

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

MEGAN JOINT
Claimant

GREEN VENTURES LLC
Employer

APPEAL 23A-UI-10473-SN-T
**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 10/15/23
Claimant: Appellant (2)

Iowa Code § 96.5(2)a – Discharge
Iowa Admin. Code r. 871-24.32(1)a – Discharge

STATEMENT OF THE CASE:

The claimant, Megan Joint, filed an appeal from the October 31, 2023, (reference 01) unemployment insurance decision that denied benefits effective October 13, 2023, based upon the conclusion she was discharged for causing dissension among other employees. The parties were properly notified of the hearing. A telephone hearing was held on November 28, 2023, at 2:00 p.m. The claimant participated. The employer participated through Owner Rich Osborne.

ISSUE:

Whether the claimant was discharged for work-related misconduct?

FINDINGS OF FACT:

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

The claimant was employed part-time as a barista from September 2023, until this employment ended on October 13, 2023, when she was terminated. The claimant reported directly to Rich Osborne, the owner of the employer. The claimant had previously worked for this employer.

The employer has an employee handbook. The claimant did not receive one when she was rehired in September 2023, but she received one during her previous term of employment. The employee handbook directs staff to be “professional and responsible.” It has an attendance policy that states an employee is to give notice that they will be absent as soon as possible. Upon her rehire the claimant and other staff were instructed to use a chat platform, Discord, to notify other staff about an expected absence in a channel called “urgent coverage needed.”

During her short tenure, the claimant became frustrated with the way other staff were performing their duties. For instance, she observed that there were crumbs left under the table after a closing shift. Mr. Osborne’s wife informally spoke with the claimant and informed her that if she was going to make such observations, then they needed to be general and not specifically name anyone as the one who was responsible.

On October 10, 2023, the claimant left a message in the chat program that said that per a meeting with Mr. Osborne in the preceding weeks, all staff need to do a full walkthrough of the coffee house to see what they might have missed when they closed. That same day, Mr. Osborne saw the message and believed it was a passive aggressive and unprofessional public shaming of those other employees.

On October 11, 2023, Mr. Osborne and his wife revised the means for addressing issues with the work of other staff. The claimant and other staff were directed to take pictures and send them to Mr. Osborne directly. The claimant sent a text message to Mr. Osborne asking him why they had the chat application if it was not to keep everyone on the same page about work expectations. Mr. Osborne sent a text message back stating that it came off as passive aggressive and reactionary behavior. The claimant replied that she felt like it was generalized just as she had been instructed to do by Mr. Osborne's wife in a recent meeting. He clarified that he wanted these concerns to be brought directly up the chain to him, so that he could correct this behavior in subordinates.

On October 12, 2023, the claimant discovered that she had been scheduled for the following Sunday, October 15, 2023. The claimant sent a text message to Mr. Osborne asking him if he remembered that she had previously discussed with him about being out of town that weekend. Mr. Osborne replied by text message that he could not find other employees willing to work that Sunday. The claimant replied that she did not want to take the Sunday because these other employees were unwilling to take it. She added that she felt like they needed to discuss this in person. She then added, "On second thought don't come in tomorrow. You're going to set me off in a rage." The claimant's message was in reference to her condition, bipolar disorder. It was a phrase she used to alert people that she was overstimulated.

At 12:40 a.m. on October 13, 2023, the claimant posted in the urgent coverage needed channel that she was having a mental health crisis. She said she would not be able to report to work that day from 6:30 a.m. to noon. The claimant did not think of using other forms of communication because she saw that several employees and Mr. Osborne had a green light next to their names showing that they were active. She also reasoned that this was the designated means of requesting time off.

At 7:30 a.m. on October 13, 2023, Mr. Osborne received a message from one of his staff that she had just pulled in and there were people waiting for the store to be opened. Mr. Osborne noticed that the claimant had changed her profile avatar in the chat to appear like him because it had a goatee and wore a Hawaiian shirt. The name of the profile had been changed to read, "I suck ass cheeks."¹ The claimant had also posted on her Facebook wall a cartoon that talked about nepotism which he took to be a reference to him. That in combination with the claimant's use of the chat to bemoan various discrepancies with staff and her absence that morning caused him to terminate her.

