

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

---

**KATHRYN K WELLS**  
Claimant

**FIVE STAR QUALITY CARE INC**  
Employer

**APPEAL 17A-UI-12865-JP-T**  
**ADMINISTRATIVE LAW JUDGE  
DECISION**

**OC: 11/12/17**  
**Claimant: Appellant (2)**

---

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

**STATEMENT OF THE CASE:**

The claimant filed an appeal from the December 5, 2017, (reference 01) unemployment insurance decision that denied benefits. The parties were properly notified about the hearing. A telephone hearing was held on January 9, 2018. Claimant participated. Employer did not register for the hearing and did not participate.

**ISSUE:**

Was the claimant discharged for disqualifying job-related misconduct?

**FINDINGS OF FACT:**

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed full-time as an activity director from July 2014, and was separated from employment on November 17, 2017, when she was discharged.

The employer has an employee handbook that prohibits employees from violating its confidentiality and nondisclosure policy. Claimant was aware of the employee handbook.

In November 2017, claimant looked to hire a prospective employee after she received a recommendation from a coworker (Amanda). Prior to hiring the prospective employee, claimant had the prospective employee fill out an employment application. The employment application asked the prospective employee if she had any prior convictions. The prospective employee indicated the prospective employee had no prior convictions. Claimant interviewed the prospective employee after the prospective employee filled out her application. At the conclusion of the interview, the prospective employee filled out the background check paperwork.

On November 14, 2017, the human resources manager came to claimant's office and told her that the prospective employee lied on the prospective employee's application. The human resources manager told claimant that there was a hit on the prospective employee's background search. Claimant asked the human resources manager if she wanted claimant to talk to the prospective employee. The human resources manager told claimant that she would take care

of it. Claimant then spoke to the administrator about the prospective employee. Claimant asked the administrator what would happen if the background check was wrong. The administrator told claimant to have the prospective employee e-mail him if the background check was wrong. Claimant then spoke to Amanda regarding the prospective employee. Claimant asked Amanda if there was something that happened approximately two years ago with the prospective employee. Amanda told claimant that she was not aware of anything negative that had happened two years ago. Amanda then spoke to the prospective employee. After Amanda spoke to the prospective employee, Amanda called claimant. Amanda told claimant that the prospective employee indicated it was a "deferred case" and it should not come up on a background check. The prospective employee then called claimant. Claimant told the prospective employee to e-mail the administrator if she could prove it was deferred.

On November 17, 2017, the administrator met with claimant. The administrator asked claimant if she had spoken to Amanda and the prospective employee. Claimant responded yes. The administrator then told claimant she was discharged for talking with an employee and breaking Health Insurance Portability and Accountability Act of 1996 (HIPAA). The employer did not explain to claimant how she had violated HIPAA.

Claimant had a prior disciplinary warning in June 2016. In June 2016, the employer gave claimant a written warning for refusing to complete paperwork and showing disrespect. Claimant was warned her job was in jeopardy for the next thirty days. Claimant successfully completed the thirty day period.

#### **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:

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.

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). When based on carelessness, the carelessness must actually indicate a "wrongful intent" to be disqualifying in nature. *Id.* Negligence does not constitute misconduct unless recurrent in nature; a single act is not disqualifying unless indicative of a deliberate disregard of the employer's interests. *Henry v. Iowa Dep't of Job Serv.*, 391 N.W.2d 731 (Iowa Ct. App. 1986). Poor work performance is not misconduct in the absence of evidence of intent. *Miller v. Emp't Appeal Bd.*, 423 N.W.2d 211 (Iowa Ct. App. 1988).

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 has the burden of proof in establishing disqualifying job misconduct. *Cosper v. Iowa Department of Job Service*, 321 N.W.2d 6 (Iowa 1982). If a party has the power to produce more explicit and direct evidence than it chooses to do, it may be fairly inferred that other evidence would lay open deficiencies in that party's case. *Crosser v. Iowa Department of Public Safety*, 240 N.W.2d 682 (Iowa 1976). Although claimant testified she did speak to her

coworker (Amanda) and the prospective employee about whether there was anything negative in the prospective employee's history, the employer did not present explicit, direct evidence of what exact rule or policies claimant violated by her conduct. Claimant also testified that the employer has an employee handbook that has a confidentiality and nondisclosure policy, but no evidence was presented about the details of the policy, including what is allowed or prohibited. "The claimant's statement and employer's statement must give detailed facts as to the specific reason for the claimant's discharge." Iowa Admin. Code r. 871-24.32(4). "Allegations of misconduct or dishonesty without additional evidence shall not be sufficient to result in disqualification." Iowa Admin. Code r. 871-24.32(4). If the employer is unwilling to furnish available evidence to corroborate the allegation, misconduct cannot be established." Iowa Admin. Code r. 871-24.32(4).

Furthermore, the conduct for which claimant was discharged was merely an isolated incident of poor judgment and inasmuch as employer had not previously warned claimant about the issue leading to the separation, it has not met the burden of proof to establish that claimant acted deliberately or with recurrent negligence in violation of company policy, procedure, or prior warning. 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. Training or general notice to staff about a policy is not considered a disciplinary warning. The employer did not meet its burden of proof to show disqualifying job misconduct. Benefits are allowed.

**DECISION:**

The December 5, 2017, (reference 01) unemployment insurance decision is reversed. 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.

---

Jeremy Peterson  
Administrative Law Judge

---

Decision Dated and Mailed

jp/rvs