

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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**BRIAN LAROSE**  
Claimant

**APPEAL 17A-UI-12308-LJ-T**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**DSM HEALTHCARE MANAGEMENT**  
Employer

**OC: 10/22/17  
Claimant: Appellant (1)**

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Iowa Code § 96.6(2) – Timeliness of Appeal  
Iowa Code § 96.5(2)a – Discharge for Misconduct

**STATEMENT OF THE CASE:**

The claimant filed an appeal from the November 16, 2017 (reference 02) unemployment insurance decision that denied benefits based upon a determination that claimant was discharged for violation of a known company rule. The parties were properly notified of the hearing. A telephone hearing was held on December 20, 2017. The claimant, Brian Larose, participated. The employer, DSM Healthcare Management, participated through Brodey Hanson, Administrator; and Cathy Barnett, HR Generalist.

**ISSUE:**

Is the appeal timely?  
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, most recently as a maintenance director and housekeeping and laundry supervisor, from June 22, 2017, until October 25, 2017, when he was discharged for harassment and failing to follow the employer's policies. On October 23, 2017, Hanson received information that one of the nurses had contacted the grievance officer about claimant. This nurse reported that claimant was inappropriately close to her, physically, and made her feel uncomfortable. Hansen investigated this complaint by speaking to other individuals who worked with claimant, including Rose and Michelle who directly reported to him. Both Rose and Michelle reported that claimant made them uncomfortable and fearful. Both reported that claimant had asked them inappropriate questions, and both women voiced concerns that claimant would retaliate against them. On one occasion, claimant yelled at Michelle until she started to cry. Michelle reported shaking in fear when claimant was around her. Hanson brought the results of his investigation to his superiors and to human resources, and the decision was made to discharge claimant.

Claimant had received several past warnings for similar behavior. On August 11, 2017, claimant received a verbal warning after yelling at Michelle from the dietary department. On

August 18, 2017, claimant received a written warning for an incident that occurred on August 15. During the August 15 incident, claimant was yelling at a dietitian who contracts with the employer. On October 12, 2017, claimant received a final written warning for an incident that happened on October 9. During the October 9 incident, claimant became unprofessional and inappropriate when speaking with Hanson. Claimant was made aware that his job would be in jeopardy if he engaged in any similar conduct.

The unemployment insurance decision was mailed to the appellant's address of record on November 16, 2017. The appellant did not receive the decision. He explained that he was between addresses at the time, and the fact-finding decision never arrived at the address to which he requested IWD send it. Claimant called the agency and someone notified him that the fact-finding decision disqualified him. This person then walked him through the process of filing an online appeal.

### **REASONING AND CONCLUSIONS OF LAW:**

For the reasons that follow, the administrative law judge concludes claimant was discharged from employment due to disqualifying, job-related misconduct. Benefits are withheld.

The first issue to be considered in this appeal is whether the appellant's appeal is timely. The administrative law judge determines it is.

Iowa Code § 96.6(2) provides:

2. Initial determination. A representative designated by the director shall promptly notify all interested parties to the claim of its filing, and the parties have ten days from the date of mailing the notice of the filing of the claim by ordinary mail to the last known address to protest payment of benefits to the claimant. The representative shall promptly examine the claim and any protest, take the initiative to ascertain relevant information concerning the claim, and, on the basis of the facts found by the representative, shall determine whether or not the claim is valid, the week with respect to which benefits shall commence, the weekly benefit amount payable and its maximum duration, and whether any disqualification shall be imposed. The claimant has the burden of proving that the claimant meets the basic eligibility conditions of section 96.4. The employer has the burden of proving that the claimant is disqualified for benefits pursuant to section 96.5, except as provided by this subsection. The claimant has the initial burden to produce evidence showing that the claimant is not disqualified for benefits in cases involving section 96.5, subsection 10, and has the burden of proving that a voluntary quit pursuant to section 96.5, subsection 1, was for good cause attributable to the employer and that the claimant is not disqualified for benefits in cases involving section 96.5, subsection 1, paragraphs "a" through "h". Unless the claimant or other interested party, after notification or within ten calendar days after notification was mailed to the claimant's last known address, files an appeal from the decision, the decision is final and benefits shall be paid or denied in accordance with the decision. If an administrative law judge affirms a decision of the representative, or the appeal board affirms a decision of the administrative law judge allowing benefits, the benefits shall be paid regardless of any appeal which is thereafter taken, but if the decision is finally reversed, no employer's account shall be charged with benefits so paid and this relief from charges shall apply to both contributory and reimbursable employers, notwithstanding section 96.8, subsection 5.

The appellant did not have an opportunity to appeal the fact-finder's decision because the decision was not received. Without notice of a disqualification, no meaningful opportunity for appeal exists. See *Smith v. Iowa Emp't Sec. Comm'n*, 212 N.W.2d 471, 472 (Iowa 1973). As soon as claimant became aware of the outcome of the fact-finding decision, he filed an online appeal. Therefore, his appeal shall be accepted as timely.

The next issue is whether claimant's separation from employment is disqualifying. Iowa Code § 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).

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). 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).

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, considering the applicable factors listed above, and using her own common sense and experience, the administrative law judge finds the employer's testimony more credible than claimant's testimony.

The employer is entitled to establish reasonable work rules and expect employees to abide by them. Here, the employer established that claimant engaged in harassing, threatening, and unprofessional behavior in the workplace. Claimant's behavior is particularly concerning as he was a supervisory employee and was acting inappropriately toward his subordinates, as well as his colleagues and his supervisor. The employer has met its burden of proving that claimant was discharged for disqualifying, job-related misconduct. Benefits are withheld.

**DECISION:**

The November 16, 2017 (reference 02) unemployment insurance decision is affirmed. Claimant was discharged from employment due to job-related misconduct. Benefits are withheld until such time as he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible.

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Elizabeth A. Johnson  
Administrative Law Judge

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Decision Dated and Mailed

lj/scn