

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

**AMY M REIMAN**  
Claimant

**GRAPETREE MEDICAL STAFFING INC**  
Employer

**APPEAL 18A-UI-07606-LJ-T**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**OC: 10/29/17  
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 filed an appeal from the July 9, 2018, (reference 01) unemployment insurance decision that allowed benefits based upon a determination that claimant was discharged for performing unsatisfactory work, which is not disqualifying misconduct. The parties were properly notified of the hearing. A telephone hearing was held on August 2, 2018. The claimant, Amy M. Reiman, participated. The employer, Grapetree Medical Staffing, Inc., participated through Erin Stevens, HR Supervisor. Employer's Exhibits 1 through 24 were received and admitted into the record without objection. The administrative law judge took official notice of the administrative record.

**ISSUES:**

Was the claimant discharged for disqualifying job-related misconduct?  
Has the claimant been overpaid unemployment insurance benefits, and if so, can the repayment of those benefits to the agency be waived?  
Can 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, most recently as a credentialing specialist, from November 27, 2017, until June 7, 2018, when she was discharged. Claimant was discharged for failing to meet the productivity level required for her position and for making a threat. After successfully completing training, claimant never met the employer's expectations for productivity. She was given a coaching on March 12 and placed on a Performance Improvement Plan on April 17 that was extended on May 22 and reviewed for a final time on June 7. Claimant struggled to complete her file audits in a timely manner and to process faxes, which affected the entire company.

On either May 26 or 28, claimant was on a stressful phone call. Claimant explained that she was speaking with another compliance manager's healthcare professional, and this was receiving lots of pushback from this healthcare professional regarding the changes she needed

to make to her TB test results. After standing up, pacing, and trying to figure out the best way to communicate with this person, claimant muted her phone and said, "Oh my gosh, I'm going to hurt her." Claimant said this out of exasperation and not as a legitimate threat of violence. When claimant was off the phone, she spoke with her supervisor and the supervisor told her not to do that again.

The administrative record reflects that claimant has received unemployment benefits in the amount of \$3,957.00, since filing a claim with an effective date of October 29, 2017, and an additional date of June 3, 2018, for the eight weeks ending July 28, 2018. The administrative record also establishes that the employer did participate in the fact-finding interview. Stevens and Kristin Mueggenberg participated in the fact-finding interview.

### **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, provided claimant is otherwise eligible.

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(5) provides:

(5) Trial period. A dismissal, because of being physically unable to do the work, being not capable of doing the work assigned, not meeting the employer's standards, or having been hired on a trial period of employment and not being able to do the work shall not be issues of misconduct.

Failure in job performance due to inability or incapacity is not considered misconduct because the actions were not volitional. *Huntoon v. Iowa Dep't of Job Serv.*, 275 N.W.2d 445, 448 (Iowa 1979). Mere incapacity or incompetence is not disqualifying. 871 IAC 24.32(1)(a); *Eaton v. Iowa Dept. of Job Service*, 376 N.W.2d 915, 917 (Iowa App. 1985); *Newman v. IDJS*, 351 N.W.2d 806 (Iowa 1984); *Richers v. Iowa Department of Job Service*, 479 N.W.2d 308 (Iowa 1991); *Kelly v. Iowa Dept. of Job Service*, 386 N.W.2d 552 (Iowa App. 1986). Where an individual is discharged due to a failure in job performance, proof of that individual's ability to do the job is required to justify disqualification, rather than accepting the employer's subjective view. To do so is to impermissibly shift the burden of proof to the claimant. *Kelly v. Iowa Dep't of Job Serv.*, 386 N.W.2d 552 (Iowa Ct. App. 1986).

In this case, claimant was discharged for poor work productivity. Since the employer agreed that claimant had never had a sustained period of time during which she performed her job duties to employer's satisfaction and inasmuch as she did attempt to perform the job to the best of her ability but was unable to meet its expectations, no intentional misconduct has been established, as is the employer's burden of proof. *Cosper v. Iowa Dep't of Job Serv.*, 321 N.W.2d 6 (Iowa 1982). Accordingly, no disqualification pursuant to Iowa Code § 96.5(2)a is imposed.

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.

Claimant was also discharged for making a threat against an individual. After taking the testimony of both parties, the administrative law judge believes this was an inappropriate comment but not a legitimate threat. Claimant did not personally know the person on the phone, she did not know where they were or how to access them, she did not make the threat to the person, and her tone in recounting the comment she made during testimony was more a tone of exasperation than anger. While the comment was inadvisable and certainly not appropriate for a workplace, it does not rise to the level of willful or deliberate misconduct. 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.

As claimant's separation is not disqualifying, the issues of overpayment, repayment, and chargeability are moot.

**DECISION:**

The July 9, 2018, (reference 01) unemployment insurance decision is affirmed. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided she is otherwise eligible. The issues of overpayment, repayment, and chargeability are moot.

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Elizabeth A. Johnson  
Administrative Law Judge

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Decision Dated and Mailed

lj/rvs