

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

DONALD J FISHER
Claimant

APPEAL 23A-UI-00429-AW-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

IA WESTER COMM COLL MERGED AREA
Employer

OC: 12/18/22
Claimant: Respondent (2)

Iowa Code § 96.5(2)a – Discharge for Misconduct

STATEMENT OF THE CASE:

Employer filed an appeal from the January 12, 2023 (reference 01) unemployment insurance decision that allowed benefits. The parties were properly notified of the hearing. A telephone hearing was held on February 9, 2023. Claimant participated. Employer participated through Dean of Communication and Fine Arts Shelly Inness and Director of Human Resources Robyn Porter. Employer's Exhibit 1 was admitted. Claimant's Exhibit A (documents 1 – 54) were not admitted. The administrative law judge took official notice of the administrative record.

ISSUES:

Whether claimant's separation was a discharge for disqualifying job-related misconduct.
Whether claimant was overpaid benefits.
Whether claimant should repay those benefits and/or whether employer should be charged based upon its participation in the fact-finding interview.

FINDINGS OF FACT:

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

Claimant was employed as a full-time Director of Marching Band from March 25, 2018 until his employment with Iowa Western Community College ended on December 9, 2022. Claimant's direct supervisor was Shelli Inness, Dean of Communication and Fine Arts.

Employer placed claimant on a Performance Improvement Plan (PIP) on September 15, 2022. (Exhibit 1, pp. 2-6) The PIP period began September 15, 2022 and ended December 12, 2022. (Exhibit 1, p. 2) The intention of the PIP was to help claimant improve in the following performance areas: communication, accountability, budget management, lessons and lab management, and recruitment. (Exhibit 1, pp. 2-5) The PIP lists specific items under each performance area that the claimant must do to improve his performance. (Exhibit 1, pp. 3-5) Claimant received a copy of the PIP. (Exhibit 1, p. 6) The PIP warns that continued unsatisfactory job performance may result in termination of employment. (Exhibit 1, pp. 2, 6)

Under the performance area of accountability, the PIP directs claimant to check in with the dean or division secretary in person within 20 minutes of his scheduled start time. (Exhibit 1, p. 3) Claimant did not check in daily because the dean and division secretary are located in a different building from the one in which claimant worked and claimant was too busy to check in.

Under the performance area of budget management, the PIP directs claimant to get the dean's approval for all expenses before spending money. (Exhibit 1, pp. 3-4) On October 3, 2022, claimant presented the dean with an invoice for \$700.00 for uniforms; claimant did not obtain the dean's approval before incurring the expense. Claimant did not obtain preapproval because he forgot.

Under the performance area of recruitment, the PIP directs claimant to complete recruitment tasks as assigned by the dean. (Exhibit 1, p. 4) The dean directed claimant to visit three high schools per week. Claimant visited three or four high schools during the three-month PIP period. The PIP also directed claimant to check-in weekly with all students interested in band until they have enrolled and to document these contacts on a recruiting spreadsheet in TEAMS. (Exhibit 1, p. 4) Claimant was also required to provide a weekly update of all recruiting tasks on the TEAMS spreadsheet. (Exhibit 1, p. 4) Claimant did not update the recruiting spreadsheet because he was unclear on whether he needed to update the TEAMS recruiting spreadsheet or his personal spreadsheet that he uploaded to TEAMS.

Employer met with claimant periodically throughout the PIP period and had a formal meeting on November 4, 2022 at the midway point. During the meeting, employer reviewed claimant's progress with daily check ins, recruiting and unapproved spending. Claimant did not show improvement following this formal meeting.

On December 9, 2022, employer discharged claimant for failing to meet the requirements of the PIP.

The administrative record reflects that claimant has not received unemployment insurance benefits since filing his original claim effective December 18, 2022. Employer participated in the fact-finding interview through Robyn Porter, Director of Human Resources.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes:

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 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 Code section 96.5(2)d 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:

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.

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).

Iowa Admin. Code r. 871-24.32(4) provides:

(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.

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 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). 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." *Newman v. Iowa Dep't of Job Serv.*, 351 N.W.2d 806 (Iowa Ct. App. 1984). The law limits disqualifying misconduct to substantial and willful wrongdoing or repeated carelessness or negligence that equals willful misconduct in culpability. *Lee v. Employment Appeal Bd.*, 616 N.W.2d 661 (Iowa 2000).

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.

In this case, employer provided claimant with detailed, written and reasonable notice of the improvements he must make to preserve his employment. Claimant failed to complete tasks in multiple performance areas. Claimant's reasoning for not completing the tasks was that he was too busy, he forgot and he did not understand the expectation. These are not good cause reasons for failing to complete the tasks employer directed him to perform. Claimant new what was expected of him and did not make the necessary improvements in multiple areas to preserve his employment. Claimant's repeated carelessness and negligence rise to the level of misconduct in culpability. Employer discharged claimant for disqualifying, job-related misconduct. Benefits are denied.

Because no benefits were paid to claimant, the issues of overpayment, repayment and chargeability are moot.

DECISION:

The January 12, 2023 (reference 01) unemployment insurance decision is REVERSED. Claimant was discharged for disqualifying job-related misconduct. Benefits are denied until claimant has worked in and been paid wages for insured work equal to ten times claimant's weekly benefit amount, provided claimant is otherwise eligible. The issues of overpayment, repayment and charges are moot.



Adrienne C. Williamson
Administrative Law Judge

February 23, 2023
Decision Dated and Mailed

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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.