

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

68-0157 (9-06) - 3091078 - EI

ALEASEA R GRIMLEY
Claimant

APPEAL NO. 17A-UI-10690-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

INNOVATIVE AG SERVICES CO
Employer

OC: 09/17/17
Claimant: Respondent (2)

Iowa Code Section 96.5(2)(a) – Discharge for Misconduct
Iowa Code Section 96.3(7) - Overpayment

STATEMENT OF THE CASE:

The employer filed a timely appeal from the October 9, 2017, reference 02, decision that allowed benefits to the claimant provided she was otherwise eligible and that held the employer's account could be charged for benefits, based on the claims deputy's conclusion that the claimant was discharged on September 18, 2017 for no disqualifying reason. After due notice was issued, a hearing was held on November 6, 2017. Claimant Aleasea Grimley participated. Carla Elliott represented the employer and presented additional testimony through Sandy Kelchen. The administrative law judge took official notice of the Agency's record of benefits disbursed to the claimant and received Exhibits 1 through 6, 8 and 9 into evidence. The administrative law judge took official notice of the fact-finding materials for the limited purpose of determining whether the employer participated in the fact-finding interview and, if not, whether the claimant engaged in fraud or intentional misrepresentation in connection with the fact-finding interview.

ISSUES:

Whether the claimant was discharged for misconduct in connection with the employment that disqualifies the claimant for unemployment insurance benefits.

Whether the claimant was overpaid unemployment insurance benefits.

Whether the claimant must repay benefits.

Whether the employer's account may be charged.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Aleasea Grimley was employed by Innovative Ag Services Company as a full-time Human Resources Generalist from June 5, 2017 until September 18, 2017, when Carla Elliott, Vice President of Human Resources, and Rick Vaughn, Chief Executive Officer, discharged her from the employment. Ms. Elliott was Ms. Grimley's immediate supervisor. Ms. Grimley had a variety of

human resources duties that included employee recruitment, communications, scholarship and an internship program. Ms. Grimley's communications duties included work on the employer's newsletter. Ms. Grimley's work hours were 7:30 a.m. to 5:00 p.m., Monday through Friday.

The final incident that triggered the discharge occurred on September 18, 2017. On that morning, Ms. Elliott had the employer's Information Technology staff run a computer activity report concerning Ms. Grimley's use of the employer's computer that morning. Ms. Grimley was supposed to be working on the company newsletter that morning. The report from the I.T. staff revealed that Ms. Grimley had used her work computer to do personal online shopping during the entire period of 8:44 a.m. to 9:39 a.m. Ms. Grimley was not on an authorized break at the time and only been at work a little over an hour before engaging in the prohibited conduct. The employer's written policies prohibited unauthorized use of company equipment prohibited using the employer's technology for personal business. The written policies were provided to Ms. Grimley at the start of her employment. There had been no other similar incidents.

Another significant and recent factor in the discharge decision was the report Ms. Elliott received from Sandy Kelchen, Human Resources Generalist 3, on September 15. On September 8, Ms. Elliott had issued a performance review to Ms. Grimley, during which time she addressed multiple concerns about Ms. Grimley's performance. During the performance review, Ms. Grimley asserted that other staff members in the human resources office were unhappy with Ms. Elliott. During the performance review, Ms. Elliott directed Ms. Grimley to address any concerns with Ms. Elliott to Ms. Elliott directly. After the performance review, Ms. Elliott spoke to other staff to follow up on Ms. Grimley's assertion that other staff members were unhappy with Ms. Elliott. During those discussions with other employees, Ms. Elliott shared with one or more employees that the source of the allegation of general discontent originated with Ms. Grimley. When Ms. Elliott returned to the workplace on September 15, Ms. Kelchen reported that Ms. Grimley had taken an adversarial tone during a meeting on September 11. However, Ms. Grimley had not intended to take an adversarial tone and had instead expressed a point based on her technological expertise. On September 15, Ms. Kelchen also reported to Ms. Elliott that Ms. Grimley had reminded Ms. Kelchen of a profane utterance Ms. Elliott had made under her breath upon leaving Ms. Kelchen's office several weeks earlier. Ms. Grimley's discussion of the matter during Ms. Elliott's September absence was prompted by a question from Ms. Kelchen.

In making the decision to discharge Ms. Grimley from the employment, Ms. Elliott also considered instances of Ms. Grimley eavesdropping on her conversations and Ms. Grimley performing unauthorized Internet searches to identify callers who called Ms. Elliott. Ms. Grimley's conduct arose from curiosity, not a business need.

In making the decision to discharge Ms. Grimley from the employment, Ms. Elliott also considered Ms. Grimley's cell phone use. Some of the cell phone use was for the purpose of playing music and that particular use had been authorized by Ms. Elliott.

Ms. Grimley established a claim for unemployment insurance benefits that was effective September 17, 2017. Ms. Grimley received \$2,524.00 in benefits for the period of September 17, 2017 through October 28, 2017. Innovative Ag Services Company is not a base period employer and has not been charged for the benefits disbursed to Ms. Grimley. On October 6, 2017, a Workforce Development claims deputy held a fact-finding interview to address Ms. Grimley's separation from the employment. The employer elected to participate in the fact-finding interview in writing and provided substantial documentation, including a narrative containing the particulars of the conduct that factored in the discharge.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code section 96.5(2)a provides:

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:

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.

