

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

NELETTE K SCHUKEI
Claimant

K&C 2020 LLC
Employer

APPEAL 24A-UI-02640-SN

**ADMINISTRATIVE LAW JUDGE
DECISION**

**OC: 01/21/24
Claimant: Respondent (1)**

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Admin. Code r. 871-24.32(1)a – Discharge for Misconduct
Iowa Code § 96.3(7) – Recovery of Benefit Overpayment
Iowa Admin. Code r. 871-24.10 – Recovery of Benefit Overpayment

STATEMENT OF THE CASE:

The employer, K&C 2020 LLC, filed an appeal from the February 27, 2024, (reference 01) unemployment insurance decision granted benefits effective January 21, 2024, based upon the determination the claimant, Nelette K Schukei, was discharged, but misconduct was not shown.

An in-person hearing was initially scheduled at the Iowa Works Center at 217 West 5th in Spencer, Iowa 51301-1087 on April 1, 2024, at 10:00 a.m. The preceding Friday, March 29, 2024, the claimant secured counsel through Iowa Legal Aid. The attorney originally assigned to the claimant, Jennifer Wilkerson, requested and was granted postponement for a good cause reason under Iowa Admin. Code r. 871-26.8(3), (4) and (5).

The hearing was then rescheduled for April 24, 2024, at 10:00 a.m. The claimant's attorney requested postponement. I initially denied the postponement because it was not a good cause reason under Iowa Admin. Code r. 871-26.8(3), (4) and (5). I emphasized that postponements granted to one party must be justified only by "extreme emergency." Iowa Admin. Code r. 871-26.8(2). The preceding Friday, April 19, 2024, the employer's attorney, Stephen Avery, announced his representation and requested postponement.

I obtained waiver of notice the notice requirements from both attorneys to reschedule the hearing to April 25, 2024, at 10:00 a.m. The employer participated through the Owner Katie Trees. The employer was represented by Stephen Avery, attorney-at-law. The claimant was represented by Frank Tenuta, attorney-at-law. Exhibits A, 1, 2, 3, 4, 5, 6, and 7 were received in evidence. I took official notice of the claimant's unemployment benefit records.

ISSUES:

Was the claimant discharged for disqualifying job-related misconduct?

Whether the claimant has been overpaid benefits? Whether the claimant is excused from repayment of benefits due to the employer's non-participation?

FINDINGS OF FACT:

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

The claimant worked as a full-time assistant closer from January 27, 2021, until she was separated from employment on January 5, 2024, when she was terminated. The claimant reported directly to Katie Trees and Colleen Krebsbach, the joint owners.

The employer has an employee manual. The claimant acknowledged receipt of the employee manual on February 23, 2022. The attendance policy states that excessive absenteeism can lead to termination. (Exhibit 3) Employees are to notify either of the two partners at least an hour prior to the start of their shift.

On June 28, 2021, the claimant received a written warning for her performance and due to her attendance. The employer provided a copy of this written warning. (Exhibit 2)

In late-August or early-September 2023, the claimant began a relationship with Brett Warner. The relationship became rocky almost immediately.

On September 30, 2023, the employer received an email from Mr. Warner alleging that the claimant had told him that Ms. Trees was cheating on her husband and to have Ms. Trees contact him. A few hours later, Mr. Warner sent another email claiming that his account was hacked, but he added that, "It isn't going to get out. I'm going to deal with it now."

On November 21, 2023, Mr. Warner left a voicemail on Ms. Trees' phone that alleged the claimant was a drug user and would attempt to deceive Ms. Trees by altering the color of some text messages. Mr. Warner ended this message with the declaration that the claimant hated Ms. Trees. The employer provided this voicemail. (Exhibit 4)

On November 27, 2023, Ms. Trees sent a text message to the claimant stating that she needed to file a no-contact order against Mr. Warner if she had not done so.

On November 28, 2023, the claimant said she did not want to file a protection order against Mr. Warner because she was worried he would not be able to be part of her child's life.

On November 29, 2023, Ms. Trees sent a text message to the claimant stating that wanted a signed statement from her describing the issues Mr. Warner was creating for the employer, and a promise she would resign if the behavior continued.

