

**IN THE IOWA ADMINISTRATIVE HEARINGS DIVISION
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

MARTY ACKERMANN
Claimant

CAVEMAN ADVENTURES
Employer

APPEAL 23R-UI-07841-ED-T
ADMINISTRATIVE LAW JUDGE
DECISION

OC: 05/07/23
Claimant: Appellant (2)

Iowa Code § 96.5(2)a – Discharge
Iowa Code § 96.3(7) – Overpayment of Benefits
Iowa Admin. Code r. 871-24.10 – Able & Available – Benefits Eligibility Conditions

STATEMENT OF THE CASE:

Claimant filed an appeal from the May 31, 2023 (reference 01) unemployment insurance decision that denied benefits based on a separation from employment. A telephone hearing was held on June 27, 2023. The employer appealed the decision to the Employment Appeal Board. The Employment Appeal Board remanded the matter. A subsequent hearing was held on August 29, 2023. Claimant, Marty Ackermann, participated personally. Employer, Caveman Adventures, participated through Ray Novick. No exhibits were admitted into the record. Official notice was taken of the administrative record.

ISSUE:

Whether claimant was discharged for disqualifying misconduct.
Whether claimant voluntarily quit without good cause attributable to the employer.
Whether the claimant was overpaid benefits.
Whether the employer participated in the fact-finding interview.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant's date of hire was April 17, 2023. He worked as a full-time IT Coordinator. The claimant's immediate supervisor was Ray Novack. April 28, 2023 was the last day the claimant physically worked in the job. The claimant was discharged via email on April 30, 2023 because Claimant did not perform work to the satisfaction of the employer and because the employer felt the claimant falsified his abilities listed on his employment application and resume. Tasks the employer determined the claimant was not able to complete satisfactorily were read and applying a pdf, following written instructions, and following verbal instructions. The claimant completed some tasks satisfactorily, but overall, was unable to complete the jobs to the satisfaction of the employer.

In a specific instance where the claimant did not accomplish the required task to the employer's satisfaction, Mr. Novack had provided a document that included a step-by-step pdf instructions to the claimant. The claimant did not read the pdf and provide the list of documents to Mr.

Novack as instructed in the pdf. The claimant had mistakenly thought he would receive an additional email when it was time for him to take the next step in the process. The claimant was mistaken because the document he had received from Mr. Novack contained all of the information he needed to complete the process.

The claimant was required to use a specific software program in the position. The claimant accessed the software 190 times during his employment. This software provided guidance on how to complete processes that were a part of the claimant's job duties. He also asked for additional training from other employees, but he did not make a direct request to Mr. Novack for additional training.

The employer requested the claimant work on a survey monkey project. The claimant sent Mr. Novack a message, stating he was going back to re-add features so the survey could be pushed out for free. Mr. Novack did not ask the claimant to do this. Mr. Novack felt pushing the survey out for free was not a legitimate option and that the claimant was not correct in deciding to take this action without checking with Mr. Novack first.

The claimant was initially able to label inventory correctly and place it in the correct location, but was not able to complete the task a subsequent time to the employer's satisfaction. The claimant was never trained on the process which involved receiving purchase orders or exporting purchase orders into QuickBooks to be able to receive them and because of that, he was not able to print the appropriate labels. He requested training from other employees in this process. He did not request additional training in this process directly from Mr. Novack. Because the claimant did not ask Mr. Novack for assistance, Mr. Novack did not know the claimant needed help with this process.

The claimant was also tasked with labeling three monitors. The claimant did not complete this task.

The claimant did not receive the employer's handbook.

Prior to working for Mr. Novack, the Claimant worked as the General Manager at Mr. Carwash for approximately four years. In this job at Mr. Carwash, the claimant was involved in hiring and training employees. In that position, the claimant would pay employees based on company standards and the employee's experience. The claimant was also in charge of evaluating employees. He had the discretion to terminate employment. Customer service and cleaning were some of the more simple tasks the claimant managed. Maintenance and quality control were more difficult tasks at Mr. Carwash that the claimant managed.

The claimant attached his resume to his job application sent to Mr. Novack when he initially applied for the IT Coordinator job. On his application, the claimant showed that it had been approximately 5.5 years since he had used Quickbooks. The claimant also showed that he was capable of building computers.

The claimant was paid \$3,306.00 in regular state unemployment benefits since the initial filing effective date of May 7, 2023. The employer participated in the fact-finding interview.

REASONING AND CONCLUSIONS OF LAW:

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

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).

871 IAC 24.32(4) provides:

(4) Report required. The claimant's statement and the 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.

871 IAC 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.

Further, 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).

The decision in this case rests, at least in part, upon the credibility of the parties. 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.* The administrative law judge concludes that the claimant's testimony is more credible than that of the employer.

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, 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).