The claimant was never formally warned about any of these discrepancies. She was surprised when she received a text message from Mr. Osborne's wife terminating her.

The employer's daughter works part-time for the employer. His daughter's roommate worked for the employer throughout the claimant's term of employment, but she has since been terminated. Both had numerous attendance issues and arrived at work in stained and inappropriate clothes such as pajamas. Mr. Osborne describes them as his "worst employees" or the "lowest on the totem pole."

¹ Other chat profiles were playful and derisive. The claimant created the avatar that Mr. Osborne used.

REASONING AND CONCLUSIONS OF LAW:

The administrative law judge concludes the employer has failed to meet its burden to show the claimant's termination was caused by work-related misconduct. Benefits are granted, provided the claimant is otherwise eligible.

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.

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.

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 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.

The administrative law judge does not find the employer met its burden to show disqualifying misconduct in this case for several reasons.

First, the employer had not warned the claimant, for what he characterized as the primary reason for terminating her, that she had been too brusque in her critiques of other staff's work. In fact, he had not warned her regarding any of the things that led to her termination. 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 to be made to preserve the employment relationship. If an employer expects an employee to conform to certain expectations or face discharge, appropriate (preferably written), detailed, and reasonable notice should be given. No such warning was given here. In fact, the employer acknowledges the policy was changed to clarify that the claimant could not generally make these observations in the chatroom. The administrative law judge finds the claimant's belief that this was per Mr. Osborne's wife's direction to generally make these critiques plausible. There were no such instances of this regarding other staff that occurred after the policy was changed.

Second, the employer added behavior occurring outside of work to its reasons for discharge. Namely that the claimant posted a picture on her Facebook wall bemoaning the problems with nepotism. For the claimant's termination to be disqualifying, it must have some connection to her work. See Iowa Admin. Code r. 871-24.32(1)a. That this was part of the employer's consideration undermines its case that she was terminated for misconduct.

Third, the employer's reason for termination seemed to evolve as the hearing went on. In his initial testimony, the employer stated that it was the claimant's attitude and the attendance issue on the final date that led him to terminate her. He offered that was the "gist of it." But the employer has the burden of describing all of its rationale for termination. This is so some objective means of discerning whether it is a disqualifying separation can be made. See 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.

Fourth, the employer stated the claimant was terminated in part because the claimant's attendance incident on October 13, 2023, and that was the final incident. Yet, that incident was properly reported per Mr. Osborne's description in his case in chief. The claimant later offered that he would have directly contacted a supervisor under those circumstances, but again the chat room the claimant used was designated specifically for that purpose. There is nothing in the record to suggest his expectation was reasonable given the circumstances. In any case, the claimant reported she was ill per the existing call off practice. This means it is not misconduct per se. See Iowa Admin. Code r. 871-24.32(7) provides:

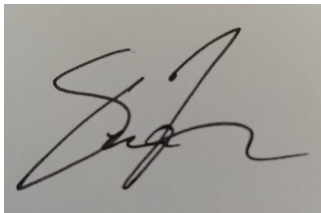
(7) Excessive unexcused absenteeism. Excessive unexcused absenteeism is an intentional disregard of the duty owed by the claimant to the employer and shall be considered misconduct **except for illness or other reasonable grounds for which the employee was absent and that were properly reported to the employer.**

It is acknowledged that the claimant changed her avatar to depict Mr. Osborne with a name that was derisive. The issue with finding this disqualifying is that does not relate in any way to the final incident of attendance. Furthermore, the record reflects that the employer did not set clearly established boundaries that were uniform throughout the organization. Letting two employees essentially violate numerous reasonable expectations makes it more plausible the claimant's allegation that the profile avatar and its name were not out of place. It also undermines the employer's ability to show that the claimant was terminated due to a reasonable and uniformly enforced application of its rules as required by Iowa Code section 96.5(2)d(2).

The administrative law judge does not condone the claimant's behavior in the final week. Rather this is a statement about the burden the employer failed to meet. Benefits are granted.

DECISION:

The October 31, 2023, (reference 01) unemployment insurance decision is REVERSED. The 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.



Sean M. Nelson
Administrative Law Judge II

November 30, 2023
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.