On the evening of December 13, 2023, Mr. Warner left a voicemail on Ms. Tree's phone claiming that the claimant smoked methamphetamine and that she was plotting to use the employer's information for "her own purposes." He further claimed the claimant had been slandering the employer's name in the local community. The employer provided a copy of this voicemail. (Exhibit 5) That same night, the claimant informed Ms. Trees that Mr. Warner showed up at her house for about an hour unannounced. She then informed her that she would be filing a no-contact order against Mr. Warner because he threatened to contact Ms. Trees again. The employer provided a copy of this text message. (Exhibit 6)

On December 29, 2023, the claimant lifted the protection order against Mr. Warner. The claimant reasoned Mr. Warner was the father of her child and he had been working on his recovery.

On January 5, 2024, Ms. Trees placed the claimant on suspension because she discovered that the no-contact order had been lifted on December 29, 2023. Ms. Trees found that this put both the claimant and the staff of the employer at risk of being harassed by Mr. Warner.

On March 5, 2024, Ms. Trees terminated the claimant. Ms. Trees terminated the claimant because she lifted the protection order. The employer provided a copy of the termination notice. (Exhibit 1) The termination notice states the claimant was also terminated for her attendance and due to “libelous and slanderous conduct towards the company and its employees.” Ms. Trees would not have taken a different action had the claimant’s attendance record had been better. The libelous and slanderous conduct is a reference to the claims and actions of Mr. Warner.

REASONING AND CONCLUSIONS OF LAW:

I conclude the claimant was terminated for the conduct of a third party on January 5, 2024, which is not disqualifying. To the extent the behavior can be attributed to her, it is not work-related, and it is not disqualifying. Benefits are granted, provided the claimant is otherwise eligible for benefits.

The decision in this case rests, at least in part, on the credibility of the witnesses. 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.*

After assessing the credibility of the witnesses who testified during the hearing, reviewing the exhibits submitted by the parties, considering the applicable factors listed above, and using his own common sense and experience, the administrative law judge finds the claimant’s version of events to be more credible than the employer’s recollection of those events.

Specifically, I find the employer’s rationale expressed on the termination notice that attendance played a part in the decision not credible. Ms. Trees conceded that she would have terminated the claimant exclusively for the issues with Mr. Warren. I further find the claimant’s allegation that the written warning was from 2021 rather than 2024 credible.

Iowa Code section 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.

Iowa Code section 96.5(2)b, c and d provide:

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:

b. Provided further, if gross misconduct is established, the department shall cancel the individual's wage credits earned, prior to the date of discharge, from all employers.

c. Gross misconduct is deemed to have occurred after a claimant loses employment as a result of an act constituting an indictable offense in connection with the claimant's employment, provided the claimant is duly convicted thereof or has signed a statement admitting the commission of such an act. Determinations regarding a benefit claim may be redetermined within five years from the effective date of the claim. Any benefits paid to a claimant prior to a determination that the claimant has lost employment as a result of such act shall not be considered to have been accepted by the claimant in good faith.

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 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. Misconduct by an individual includes but is not limited to all of the following:

- (1) Material falsification of the individual's employment application.
- (2) Knowing violation of a reasonable and uniformly enforced rule of an employer.
- (3) Intentional damage of an employer's property.
- (4) Consumption of alcohol, illegal or nonprescribed prescription drugs, or an impairing substance in a manner not directed by the manufacturer, or a combination of such substances, on the employer's premises in violation of the employer's employment policies.
- (5) Reporting to work under the influence of alcohol, illegal or nonprescribed prescription drugs, or an impairing substance in an off-label manner, or a combination of such substances, on the employer's premises in violation of the employer's employment policies, unless the individual is compelled to work by the employer outside of scheduled or on-call working hours.
- (6) Conduct that substantially and unjustifiably endangers the personal safety of coworkers or the general public.
- (7) Incarceration for an act for which one could reasonably expect to be incarcerated that result in missing work.
- (8) Incarceration as a result of a misdemeanor or felony conviction by a court of competent jurisdiction.
- (9) Excessive unexcused tardiness or absenteeism.
- (10) Falsification of any work-related report, task, or job that could expose the employer or coworkers to legal liability or sanction for violation of health or safety laws.
- (11) Failure to maintain any licenses, registration, or certification that is reasonably required by the employer or by law, or that is a functional requirement to perform the individual's regular job duties, unless the failure is not within the control of the individual.
- (12) Conduct that is libelous or slanderous toward an employer or an employee of the employer if such conduct is not protected under state or federal law.
- (13) Theft of an employer or coworker's funds or property.

