

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

CYNTHIA B ALTEMUS
Claimant

APPEAL 24A-UI-02119-LJ-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

REM IOWA COMMUNITY SERVICES INC
Employer

OC: 01/21/24

Claimant: Respondent (2)

Iowa Code § 96.5(2)a – Discharge from Employment
Iowa Code § 96.3(7) – Recovery of Benefit Overpayment

STATEMENT OF THE CASE:

On February 22, 2024, employer REM Iowa Community Services Inc. filed an appeal from the February 13, 2024 (reference 01) unemployment insurance decision that allowed benefits, determining claimant was discharged on January 26, 2024, and the employer failed to prove claimant was discharged for willful or deliberate misconduct. The Unemployment Insurance Appeals Bureau mailed notice of the hearing on February 29, 2024. Administrative Law Judge Elizabeth A. Johnson held a telephonic hearing at 8:00 a.m. on Tuesday, March 19, 2024. Claimant Cynthia B. Altemus personally participated. Employer REM Iowa Community Services Inc. participated through witnesses Raven Young, Program Director; and Kiersten Madden, Program Director; and Jackie Boudreaux represented the employer. Employer's Exhibits 1, 2, and 3 were received and admitted into the record without objection. The administrative law judge took official notice of the administrative record.

ISSUE:

Whether claimant was discharged from employment for a current act of disqualifying, job-related misconduct.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds:

Claimant began working for REM Iowa Community Services on March 16, 2023. She worked full-time hours, most recently as a direct support professional. Claimant's employment ended on January 26, 2024, when the employer discharged her for violating company policies.

On November 27, 2023, claimant received three speeding tickets while driving a work vehicle, traveling up to Fort Dodge and then transporting an individual back to Burlington from a home visit. A law enforcement officer physically issued claimant one ticket somewhere near Fort Dodge that night. Additionally, claimant was caught on a Webster City mobile "speed camera" at 8:23 p.m. traveling westbound at 85 mph in a posted 65 mph zone. (Exhibit 1). She was caught on another Webster City mobile "speed camera" at 9:29 p.m., traveling eastbound at 83 mph in a posted 65 mph zone. (Exhibit 2) Each of these tickets imposed a \$120.00 fine.

After claimant received the ticket near Fort Dodge, she reported to Kiersten Madden that she had been pulled over. Madden corresponded briefly via phone call and text with claimant that evening. She instructed claimant to bring in a copy of the ticket on her next work day. Claimant never brought Madden a copy of the ticket, and Madden forgot to follow up with claimant about this issue.

On January 9, 2024, the employer received in its mail the two additional speeding citations. Young and Madden reviewed employer records to determine claimant was driving the vehicle that received the two citations. Madden then forwarded the matter to her boss, who also worked with Human Resources, to determine the appropriate level of corrective action for the incident. Management let Madden know on January 25 or January 26 that claimant should be discharged. The employer determined claimant should be discharged due to the severity of the multiple speeding violations. When Young and Madden contacted claimant by telephone to inform her that she was terminated, she hung up on them. One hour later, she called back and requested the employer provide her copies of the tickets that were issued to her. The employer ended up paying the two \$120.00 fines.

The employer maintains a Code of Conduct, which claimant received when she began employment. (Exhibit 3, pages 2, 3, and 6)) This Code of Conduct specifically prohibits: "Improperly parking motor vehicles, driving recklessly, speeding, and violating motor vehicle laws while operating Network vehicles or personal vehicles while conducting [employer] business." (Exhibit 3, page 8) Claimant had one prior violation of this provision in the Code of Conduct, when she sideswiped another vehicle while driving the employer's van and working.

Claimant opened the claim for unemployment insurance benefits effective January 21, 2024. She has filed eight weekly continued claims for benefits, for the eight consecutive weeks beginning the week ending January 27, 2024; and ending the week ending March 16, 2024. She has received benefits in the amount of \$4,545.00. Iowa Workforce Development held a fact-finding interview at 12:50 p.m. on February 12, 2024. The employer did not participate in the fact-finding interview or provide written documentation that, without rebuttal, would have resulted in disqualification. The employer submitted a response prepared by its third-party administrator. It did not provide copies of either ticket from November 27, 2023, nor did it provide any relevant employment policies or contact information for a rebuttal firsthand witness.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes claimant was discharged from employment for no disqualifying reason, as she was not discharged for a current act of misconduct. Benefits are withheld.

Iowa Code section 96.5(2)(a) and (d) provide:

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 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...

d. For the purposes of this subsection, “*misconduct*” means a deliberate act or omission by an employee that constitutes a material breach of the duties and obligations arising out of the employee’s contract of employment. Misconduct is 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 even 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. Misconduct by an individual includes but is not limited to all of the following:

(2) Knowing violation of a reasonable and uniformly enforced rule of an employer.

(6) Conduct that substantially and unjustifiably endangers the personal safety of coworkers or the general public.

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).

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.

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.” Where an employer gives seven days’ notice to the employee that it will consider discharging him, the date of that notice is used to measure whether the act complained of is current. *Greene v. Emp’t Appeal Bd.*, 426 N.W.2d 659 (Iowa Ct. App. 1988). 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).

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 v. EAB*, 10-2098, slip op. at 8 (Iowa App. June 15, 2011). 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.

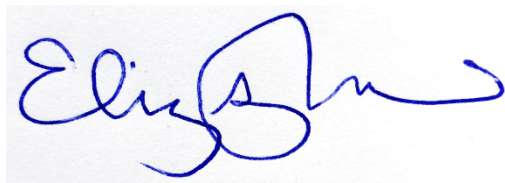
The facts of this case present a twelve-workday gap in time between the date the employer learned of the two speeding citations and the date claimant was discharged for those violations. During that gap in time, the only investigation the employer conducted was looking at records to determine who was driving the vehicle that received the speeding citations on November 27. No one spoke with the claimant, notified her that her job was in jeopardy due to the speeding citations she received, or suspended her to prevent her from driving as part of her job duties and presenting further risk to the employer and the individuals it served. Additionally, the employer first learned that claimant received some sort of citation on November 27, when claimant herself reported it to Madden. While claimant may have failed to promptly turn in the ticket she received to the employer so they could investigate what happened, Madden also failed to follow up with claimant to obtain the ticket and investigate that incident. Based on the evidence in the record, I conclude the employer has not proven the claimant was discharged for a current act of disqualifying, job-related misconduct. Benefits must remain allowed.

Because claimant is allowed benefits based on this separation, the issues of overpayment and chargeability are moot.

DECISION:

The February 13, 2024 (reference 01) unemployment insurance decision is affirmed. The employer discharged claimant from employment for no disqualifying reason. Benefits are allowed effective January 21, 2024, provided she is otherwise eligible.

The issues of overpayment and chargeability are moot.



Elizabeth A. Johnson
Administrative Law Judge

March 22, 2024
Decision Dated and Mailed

LJ/jkb

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.