

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

TANESHA D CULBERSON
Claimant

APPEAL 15A-UI-13723-CL-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

EGS CUSTOMER CARE INC
Employer

**OC: 11/08/15
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 December 3, 2015, (reference 01) unemployment insurance decision that allowed benefits. The parties were properly notified about the hearing. A telephone hearing was held on January 5, 2016. Claimant participated. Employer participated through human resources generalist, Turkessa Newsome, and human resource manager, Sonia Johnson.

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 customer service representative from June 6, 2014, and was separated from employment on November 19, 2015, when she was terminated.

Employer has a policy prohibiting threats of physical violence and/or intimidation in the workplace. The policy is included in its employee handbook. Claimant received a copy of the employee handbook at the beginning of her employment.

Several months prior to the end of her employment, claimant and "employee A" were involved in a workplace dispute and stopped speaking to each other.

On October 20, 2015, claimant talked to a co-worker about owning a gun. On October 21, 2015, claimant talked to another co-worker about going to the shooting range with his wife. Employee B heard these comments and reported them to employee A.

On October 22, 2015, employee A reported to human resources generalist, Turkessa Newsome, that employee B heard claimant making comments about owning a gun and it made employee A feel intimidated. Newsome followed up with employee B who stated that claimant also remarked, "They don't know who they're dealing with." Newsome interviewed one other person who said claimant was talking about the gun range and having a license to carry a gun while looking at employee A. Newsome and human resource manager, Sonia Johnson, then interviewed claimant. Claimant was evasive about whether she owned a gun, but was adamant about the fact that she did not threaten anyone with the use of a gun. Employer suspended claimant without pay.

Employer then interviewed six other employees. The employees confirmed claimant spoke about owning a gun or going to a gun range. One other employee reported claimant told her she went to the gun range when she was upset about work and imagined the targets were people she was upset with.

Employer determined claimant was a risk to the safety of its other employees and terminated her employment on November 19, 2015.

The administrative record reflects that claimant has received unemployment benefits in the amount of \$2216.00, since filing a claim with an effective date of November 8, 2015, for eight weeks until the week ending January 2, 2016. The administrative record also establishes that the employer did participate in the fact-finding interview.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged 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).

The employer has the burden to prove the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law. *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). The law limits disqualifying misconduct to substantial and willful wrongdoing or repeated carelessness or negligence that equals willful misconduct in culpability. *Lee v. Emp't Appeal Bd.*, 616 N.W.2d 661 (Iowa 2000).

Misconduct must be "substantial" to warrant a denial of job insurance benefits. *Newman v. Iowa Dep't of Job Serv.*, 351 N.W.2d 806 (Iowa Ct. App. 1984). 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).

Here, the conduct for which employer terminated claimant would qualify as misconduct if it occurred. Employer has the burden to prove the conduct occurred. It has failed to do so in this case. Employer did not present testimony from any of the witnesses who heard claimant's alleged comments. Claimant was the only person present for the conversations that testified. Claimant states she only talked about owning a gun and going to a gun range and she did not direct her comments toward employee A. I find claimant's testimony more credible than the testimony provided by employer's second-hand witnesses due to the fact she was present for the conversations. Furthermore, employee A did not report that she heard the comments herself, which corroborates claimant's testimony that she did not direct the comments toward employee A. Making general comments about gun ownership and a gun range does not violate any of employer's policies or standards of conduct generally expected of employees in the workplace. Thus, employer failed to establish claimant engaged in misconduct.

Because claimant is qualified to receive benefits, the issues regarding overpayment are moot and will not be discussed further.

DECISION:

The December 3, 2015, (reference 01) unemployment insurance decision is affirmed. Claimant was separated for no disqualifying reason. Claimant is eligible to receive unemployment insurance benefits, provided claimant meets all other eligibility requirements.

Christine A. Louis
Administrative Law Judge
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Decision Dated and Mailed

cal/pjs