(14) Intentional misrepresentation of time worked or work carried out that results in the individual receiving unearned wages or unearned benefits.

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). The Iowa Court of Appeals found substantial evidence of misconduct in testimony that the claimant worked slower than he was capable of working and would temporarily and briefly improve following oral reprimands. *Sellers v. Emp't Appeal Bd.*, 531 N.W.2d 645 (Iowa Ct. App. 1995). Generally, continued refusal to follow reasonable instructions constitutes misconduct. *Gilliam v. Atlantic Bottling Co.*, 453 N.W.2d 230 (Iowa Ct. App. 1990). 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). 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).

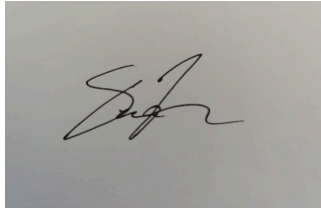
As outlined in the findings of fact, I find the claimant was terminated for the actions of Mr. Warner. While I understand this may have been a good decision for the employer, a discharge due to the actions of someone merely associated with the claimant is not disqualifying.

Under the definition of misconduct for purposes of unemployment benefit disqualification, the conduct in question must be "work-connected." *Diggs v. Emp't Appeal Bd.*, 478 N.W.2d 432 (Iowa Ct. App. 1991). The court has concluded that some off-duty conduct can have the requisite element of work connection. *Kleidosty v. Emp't Appeal Bd.*, 482 N.W.2d 416, 418 (Iowa 1992). Under similar definitions of misconduct, for an employer to show that the employee's off-duty activities rise to the level of misconduct in connection with the employment, the employer must show by a preponderance of the evidence that the employee's conduct (1) had some nexus with the work; (2) resulted in some harm to the employer's interest, and (3) was conduct which was (a) violative of some code of behavior impliedly contracted between employer and employee, and (b) done with intent or knowledge that the employer's interest would suffer. See also, *Dray v. Director*, 930 S.W.2d 390 (Ark. Ct. App. 1996); *In re Kotrba*, 418 N.W.2d 313 (SD 1988), (quoting *Nelson v. Dept of Emp't Security*, 655 P.2d 242 (WA 1982)); 76 Am. Jur. 2d, Unemployment Compensation §§ 77–78.

To the extent that the claimant's behavior was implicated at all, it was behavior occurring outside of work in her relationship with Mr. Warner. No court would find this work connected enough to be disqualifying referencing the factors above. It is acknowledged that Mr. Warner's behavior harmed the employer's interests. Other than that factor, the remaining factors cannot be met. The behavior had nothing to do with the claimant's work. There could not be an implied contract between the two to police the actions of Mr. Warner. Finally, to the extent the claimant was able to control Mr. Warner's behavior one way or another, it clearly was not done with the intention or knowledge that the employer's interest would suffer. The employer has not met its burden to show the claimant was discharged due to work-related misconduct. Benefits are granted, provided she is otherwise eligible for benefits.

DECISION:

The February 27, 2024, (reference 01) unemployment insurance decision is AFFIRMED. The claimant was terminated for the actions of a third party. To the extent that she was terminated for her own behavior, it was non-work related. The employer has not met its burden to show the claimant was discharged on January 5, 2024, due to misconduct. Benefits are granted, provided he is otherwise eligible for benefits.

A rectangular box containing a handwritten signature in black ink. The signature is stylized and appears to read 'Sean M. Nelson'.

Sean M. Nelson
Administrative Law Judge II
Iowa Department of Inspections & Appeals
Administrative Hearings Division – UI Appeals Bureau

April 29, 2024
Decision Dated and Mailed

smn/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:

**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:

**Employment Appeal Board
6200 Park Avenue Suite 100
Des Moines, Iowa 50321
Fax: (515)281-7191
Online: 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.