

**IOWA DEPARTMENT OF INSPECTIONS AND APPEALS
ADMINISTRATIVE HEARINGS DIVISION, UI APPEALS BUREAU**

PENNY RUNNELLS
Claimant

APPEAL 22A-UI-16125-SN-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

OTTUMWA CHRISTIAN SCHOOL
Employer

**OC: 08/15/21
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, Ottumwa Christian School, filed an appeal from the August 5, 2022, (reference 02) unemployment insurance decision that granted benefits based upon the conclusion the claimant was discharged, but due to non-disqualifying conduct. The parties were properly notified of the hearing. A telephone hearing was held on September 13, 2022. The claimant participated. The claimant was represented by Hannah Moreland, attorney at law. The administrative law judge postponed the hearing because Ms. Moreland had requested the factfinding file and had not yet received it.

A new hearing was scheduled to occur on November 22, 2022 at 9:00 a.m. The claimant participated. The claimant was represented by Hannah Moreland, attorney at law. The employer participated through President Ben Foote. The administrative law judge took official notice of the agency records. Documents prohibited from dissemination by the Iowa Code have been removed from agency files and shredded. The administrative law judge has also sealed the hearing record.

ISSUES:

Whether the claimant's separation from employment was disqualifying?
Whether the claimant had been overpaid benefits? Whether the claimant is excused from repaying benefits due to the employer's non-participation at factfinding?

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 second-grade elementary school teacher from August 13, 2021, until this employment ended on July 15, 2022, when she was terminated. Principal Tracey Menninga was the claimant's immediate supervisor.

The employer places rules regarding an employee's service in the employee contract. The contract states "any social media or internet use that an employee may have must reflect the Christian values and principles of [the employer.] The employer has a ZERO-TOLERANCE policy for the following: Cyber bullying [sic] (The pressuring, harassing, or exploitation of student(s), staff or parents through electronic devices, and/or social media.) Sexting or any other inappropriate texting. The creating or sending of inappropriate photographs, jokes, sayings, emails, emojis or videos. The use or altering of a student's picture as a form of harassment, intimidation, or exploitation." The contract goes on to label the following topics as "inappropriate for staff to access on the Internet: sexual content, swearing / bad language, satanic/ cult material, anti-Christian, anti-Patriotic or terroristic material, non-Christian music or related sites." The contract goes on to state that conversations are to "reflect characteristics that are honorable and respectful." In another section, the contract states cause for termination "includes, but is not limited to, teaching performance, chronic policy violations, any conduct tending to reflect discredit upon the school or upon the employee, or any conduct tending to seriously impair his/her continued usefulness as a role model for the students."

The employer also has an employee handbook. The employee handbook states if a teacher has an issue with someone else on staff, then they are first to see if they can resolve the issue with that person. If they cannot, then they are to resolve the issue with Ms. Menninga. Ms. Menninga is then required to provide a report to the School Board. Then the teacher can contact the School Board directly regarding the issue by using a specific form requesting a meeting.

On May 12, 2022, a parent wrote a Facebook wall post with the following message, "Thankful for a couple special people in my daughter's life that had her best interest at heart! To the rest of you... Fuck you." The message also has an emoji showing a woman shrugging followed by an emoji hand displaying its middle finger. The claimant responded to this message with an emoji showing a woman showing two thumbs up. The parent's remark referred to the claimant being concerned with a child being treated poorly on May 4, 2022.

The record contains additional undated Facebook wall posts. In one post, the claimant wrote, "If standing up for yourself burns a bridge, I have matches. We ride at dawn." Preschool Director April MacQueen remarked, "Amen!!!" Ms. Vice remarked, "Love this." In another post, the claimant wrote, "I'm sorry that you had to make me the villain of your story in order to stay in the light and keep the onlookers in the dark. I'm sorry, so very sorry.... for you. I have no desire to clear my name in your book of fiction. Paint me however you need to paint me so the guilt doesn't feel so heavy. I am as light as a feather." In another post, the claimant shared a post with the following message, "Some of you would have told David to pray for Goliath and 'not cause a scene.' If God tells me to slay some giants that's what I'm going to go." Ms. MacQueen liked this post. Neither party could say when these posts were made, but both thought they were made in late-May or early June 2022.

On May 25, 2022, the claimant sent an email to Ms. Menninga and President Ben Foote regarding a field trip that occurred. Ms. Menninga's daughter had reported that three students had been disruptive. The claimant said she was not aware of any disruptive behavior, but stated she suspected Ms. Menninga was retaliating against her for raising concerns earlier regarding the treatment of a student.

On May 27, 2022, two parents approached Mr. Foote regarding messages and statements made by the claimant that they believed put the employer's reputation in a poor light.

