

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

JENNIFER R YERINGTON
Claimant

CODY NEISWONGER
Employer

APPEAL 18A-UI-09342-NM-T
**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 08/05/18
Claimant: Respondent (1)

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Admin. Code r. 871-24.32(8) – Current Act
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 August 30, 2018, (reference 03) unemployment insurance decision that allowed benefits. The parties were properly notified about the hearing. A telephone hearing was held on September 26, 2018. Claimant elected not to participate in the hearing. Employer participated through non-attorney representative Robert Neiswonger and witnesses Rhonda Lane and Haley Frost. Employer's Exhibits 1 through 3 were received into evidence. Official notice was taken of the administrative record.

ISSUES:

Was the claimant discharged for disqualifying job-related misconduct?

Has the claimant been overpaid any unemployment insurance benefits, and if so, can the repayment of those benefits to the agency be waived?

Can any 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 began working for employer on March 2, 2018. Claimant last worked as a part-time respite care provider. Claimant was separated from employment on August 8, 2018, when she was discharged.

On July 18, 2018, the individual for whom claimant was providing respite care was admitted to the University of Iowa Hospital for surgery. Sometime during his stay, she could not remember when, Lane received a call from the hospital indicating a woman had just called asking for information about the client. The caller claimed to be the client's mother. Lane is the client's

mother. Lane confirmed she was not the caller and the hospital provided her with the caller's telephone number. Lane recognized the telephone number as the claimant's.

Lane had several other concerns with claimant's conduct over the course of her employment, though those incidents were not similar or related to this final incident. Lane was not sure what to do in a situation like this, as she had never had to discharge anyone before. Claimant, and the client's other respite care workers, were put on leave while Lane figured out what to do. Lane did not confront claimant with the information about the incident, nor did she tell claimant it was the reason she was put on leave or that she might be discharged. Lane did not conduct any further investigation or collect additional facts or evidence while claimant was on leave. Claimant was ultimately discharged on August 8, 2018.

The claimant filed a new claim for unemployment insurance benefits with an effective date of August 30, 2018. The claimant filed for and received a total of \$952.00 in unemployment insurance benefits for the weeks between August 5 and September 22, 2018. The employer did not participate in a fact-finding interview regarding the separation on August 29, 2018. The fact finder determined claimant qualified for benefits.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was not discharged from employment due to job-related misconduct.

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.

871 IAC 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 Department of Job Service*, 275 N.W.2d 445, 448 (Iowa 1979).

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). The Iowa Court of Appeals found substantial evidence of misconduct in testimony that the claimant worked slower than he was capable of working and would temporarily and briefly improve following oral reprimands. *Sellers v. Emp't Appeal Bd.*, 531 N.W.2d 645 (Iowa Ct. App. 1995). Generally, continued refusal to follow reasonable instructions constitutes misconduct. *Gilliam v. Atlantic Bottling Co.*, 453 N.W.2d 230 (Iowa Ct. App. 1990). 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). 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).

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 lapse of 11 days from the final act until discharge when claimant was notified on the fourth day that his conduct was grounds for dismissal did not make the final act a "past act." 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).

The claimant did engage in a final act of misconduct when she impersonated the client's mother in an attempt to gain private medical information from the hospital following his surgery. However, inasmuch as employer knew of the incident around the time it occurred, did not advise the claimant it was an issue that would be investigated, and waited somewhere between two and three weeks before firing the claimant, the act for which the claimant was discharged was no longer current. Because the act for which the claimant was discharged was not current and the claimant may not be disqualified for past acts of misconduct, benefits are allowed. The employer has not met its burden of proof to establish a current or final act of misconduct, and, without such, the history of other incidents need not be examined. As benefits are allowed, the issues of overpayment and participation are moot.

DECISION:

The August 30, 2018, (reference 03) unemployment insurance decision is affirmed. 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. The issues of overpayment and participation are moot.

Nicole Merrill
Administrative Law Judge

Decision Dated and Mailed

nm/rvs