

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

WUCELY S ANDERSEN
Claimant

HY-VEE INC
Employer

APPEAL 18A-UI-05654-DB-T
**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 04/15/18
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/appellant filed an appeal from the May 8, 2018 (reference 03) unemployment insurance decision that allowed benefits based upon claimant's discharge from employment. The parties were properly notified of the hearing. A telephone hearing was held on June 8, 2018. The claimant, Wucely S. Andersen, participated personally. The employer, Hy-Vee Inc., participated through Representative Lisa Harroff. Witnesses Shannon Hughes and Sara Lawler participated on behalf of the employer. Employer's Exhibit 1 was admitted.

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 was employed full-time as a corporate security officer. He began his employment on April 27, 2016 and his employment ended on April 11, 2018, when he was discharged. His job duties consisted of providing security at three separate locations. His typical working hours were Monday through Friday from 10:00 a.m. to 6:00 p.m. Jeff White was his supervisor.

On April 4, 2018, claimant was working at the visitor entrance post from 2:00 p.m. to 6:00 p.m. Part of his job duties at this post consisted of checking visitors into the building and monitoring the camera screens to ensure the building was secure. During this four-hour shift, claimant was using his personal cellular telephone for non-related job duties for approximately one hour. Also during the shift, claimant used the employer's security monitors to enlarge the video of a co-worker who was using the treadmill in the employer's fitness room. Claimant took a picture of the video of the co-worker on the monitor with his personal cellular telephone. He then sent the

picture of the co-worker to her via Snap Chat and stated to her to “run faster”. This was during a time that he was supposed to be working. The co-worker reported the incident to her mother, who was also an employee. The matter was then reported to Mr. Hughes, who conducted an investigation.

During the investigation, Mr. Hughes reviewed camera footage of the claimant during his shift on April 4, 2018 and confirmed that claimant took a picture of this co-worker with his personal cellular telephone by enlarging the video from the employer’s security system. Mr. Hughes also determined that claimant was using his personal cellular telephone for approximately one hour during work time. Mr. Hughes spoke to claimant about his actions and claimant admitted to taking the picture and sending it to the co-worker via Snap Chat. Claimant believed that this co-worker was a friend and that he was trying to motivate her by telling her to “run faster”.

On April 10, 2018, claimant received a one-day suspension for conduct unbecoming of a corporate security officer and inappropriate use of company security equipment due to the April 4, 2018 incident. See Exhibit 1. Claimant signed the documentation regarding the one-day suspension. See Exhibit 1. The documentation provided that any additional conduct of this nature will lead to further disciplinary action, up to and including discharge. See Exhibit 1. Claimant returned to work on April 11, 2018. When he returned to work, he was discharged for the April 4, 2018 incident for which he had already received a suspension.

Claimant has received \$2,585.00 in gross unemployment insurance benefits since filing his initial claim with an effective date of April 15, 2018. The employer did participate in the fact-finding interview.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment for no disqualifying reason. Benefits are allowed.

As a preliminary matter, the administrative law judge finds that the Claimant did not quit. Claimant was discharged from employment.

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).

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). Further, a claimant cannot be discharged for a past act of misconduct.

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 purpose of this rule is to assure that an employer does not save up acts of misconduct and spring them on an employee when an independent desire to terminate arises. For example, an

employer may not convert a lay off into a termination for misconduct by relying on past acts. *Milligan v. EAB*, 802 N.W.2d 238 (Table)(Iowa App. June 15, 2011).

The employer has failed to meet its burden of proof in establishing a current act of disqualifying job-related misconduct between the April 10, 2018 suspension and the April 11, 2018 discharge. Inasmuch as the employer had suspended the claimant for the final incident on April 10, 2018 and there were no incidents of alleged misconduct thereafter, it has not met the burden of proof to establish that claimant acted deliberately or negligently after the most recent warning. The employer has not established a current or final act of misconduct, and, without such, the history of other incidents need not be examined. Accordingly, benefits are allowed. Because benefits are allowed, the claimant is not overpaid benefits and the employer's account may be charged for benefits paid.

DECISION:

The May 8, 2018 (reference 03) unemployment insurance decision is affirmed. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided claimant is otherwise eligible. The employer's account may be charged for benefits paid.

Dawn Boucher
Administrative Law Judge

Decision Dated and Mailed

db/rvs