In June 2022, Mr. Foote interviewed the two parents who brought concerns regarding the claimant's posts and statements. Mr. Foote also interviewed Ms. Menninga. Mr. Foote could not

remember the exact dates, but he said these individuals were likely interviewed in the middle to late-June 2022.

On July 11, 2022, the School Board met regarding the claimant's continued employment with the employer. The School Board agreed that Mr. Foote should meet with the claimant and determine if she would change her behavior going forward and reconcile with Ms. Menninga. Mr. Foote testified the earliest a School Board meeting could be arranged was July 6, 2022, due to vacations and other considerations.

On July 13, 2022, President Ben Foote sent an email and text message to the claimant informing her that he would like to speak with her. The claimant offered that she could meet on July 15, 2022.

On July 15, 2022, Mr. Foote, Kevin Rhoads and Brian White met with the claimant. Mr. Foote testified that throughout the course of that conversation it became clear that the claimant could not reconcile with Ms. Menninga. The termination notice states the claimant's using of social media, spreading rumors among parents and staff, as well as, not abiding by the chain of command caused it to terminate her employment. Mr. Foote explained that if the claimant could have demonstrated she could reconcile with Ms. Menninga, then she would have been retained.

The following section of the findings of facts describes the findings necessary to resolve the participation issue:

The claimant filed for and received \$140.00 in unemployment insurance benefits for the week ending August 6, 2022.

On July 25, 2022, Iowa Workforce Development Department sent a notice of factfinding to the parties informing them of an interview occurring on August 1, 2022 at 11:20 a.m. Mr. Foote participated personally.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes claimant was discharged from employment for no disqualifying reason. Benefits are granted, provided she is otherwise eligible.

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.

871 IAC 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 Department of Job Service*, 275 N.W.2d 445, 448 (Iowa 1979).

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 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:

- (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). 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).

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. 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.

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.

Iowa Admin. Code r.871-24.32(4) and (8) provide:

(4) Report required. The claimant's statement and employer's statement must give detailed facts as to the specific reason for the claimant's discharge. 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. In cases where a suspension or disciplinary layoff exists, the claimant is considered as discharged, and the issue of misconduct shall be resolved.

(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.

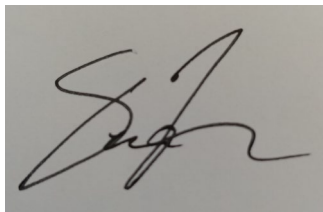
The administrative law judge finds the employer has failed to meet its burden of production to show the claimant was discharged for misconduct. Mr. Foote testified that if the claimant would have apologized and offered hope of reconciliation with Ms. Menninga, then she may have been retained. The claimant's failure to reconcile or apologize does not violate any of the employer's rules, so it cannot be the basis of a misconduct qualification. Even if it did, it is unclear what the claimant could have done to show she was willing to reconcile with Ms. Menninga.

The administrative law judge also finds the employer's theory for discharge involving rumors or social media posts to be a non-disqualifying reason. He finds the employer has failed to meet its burden to show when these instances occurred and/or became known to the employer with any specificity as required by Iowa Admin. Code r.871-24.32(4). It provided one social media post that was dated. This post was made back on May 12, 2022. If the other social media posts and rumors were discovered at that time, the administrative law judge does not believe the employer terminated the claimant for a current act of misconduct as required by Iowa Admin. Code r.871-24.32(8). Mr. Foote's testimony suggests that he heard about additional rumors on at some point in June 2022 from parents. He then explained that he conducted the interviews in mid-

June 2022. Then he could not convene a School Board meeting until about a week before the claimant's termination. The administrative law judge needs much more detail to find the employer reasonably conducted its investigation such that the claimant's termination could be reasoned to be due to a current act. Considering the fact the employer could not provide specific dates for the incidents that led to its decision to discharge the claimant, it has failed to meet its burden. Benefits are granted, provided she is otherwise eligible for benefits.

DECISION:

The August 5, 2022, (reference 02) unemployment insurance decision is AFFIRMED. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided she is otherwise eligible. Any benefits claimed and withheld on this basis shall be paid.

A handwritten signature in black ink, appearing to read 'Sean M. Nelson', is written over a light gray rectangular background.

Sean M. Nelson
Administrative Law Judge
Unemployment Insurance Appeals Bureau
1000 East Grand Avenue
Des Moines, Iowa 50319-0209
Fax (515) 725-9067

December 7, 2022
Decision Dated and Mailed

smn/mh

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
4th Floor – Lucas Building
Des Moines, Iowa 50319
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
4th Floor – Lucas Building
Des Moines, Iowa 50319
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.