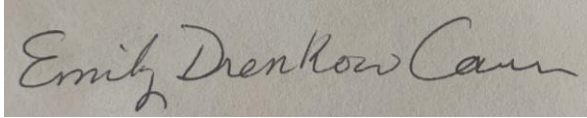
In this case, there was no evidence presented that any of the incidents alleged by the employer were intentional or were caused by claimant's carelessness which indicated a wrongful intent. Instead, the evidence shows that the claimant took steps in attempting to learn the correct procedures, such as accessing the instructional software and requesting assistance from co-workers. His employment was brief, less than two weeks in its entirety. During that time, the evidence shows that his actions demonstrated an effort to be diligent in learning his new position. While he did fail to complete some tasks assigned to him, such as the labeling of the monitors, there was no evidence that failure was anything other than negligence. This type of behavior does not rise to the level of misconduct. The law limits disqualifying misconduct to substantial and willful wrongdoing or repeated carelessness or negligence that equals willful misconduct in culpability. *Lee v. Employment Appeal Bd.*, 616 N.W.2d 661 (Iowa 2000). Reoccurring acts of negligence by an employee would probably be described by most employers as in disregard of their interests. *Greenwell v Emp't Appeal Bd.*, No. 15-0154 (Iowa Ct. App. March 23, 2016). The misconduct legal standard requires more than reoccurring acts of negligence in disregard of the employer's interests. *Id.* There is no evidence that the claimant's incidents were intentional and anything more than negligence.

In addition, there is no evidence presented that the information the claimant provided on his job application and attached resume was false.

The employer failed to meet its burden of proof in establishing disqualifying job misconduct. As such, benefits are allowed.

DECISION:

The May 31, 2023 (reference 01) unemployment insurance decision is reversed. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided he is otherwise eligible. The benefits claimed and withheld shall be paid, provided he is otherwise eligible.



Emily Drenkow Carr
Administrative Law Judge

September 5, 2023
Decision Dated and Mailed

ed/rvs

APPEAL RIGHTS. If you disagree with the decision, you or any interested party may:

1. Appeal to the Employment Appeal Board within fifteen (15) days of the date under the judge's signature by submitting a written appeal via mail, fax, or online to:

**Employment Appeal Board
4th Floor – Lucas Building
Des Moines, Iowa 50319
Fax: (515)281-7191
Online: eab.iowa.gov**

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

AN APPEAL TO THE BOARD SHALL STATE CLEARLY:

- 1) The name, address, and social security number of the claimant.
- 2) A reference to the decision from which the appeal is taken.
- 3) That an appeal from such decision is being made and such appeal is signed.
- 4) The grounds upon which such appeal is based.

An Employment Appeal Board decision is final agency action. If a party disagrees with the Employment Appeal Board decision, they may then file a petition for judicial review in district court.

2. If no one files an appeal of the judge's decision with the Employment Appeal Board within fifteen (15) days, the decision becomes final agency action, and you have the option to file a petition for judicial review in District Court within thirty (30) days after the decision becomes final. Additional information on how to file a petition can be found at Iowa Code §17A.19, which

is online at <https://www.legis.iowa.gov/docs/code/17A.19.pdf> or by contacting the District Court Clerk of Court <https://www.iowacourts.gov/iowa-courts/court-directory/>.

Note to Parties: YOU MAY REPRESENT yourself in the appeal or obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds.

Note to Claimant: It is important that you file your weekly claim as directed, while this appeal is pending, to protect your continuing right to benefits.

SERVICE INFORMATION:

A true and correct copy of this decision was mailed to each of the parties listed.

DERECHOS DE APELACIÓN. Si no está de acuerdo con la decisión, usted o cualquier parte interesada puede:

1. Apelar a la Junta de Apelaciones de Empleo dentro de los quince (15) días de la fecha bajo la firma del juez presentando una apelación por escrito por correo, fax o en línea a:

**Employment Appeal Board
4th Floor – Lucas Building
Des Moines, Iowa 50319
Fax: (515)281-7191
En línea: eab.iowa.gov**

El período de apelación se extenderá hasta el siguiente día hábil si el último día para apelar cae en fin de semana o día feriado legal.

UNA APELACIÓN A LA JUNTA DEBE ESTABLECER CLARAMENTE:

- 1) El nombre, dirección y número de seguro social del reclamante.
- 2) Una referencia a la decisión de la que se toma la apelación.
- 3) Que se interponga recurso de apelación contra tal decisión y se firme dicho recurso.
- 4) Los fundamentos en que se funda dicho recurso.

Una decisión de la Junta de Apelaciones de Empleo es una acción final de la agencia. Si una de las partes no está de acuerdo con la decisión de la Junta de Apelación de Empleo, puede presentar una petición de revisión judicial en el tribunal de distrito.

2. Si nadie presenta una apelación de la decisión del juez ante la Junta de Apelaciones Laborales dentro de los quince (15) días, la decisión se convierte en acción final de la agencia y usted tiene la opción de presentar una petición de revisión judicial en el Tribunal de Distrito dentro de los treinta (30) días después de que la decisión adquiera firmeza. Puede encontrar información adicional sobre cómo presentar una petición en el Código de Iowa §17A.19, que se encuentra en línea en <https://www.legis.iowa.gov/docs/code/17A.19.pdf> o comunicándose con el Tribunal de Distrito Secretario del tribunal <https://www.iowacourts.gov/iowa-courts/court-directory/>.

Nota para las partes: USTED PUEDE REPRESENTARSE en la apelación u obtener un abogado u otra parte interesada para que lo haga, siempre que no haya gastos para Workforce Development. Si desea ser representado por un abogado, puede obtener los servicios de un abogado privado o uno cuyos servicios se paguen con fondos públicos.

Nota para el reclamante: es importante que presente su reclamo semanal según las instrucciones, mientras esta apelación está pendiente, para proteger su derecho continuo a los beneficios.

SERVICIO DE INFORMACIÓN:

Se envió por correo una copia fiel y correcta de esta decisión a cada una de las partes enumeradas.