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 of proof in this matter. See Iowa Code section 96.6(2). Misconduct must be substantial in order to justify a denial of unemployment benefits. Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of unemployment benefits. See *Lee v. Employment Appeal Board*, 616 N.W.2d 661 (Iowa 2000). The focus is on deliberate, intentional, or culpable acts by the employee. See *Gimbel v. Employment Appeal Board*, 489 N.W.2d 36, 39 (Iowa Ct. App. 1992).

While past acts and warnings can be used to determine the magnitude of the current act of misconduct, a discharge for misconduct cannot be based on such past act(s). The termination of employment must be based on a current act. See 871 IAC 24.32(8). In determining whether the conduct that prompted the discharge constituted a "current act," the administrative law judge considers the date on which the conduct came to the attention of the employer and the date on which the employer notified the claimant that the conduct subjected the claimant to possible discharge. See also *Greene v. EAB*, 426 N.W.2d 659, 662 (Iowa App. 1988).

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. See 871 IAC 24.32(4). When it is in a party's power to produce more direct and satisfactory evidence than is actually produced, it may fairly be inferred that the more direct evidence will expose deficiencies in that party's case. See *Crosser v. Iowa Dept. of Public Safety*, 240 N.W.2d 682 (Iowa 1976).

The weight of the evidence in the record establishes a pattern of behavior indicating an intentional and substantial disregard of the employer's interests. Such conduct included the conduct of the last day of the employment, wherein Ms. Grimley spent almost an hour on personal Internet shopping, rather than performing her work duties. That brazen conduct followed other brazen conduct earlier in the employment that included eavesdropping on Ms. Elliott's conversations and performing unauthorized investigation into callers to Ms. Elliott. While the evidence otherwise indicates a personality conflict between Ms. Grimley and her office mates, that was not the primary basis for the discharge. Instead, Ms. Grimley, a human resources professional, engaged in a pattern of behavior that undermined the employer's operations and workplace relationships.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Ms. Grimley was discharged for misconduct in connection with the employment. Accordingly, Ms. Grimley is disqualified for benefits until she has worked in and been paid wages for insured work equal to ten times her weekly benefit amount. Ms. Grimley must meet all other eligibility requirements.

The unemployment insurance law requires that benefits be recovered from a claimant who receives benefits and is later deemed ineligible benefits even if the claimant acted in good faith and was not at fault. However, a claimant will not have to repay an overpayment when an initial decision to award benefits on an employment separation issue is reversed on appeal if two conditions are met: (1) the claimant did not receive the benefits due to fraud or willful misrepresentation, and (2) the employer failed to participate in the initial proceeding that awarded benefits. In addition, if a claimant is not required to repay an overpayment because a base period employer failed to participate in the initial proceeding, the employer's account will be charged for the overpaid benefits. Iowa Code § 96.3(7)(a) and (b).

Iowa Administrative Code rule 817-24.10(1) defines employer participation in fact-finding interviews as follows:

Employer and employer representative participation in fact-finding interviews.
24.10(1) "Participate," as the term is used for employers in the context of the initial determination to award benefits pursuant to Iowa Code section 96.6, subsection 2, means submitting detailed factual information of the quantity and quality that if unrebutted would be sufficient to result in a decision favorable to the employer. The most effective means to participate is to provide live testimony at the interview from a witness with firsthand knowledge of the events leading to the separation. If no live testimony is provided, the employer must provide the name and telephone number of an employee with firsthand information who may be contacted, if necessary, for rebuttal. A party may also participate by providing detailed written statements or documents that provide detailed factual information of the events leading to separation. At a minimum, the information provided by the employer or the employer's representative must identify the dates and particular circumstances of the incident or incidents, including, in the case of discharge, the act or omissions of the claimant or, in the event of a voluntary separation, the stated reason for the quit. The specific rule or

policy must be submitted if the claimant was discharged for violating such rule or policy. In the case of discharge for attendance violations, the information must include the circumstances of all incidents the employer or the employer's representative contends meet the definition of unexcused absences as set forth in 871—subrule 24.32(7). On the other hand, written or oral statements or general conclusions without supporting detailed factual information and information submitted after the fact-finding decision has been issued are not considered participation within the meaning of the statute.

Ms. Grimley received \$2,524.00 in benefits for the period of September 17, 2017 through October 28, 2017. This decision disqualifies her for those benefits. Accordingly, Ms. Grimley has been overpaid \$2,524.00 in benefits for the period of September 17, 2017 through October 28, 2017. The employer is not a base period employment and has not been charged for benefits paid to Ms. Grimley. The employer's account shall not be charged for benefits. However, because the employer's written participation in the fact-finding interview satisfied the participation requirement, Ms. Grimley is required to repay the overpaid benefits.

DECISION:

The October 9, 2017, reference 02, decision is reversed. The claimant was discharged on September 18, 2017 for misconduct in connection with the employment. The claimant is disqualified for unemployment benefits until she has worked in and been paid wages for insured work equal to ten times her weekly benefit amount. The claimant must meet all other eligibility requirements. The claimant is overpaid \$2,524.00 in benefits for the period of September 17, 2017 through October 28, 2017. The claimant is required to repay the overpaid benefits. The employer's account shall not be charged for benefits.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/rvs