IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

BRITTANY A MCCORD Claimant **LONGHOUSE NORTHSHIRE LTD** Employer	**APPEAL 18A-UI-02678-JP-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 01/28/18** **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:

The employer filed an appeal from the February 19, 2018, (reference 01) unemployment insurance decision that allowed benefits. The parties were properly notified about the hearing. A telephone hearing was held on March 23, 2018. Claimant participated. Employer participated through food service manager Bonnie Pollen-Lahman and administrator Tim Christy. Official notice was taken of the administrative record with no objection.

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: Claimant was employed part-time as a dietary aide from May 2, 2017, and was separated from employment on January 29, 2018, when she was discharged.

The employer has a no-call/no-show policy that provides if an employee has three no-call/no-shows in a six month period they are discharged. The employer also has an attendance policy that requires employees to call the employer prior to the start of their shift if they are going to be absent. The employer's policy provides that three unexcused absences will result in a verbal warning, four unexcused absences will result in a written warning, five unexcused absences will result in a suspension, and six unexcused absences will result in discharge. Claimant was aware of the employer's policy.

On October 5, 2017, the employer gave a verbal warning informing claimant she needed to work the schedule as posted; claimant had been refusing to work evening shifts. Claimant was hired to work the morning and evening shifts. On October 26, 2017, the employer gave

claimant a written warning and a two day suspension for two no-call/no-shows. Claimant was a no-call/no-show on October 7, 2017 and October 8, 2017.

On January 9, 2018, claimant was absent from her scheduled shift. Claimant was a no-call/no-show on January 9, 2018. Claimant's no-call/no-show on January 9, 2018, was her third no-call/no-show in a six month period. Ms. Pollen-Lahman did not start investigating claimant's attendance record after this no-call/no-show.

On January 12, 2018, claimant was absent from her scheduled shift. Claimant was a no-call/no-show on January 12, 2018. The employer attempted to contact claimant on January 12, 2018, but it was not successful.

On Saturday, January 13, 2018, Ms. Pollen-Lahman discovered claimant had been a no-call/no-show on January 12, 2018. Ms. Pollen-Lahman was not working on January 13, 2018 when she found out claimant was a no-call/no-show. Ms. Pollen-Lahman only worked Monday through Friday. Claimant was next scheduled to work on January 13 and 14, 2018. Claimant worked her shifts on January 13 and 14, 2018.

On Monday, January 15, 2018, Ms. Pollen-Lahman worked her scheduled shift. Claimant was also scheduled to work on January 15, 2018, but she did not work. Claimant found a replacement for her scheduled shift. Claimant's next scheduled shift was Thursday, January 18, 2018.

On January 18, 2018, claimant worked her scheduled shift. The employer did not notify claimant that she was under investigation because of her no-call/no-shows. Claimant was next scheduled to work on Monday, January 22, 2018, but she did not work. Claimant found a replacement to work her scheduled shift for January 22, 2018. Claimant was also scheduled to work on January 23, 2018, but she took a vacation day.

Claimant worked her next scheduled shifts on January 26, 27, 28, and 29, 2018. By January 29, 2018, Ms. Pollen-Lahman testified she had gathered all of claimant's records. On January 29, 2018, Ms. Pollen-Lahman and assistant administrator Dave met with claimant. The employer explained to claimant that her four no-call/no-shows violated the employer's policy. The employer informed claimant she was discharged due to her four no-call/no-shows. Ms. Pollen-Lahman did not tell claimant prior to her discharge that she was being investigated due to her no-call/no-shows on January 9 and 12, 2018.

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 allowed.

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:
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> 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).

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.

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." *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.

The employer's argument that it took some time to gather and investigate claimant's attendance record prior to her discharge is not persuasive. Claimant had four no-call/no-shows within a six month period. The employer's policy provides that employees will be discharged after three no-call/no-shows within a six month period. On January 13, 2018, Ms. Pollen-Latham became aware of claimant's final no-call/no-show that occurred on January 12, 2018. The employer had previously suspended claimant for two days on October 26, 2017, because she had two no-call/no-shows and therefore it was aware or should have been aware that claimant's third no-call/no-show (on January 9, 2018) and fourth no-call/no-show (on January 12, 2018) violated its policy. Although Ms. Pollen-Latham spoke to claimant after January 13, 2018, Ms. Pollen-Latham never informed claimant she was under any investigation for her no-call/no-shows. The employer allowed claimant to work for over two weeks after her final no-call/no-show. Despite claimant's third and fourth no-call/no-shows violating the employer's policy, the employer did not discharge her for violating its policy until January 29, 2018.

Where an employer gives seven days' notice to the employee that it will consider discharging him, the date of that notice is used to measure whether the act complained of is current. *Greene v. Emp't Appeal Bd.*, 426 N.W.2d 659 (Iowa Ct. App. 1988). An unpublished decision held informally that two calendar weeks or up to ten work days from the final incident to the discharge may be considered a current act. *Milligan v. Emp't Appeal Bd.*, No. 10-2098 (Iowa Ct. App. filed June 15, 2011). Inasmuch as the employer was aware on January 13, 2018 that claimant accrued her fourth no-call/no-show in a six month period on January 12, 2018, but the employer waited over two weeks before it discharged her, the act for which claimant was discharged was no longer current. Because the act for which claimant was discharged was not current and claimant may not be disqualified for past acts of misconduct, benefits are allowed.

As benefits are allowed, the issues of overpayment, repayment, and the chargeability of the employer's account are moot.

DECISION:

The February 19, 2018, (reference 01) unemployment insurance decision is affirmed. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided claimant is otherwise eligible. Any benefits claimed and withheld on this basis shall be paid.

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Jeremy Peterson
Administrative Law Judge

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Decision Dated and Mailed

jp/rvs