all employees must participate in the group fire drill. The claimant told the director that, moving forward, she would make sure all employees participated in the group fire drill.

On January 23, 2024, the employer called the claimant into a meeting and informed the claimant that her employment was being terminated effective immediately due to miscategorizing expenditures, for incorrectly overseeing the fire drills, and for failing to terminate an employee who fell asleep on the job quickly enough. Prior to her termination, the claimant felt

she was performing her job to the best of her ability and she did not think that her job was in jeopardy.

The claimant's administrative records indicate that the claimant filed her original claim for benefits with an effective date of January 21, 2024, and weekly continued claims for benefits for eight weeks between January 21 and March 16, 2024. The claimant has received total unemployment insurance benefits of $3,624.00. The employer participated in the fact-finding interview with Iowa Workforce Development.

REASONING AND CONCLUSIONS OF LAW:

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

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(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.

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). 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). A failure in job performance is not misconduct unless it is intentional. *Huntoon*, supra; *Lee v. Emp't Appeal Bd.*, 616 N.W.2d 661 (Iowa 2000).

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*, 10-2098, slip op. at 8. 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.

It is the duty of the administrative law judge as the trier of fact in this case, to determine the credibility of witnesses, weigh the evidence and decide the facts in issue. *Arndt v. City of*

LeClaire, 728 N.W.2d 389, 394-395 (Iowa 2007). The administrative law judge may believe all, part or none of any witness's testimony. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996). In assessing the credibility of witnesses, the administrative law judge should consider the evidence using his or her own observations, common sense and experience. *Id.* In determining the facts, and deciding what testimony to believe, the fact finder may consider the following factors: whether the testimony is reasonable and consistent with other believable evidence; whether a witness has made inconsistent statements; the witness's appearance, conduct, age, intelligence, memory and knowledge of the facts; and the witness's interest in the trial, their motive, candor, bias and prejudice. *Id*.

The findings of fact show how I have resolved the disputed factual issues in this case. I assessed the credibility of the witnesses who testified during the hearing, considering the applicable factors listed above, and using my own common sense and experience. I find credible the claimant's testimony that she tried to accurately enforce the work rules and to perform her job duties to the best of her ability. The administrative law judge concludes the claimant did not intentionally violate the employer's work rules and policies.

The employer discharged the claimant for a variety of issues that occurred over the last several months of the claimant's employment. Specifically, the employer terminated the claimant's employment for allegedly miscategorizing food expenditures, for incorrectly instructing employees on policies concerning expensing lunches and performing fire drills, and for not firing an employee fast enough.

As to the claimant's incorrect instructions to employees concerning purchasing lunches and performing fire drills, the employer learned of these issues in late-December 2023 and early-January 2024, promptly coached and counseled the claimant concerning both issues, and the claimant immediately corrected her mistakes. As to the claimant's alleged failure to promptly terminate an employee, the claimant's alleged inaction occurred months before her termination and the employer did not notify the claimant that her conduct was grounds for dismissal until her discharge on January 23, 2024. As such, these acts were no longer current.

As to claimant's alleged miscategorization of food expenditures, while her conduct may have violated the employer's policy, there is no evidence that the claimant willfully or wantonly disregarded the employer's instructions of the standards of behavior the employer had a right to expect of her. Rather, the evidence supports that the claimant's mistake arose from incorrect past advice and ordinary negligence. While carelessness can result in disqualification, it must be of such degree of recurrence as to demonstrate substantial disregard for the employer's interests. Claimant's conduct in this instance does not meet that standard. As such, the employer has not carried its burden of establishing that the claimant engaged in disqualifying misconduct. Benefits are allowed, provided the claimant is otherwise eligible.

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

DECISION:

The February 12, 2024, (reference 01) unemployment insurance decision is affirmed. The claimant was discharged from employment on January 23, 2024, for no disqualifying reason. The claimant is allowed benefits provided she remains otherwise eligible. The issues of overpayment, repayment and chargeability are moot.

