

**IN THE IOWA ADMINISTRATIVE HEARINGS DIVISION
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

DEEMARCO L HARRINGTON
Claimant

BWW RESOURCES LLC
Employer

APPEAL 24A-UI-04054-PT-T
**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 03/24/24
Claimant: Appellant (2)

Iowa Code § 96.5(2)a – Discharge

STATEMENT OF THE CASE:

The claimant, Deemarco Harrington, filed an appeal from a decision of a representative dated April 18, 2024, (reference 02) that held the claimant ineligible for unemployment insurance benefits after a separation from employment. After due notice, a telephone hearing was held on May 7, 2024. The claimant participated personally. The employer, BWW Resources LLC, participated through District Manager Jake Gessmann. The employer's Exhibit 1 was admitted into evidence. The administrative law judge took official notice of the administrative record.

ISSUES:

Was the claimant discharged for disqualifying, job-related misconduct?

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 for BWW Resources LLC as a general manager on May 21, 2018. The claimant was separated from employment on March 5, 2024, when he was discharged.

As a general manager, the claimant was responsible for overseeing all operations of the sports bar, reviewing financial statements, and assigning and directing the management team and employees. During the claimant's first five years of employment, the claimant performed his job duties adequately and generally met the employer's expectations.

In May 2023, the claimant's supervisor left and was replaced by a new district manager. The new district manager had higher expectations of the sports bars he oversaw and he imposed stricter standards for the general managers. Despite working hard and trying to learn from his mistakes, the claimant struggled to meet the new district manager's expectations.

On August 21, 2023, the employer placed the claimant on a 60-day performance improvement plan (PIP). The PIP period began August 21 and ended November 24, 2023. The intention of the PIP was to help the claimant improve in the following performance areas: more effective communication with the management team and staff; maintaining higher standards and holding employees accountable; and properly maintaining the facility.

During the 60-day PIP period, the claimant demonstrated consistent improvement in all performance areas. On November 24, 2023, the claimant successfully completed the PIP. The claimant's successful completion of the PIP corresponded with the restaurant's most successful quarter since the claimant was first hired as the general manager.

In December 2023, the claimant felt that he was doing his job well and that his job was secure. However, at the end of December 2023, the restaurant's kitchen manager left and her replacement was not as prepared for the position as the claimant had hoped and expected. Throughout January 2024, the claimant spent a significant amount of time instructing and directing the new kitchen manager. The extra time spent coaching the new manager caused the claimant to fall behind on several of his job duties, such as timely posting staff schedules and consistently holding manager meetings.

On February 16, 2024, the employer issued the claimant a final written warning for failing to improve business operations, conduct manager meetings, timely post staff schedules, and properly maintain the facility. The warning notified the claimant that the restaurant must pass the first quarter Quality, Service, and Cleanliness Audit, that he must post all schedules on time, conduct all weekly manager meetings, and timely post weekly sales forecasts. The disciplinary notice warned the claimant that failure to demonstrate immediate and sustained improvement in these areas would result in further discipline up to and including termination of employment.

On March 1, 2024, the employer conducted the first quarter Quality, Service, and Cleanliness Audit of the claimant's restaurant. The restaurant failed the audit. On March 5, 2024, the employer called the claimant into a meeting and informed the claimant that his employment was being terminated effective immediately due to continued unsatisfactory work performance after having received a final warning.

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. 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.

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-related 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). The gravity of the incident, number of policy violations and prior warnings are factors considered when analyzing misconduct. The lack of a current warning may detract from a finding of an intentional policy violation.

When based on carelessness, the carelessness must actually indicate a "wrongful intent" to be disqualifying in nature. *Id.* Negligence does not constitute misconduct unless recurrent in nature; a single act is not disqualifying unless indicative of a deliberate disregard of the employer's interests. *Henry v. Iowa Dep't of Job Serv.*, 391 N.W.2d 731 (Iowa Ct. App. 1986). Poor work performance is not misconduct in the absence of evidence of intent. *Miller v. Emp't Appeal Bd.*, 423 N.W.2d 211 (Iowa Ct. App. 1988). Generally, continued refusal to follow reasonable instructions constitutes misconduct. *Gilliam v. Atlantic Bottling Co.*, 453 N.W.2d 230 (Iowa Ct. App. 1990); however, "Balky and argumentative" conduct is not necessarily disqualifying. *City of Des Moines v. Picray*, (No. 85-919, Iowa Ct. App. Filed June 25, 1986).

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 the claimant's testimony that he tried to follow the employer's instructions and perform his job to the best of his ability credible. The administrative law judge concludes the claimant did not intentionally fail to perform the duties and expectations of his position.

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). Mere incapacity or incompetence is not disqualifying. Iowa Admin. Code r. 871—24.32(1)(a); see also, *Eaton v. Iowa Dep't of Job Serv.*, 376 N.W.2d 915, 917 (Iowa App. 1985). 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 simply accept the employer's subjective view is to impermissibly shift the burden of proof to the claimant. See *Kelly v. Iowa Dep't of Job Serv.*, 386 N.W.2d 552 (Iowa App. 1986).

In this case, the employer discharged the claimant for various issues with claimant's job performance, but primarily because the claimant fell behind in the performance areas outlined in the PIP and because the restaurant failed the first quarter Quality, Service, and Cleanliness Audit. The evidence demonstrates that the claimant made some progress towards several of the performance areas outlined in the PIP, but fell behind again in February and March 2024. While the claimant may have failed to meet the employer's performance expectations, the progress the claimant made is enough to demonstrate that the claimant was not willfully or wantonly disregarding the standards of behavior the employer had a right to expect of him. In as much as the claimant did attempt to perform the job to the best of his ability, but was unable to meet the employer's expectations, no intentional misconduct has been established, as is the employer's burden of proof. Accordingly, no disqualification is imposed. Benefits are allowed, provided the claimant is otherwise eligible.

DECISION:

The April 18, 2024 (reference 02) unemployment insurance decision is reversed. The claimant was discharged from employment on March 5, 2024, for no disqualifying reason. The claimant is eligible to receive unemployment insurance benefits, provided the claimant is otherwise eligible.



Patrick B. Thomas
Administrative Law Judge

May 17, 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 adquiriera 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.