

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

AMBER J HELGERSON
Claimant

APPEAL 17A-UI-09165-SC-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

SPRING VALLEY RADIO INC
Employer

**OC: 08/06/17
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:

Spring Valley Radio, Inc. (employer) filed an appeal from the August 30, 2017, reference 03, unemployment insurance decision that allowed benefits based upon the determination Amber J. Helgerson (claimant) was discharged for unsatisfactory work performance which is not disqualifying misconduct. The parties were properly notified about the hearing. A telephone hearing was held on September 25, 2017. The claimant participated personally. The employer participated through District Manager of Western Iowa Trevor Heintz. Director of Operations Anna Heeney was registered for the hearing and contacted at the start of the hearing; however, she declined to participate stating Heintz could adequately represent the employer. No exhibits were offered into the record. Official notice was taken of the administrative record, specifically the fact-finding documents.

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: The claimant was employed full-time as a Store Manager/Leader beginning on October 27, 2016, and was separated from employment on August 4, 2017, when she was discharged. The claimant was required to work a total of 40 hours a week, which was to be comprised of five to seven hour shifts over the course of a seven-day week.

The claimant had undergone surgery and been on leave from April 28 through June 18, 2017. She was not required to notify her supervisor District Manager of Western Iowa Trevor Heintz

each day she was absent, just give him periodic updates. She did not have to complete any documentation for her leave.

Mid-July 2017, the claimant notified Heintz that there were complications related to her surgery and her daughter was ill. She left him a message stating she would be taking time off. When she did not get a reply, she contacted the manager of the Jordan Creek store, who was designated as Heintz's back-up when Heintz was unavailable. The other manager told her that was fine. On July 18, 20, and 31, the claimant clocked in and worked, although not her full shifts.

On August 1, 2017, Heintz received a call from one of the claimant's employees who had a simple question. He asked if the claimant was there and the employee said she was not. Heintz then discovered the claimant had not been working her full hours or notifying him of her absences. On August 2, 2017, Heintz went to the claimant's store and waited for her. She did not report to work nor answer when he called. The next time Heintz tried to contact the claimant was August 4, 2017, when she again did not answer. The claimant returned his call the same day. He told her that as her store was underperforming, she was being discharged. The claimant had not received any warnings related to work performance or attendance.

The administrative record reflects that claimant has received unemployment benefits in the amount of \$1,592.00, since filing a claim with an effective date of August 6, 2017, for the eight weeks ending September 30, 2017. The administrative record also establishes that the employer did not participate in the fact-finding interview, make a first-hand witness available for rebuttal, or provide written documentation that, without rebuttal, would have resulted in disqualification.

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 law disqualifies individuals who are discharged from employment for misconduct from receiving unemployment insurance benefits. Iowa Code § 96.5(2)a. They remain disqualified until such time as they requalify for benefits by working and earning insured wages ten times their weekly benefit amount. *Id.* Iowa Administrative Code rule 871-24.32(1)a provides:

“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). An employee's inability to perform to the employer's standards is not considered misconduct. Iowa Admin. Code r. 871-24.32(5).

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 the disputed factual issues were resolved. After assessing the credibility of the witnesses who testified during the hearing, the reliability of the evidence submitted, considering the applicable factors listed above, and using her own common sense and experience, the administrative law judge attributes more weight to the claimant's version of events.

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 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." 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).

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). 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 do so is to impermissibly shift the burden of proof to the claimant. *Kelly v. Iowa Dep't of Job Serv.*, 386 N.W.2d 552 (Iowa Ct. App. 1986). The employer discharged the claimant due to poor work performance. It did not establish that she had a sustained period of time that she was meeting the employer's standards and expectations. Accordingly, benefits are allowed.

Even if it is accepted the claimant's discharge was due to her absences at the end of her employment, benefits would still be allowed. The claimant was following the process she had followed for her prior absences. As the employer had not previously warned the claimant about the issue leading to the separation, it has not met the burden of proof to establish that the

claimant acted deliberately or with recurrent negligence in violation of company policy, procedure, or prior warning. An employee is entitled to fair warning that the employer will no longer tolerate certain performance and conduct. Without fair warning, an employee has no reasonable way of knowing that there are changes that need be made in order to preserve the employment. If an employer expects an employee to conform to certain expectations or face discharge, appropriate (preferably written), detailed, and reasonable notice should be given.

As benefits are allowed, the issue of overpayment is moot and charges to the employer's account cannot be waived.

DECISION:

The August 30, 2017, reference 03, unemployment insurance decision is affirmed. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided she is otherwise eligible. As benefits are allowed, the issue of overpayment is moot and charges to the employer's account cannot be waived.

Stephanie R. Callahan
Administrative Law Judge

Decision Dated and Mailed

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