Patrick B. Thomas
Administrative Law Judge

April 1, 2024
Decision Dated and Mailed

pbt/scn

APPEAL RIGHTS. If you disagree with the decision, you or any interested party may:

1. Appeal to the Employment Appeal Board within fifteen (15) days of the date under the judge's signature by submitting a written appeal via mail, fax, or online to:

Iowa Employment Appeal Board
6200 Park Avenue Suite 100
Des Moines, Iowa 50321
Fax: (515)281-7191
Online: eab.iowa.gov

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

AN APPEAL TO THE BOARD SHALL STATE CLEARLY:
1) The name, address, and social security number of the claimant.
2) A reference to the decision from which the appeal is taken.
3) That an appeal from such decision is being made and such appeal is signed.
4) The grounds upon which such appeal is based.

An Employment Appeal Board decision is final agency action. If a party disagrees with the Employment Appeal Board decision, they may then file a petition for judicial review in district court.

2. If no one files an appeal of the judge's decision with the Employment Appeal Board within fifteen (15) days, the decision becomes final agency action, and you have the option to file a petition for judicial review in District Court within thirty (30) days after the decision becomes final. Additional information on how to file a petition can be found at Iowa Code §17A.19, which is online at https://www.legis.iowa.gov/docs/code/17A.19.pdf or by contacting the District Court Clerk of Court https:///www.iowacourts.gov/iowa-courts/court-directory/.

Note to Parties: YOU MAY REPRESENT yourself in the appeal or obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds.

Note to Claimant: It is important that you file your weekly claim as directed, while this appeal is pending, to protect your continuing right to benefits.

SERVICE INFORMATION:
A true and correct copy of this decision was mailed to each of the parties listed.

DERECHOS DE APELACIÓN. Si no está de acuerdo con la decisión, usted o cualquier parte interesada puede:

1. Apelar a la Junta de Apelaciones de Empleo dentro de los quince (15) días de la fecha bajo la firma del juez presentando una apelación por escrito por correo, fax o en línea a:

Iowa Employment Appeal Board
6200 Park Avenue Suite 100
Des Moines, Iowa 50321
Fax: (515)281-7191
En línea: eab.iowa.gov

El período de apelación se extenderá hasta el siguiente día hábil si el último día para apelar cae en fin de semana o día feriado legal.

UNA APELACIÓN A LA JUNTA DEBE ESTABLECER CLARAMENTE:
1) El nombre, dirección y número de seguro social del reclamante.
2) Una referencia a la decisión de la que se toma la apelación.
3) Que se interponga recurso de apelación contra tal decisión y se firme dicho recurso.
4) Los fundamentos en que se funda dicho recurso.

Una decisión de la Junta de Apelaciones de Empleo es una acción final de la agencia. Si una de las partes no está de acuerdo con la decisión de la Junta de Apelación de Empleo, puede presentar una petición de revisión judicial en el tribunal de distrito.

2. Si nadie presenta una apelación de la decisión del juez ante la Junta de Apelaciones Laborales dentro de los quince (15) días, la decisión se convierte en acción final de la agencia y usted tiene la opción de presentar una petición de revisión judicial en el Tribunal de Distrito dentro de los treinta (30) días después de que la decisión adquiera firmeza. Puede encontrar información adicional sobre cómo presentar una petición en el Código de Iowa §17A.19, que se encuentra en línea en https://www.legis.iowa.gov/docs/code/17A.19.pdf o comunicándose con el Tribunal de Distrito Secretario del tribunal https:///www.iowacourts.gov/iowa-courts/court-directory/.

Nota para las partes: USTED PUEDE REPRESENTARSE en la apelación u obtener un abogado u otra parte interesada para que lo haga, siempre que no haya gastos para Workforce Development. Si desea ser representado por un abogado, puede obtener los servicios de un abogado privado o uno cuyos servicios se paguen con fondos públicos.

Nota para el reclamante: es importante que presente su reclamo semanal según las instrucciones, mientras esta apelación está pendiente, para proteger su derecho continuo a los beneficios.

SERVICIO DE INFORMACIÓN:
Se envió por correo una copia fiel y correcta de esta decisión a cada una de las partes enumeradas.