

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

KRISTIAN M CORBIN
Claimant

KINSETH HOTEL CORPORATION
Employer

APPEAL 17A-UI-00475-JCT

**ADMINISTRATIVE LAW JUDGE
DECISION**

**OC: 11/27/16
Claimant: Respondent (1)**

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 January 4, 2017, (reference 01) unemployment insurance decision that allowed benefits. The parties were properly notified about the hearing. A telephone hearing was held on February 2, 2017. The claimant participated personally. The employer participated through Chris Hunter, Hearing Representative with Employer's Unity. Employer witnesses included Carol Makoui, General Manager and Rachel Hillebrand, Breakfast Manager. Gloria Her, unemployment insurance specialist with Employer's Unity testified about the fact-finding interview only. Employer Exhibits 1 through 30 and Claimant Exhibits A, B, C and D were received into evidence. The administrative law judge took official notice of the administrative records including the fact-finding documents. Based on the evidence, the arguments presented, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

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:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed full-time as a front desk clerk and was separated from employment on December 2, 2016, when she was discharged (Employer Exhibit 2).

Upon hire, the claimant was made aware of and trained on the employer policies (Employer Exhibits 3, 4, 5) which require professional conduct and interactions. The claimant was previously warned on September 18, 2016 for her interaction with Ginny Kleinschmidt, in which it was determined the claimant had been unprofessional to her, in front of a guest (Employer 29). According to Ms. Makoui, there was a list of ongoing issues with the claimant, and the use

of her time and interactions with her peers, including Rachel Hillebrand, Ginny Kleinschmidt (Employer Exhibits 15, 16) Crystal Schurchard, and Jami Callahan, in which bossy, intimidating and bullying behavior was alleged. Only Ms. Hillebrand testified with Ms. Makoui and stated she had felt the claimant was telling her what to do (Employer exhibit 15), to which the claimant acknowledged she previously held Ms. Hillebrand's job and had answered questions when asked and offered guidance when she could.

The final incident occurred over Thanksgiving weekend, while Ms. Makoui was away from the hotel. The employer had posted its holiday schedule on November 9, 2016. The undisputed evidence is the claimant was invited last minute to attend a get together, and Ms. Kleinschmidt agreed to cover the shift, and worked it for her. The employer asserted that the claimant told Ms. Kleinschmidt she had received approval for covering the shift when she had not. In the absence of Ms. Makoui, the claimant asked Jami (Jensen) Callahan, Head Housekeeper, who advised the claimant not to bother Ms. Makoui so long as the shift was covered (Claimant Exhibit C). The claimant was issued a written warning in response to switching shifts with Ms. Kleinschmidt, at the claimant's request on November 29, 2016 (Employer Exhibit 30). Ms. Makoui determined based on Ms. Kleinschmidt's report that the claimant had lied about getting permission.

When the warning was issued, the claimant was not told she was suspended pending further investigation, or that future investigating would take place. Then the claimant was informed that her shifts for the following week had been removed because another employee needed them, before being called and told she was discharged. Between the period of the warning issuance and the separation, the claimant did not work again. Ms. Makoui indicated other employees had complained about the claimant and were threatening to quit, but did not state that the claimant did anything further to contribute to her separation after the November 29, 2016 warning was issued. Ms. Makoui summarized the claimant's conduct at the hearing as "when she was bad, she was ever so bad."

The administrative record reflects that claimant has received unemployment benefits in the amount of \$368.00, since filing a claim with an effective date of November 27, 2016. The administrative record also establishes that the employer did not participate in the fact-finding interview or make a witness with direct knowledge available for rebuttal. The employer representative, Gloria Her, missed the scheduled fact-finding interview because she was tending to another phone call. She did return the call after the fact, and submitted written documentation after the scheduled fact-finding interview.

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 § 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.

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.

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. The employer has the burden of proof in establishing disqualifying job misconduct. *Cosper v. Iowa Department of Job Service*, 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. IDJS*, 364 N.W.2d 262 (Iowa 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. IDJS*, 425 N.W.2d 679 (Iowa 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 Department of Job Service*, 351 N.W.2d 806 (Iowa App. 1984).

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.* Assessing the credibility of the witnesses and reliability of the evidence in conjunction with the applicable burden of proof, as shown in the factual conclusions reached in the above-noted findings of fact, the administrative law judge concludes that the employer has not satisfied its burden to establish by a preponderance of the evidence that the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law.

In this case, the claimant was discharged based on her negative interactions with her co-workers, which were described as being bullying and negative. Several employees reportedly complained about the claimant, including Rachel Hillebrand, Ginny Kleinschmidt (Employer Exhibits 15, 16) Crystal Schurchard, and Jami Callahan, and according to Ms. Makoui, some employees were threatening to quit because of the claimant. The claimant had one warning in September 2016, before the final incident, in response to her negative interaction with co-worker, Ginny Kleinschmidt (Employer Exhibit 29).

The final incident occurred over Thanksgiving weekend while Ms. Makoui was out of the office. The claimant requested Ms. Kleinschmidt cover her shift, and it was covered. The claimant notified Ms. Callahan in Ms. Makoui's absence and was advised not to bother Ms. Makoui. Upon return, Ms. Makoui was told the claimant had been dishonest inasmuch as she allegedly told Ms. Kleinschmidt she had shift coverage approved by Ms. Makoui (when actually it was Ms. Callahan.)

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.

Inasmuch as the employer had warned the claimant about the final incident on November 29, 2016 and there were no incidents of alleged misconduct thereafter, it has not met the burden of proof to establish that claimant acted deliberately or negligently after the most recent warning. The claimant when given her warning on November 29, 2016 and was not told she remained under investigation or could face additional discipline for the incident that occurred over Thanksgiving. Further, the claimant did not perform work again after November 29, 2016, because the claimant's shifts were removed from the schedule and then she was discharged. Therefore, the claimant did not commit any additional act after the final incident, for which she was already disciplined by way of the warning. The employer has not established a current or final act of misconduct, and, without such, the history of other incidents need not be examined. Accordingly, benefits are allowed.

Nothing in this decision should be interpreted as a condemnation of the employer's right to terminate the claimant for violating its policies and procedures. The employer had a right to follow its policies and procedures. The analysis of unemployment insurance eligibility, however, does not end there. This ruling simply holds that the employer did not meet its burden of proof

to establish the claimant's conduct leading separation was misconduct under Iowa law. Since the employer has not met its burden of proof, benefits are allowed.

Because the claimant is eligible for benefits, the issues of overpayment and employer relief of charges are moot.

DECISION:

The January 4, 2017, (reference 01) decision is affirmed. The claimant was not discharged from employment due to job-related misconduct. Benefits are allowed, provided she is otherwise eligible. The claimant has not been overpaid unemployment insurance benefits. The employer did not participate in the fact-finding interview and its account shall be charged.

Jennifer L. Beckman
Administrative Law Judge

Decision Dated and Mailed

jlb/rvs