

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

TINA M ANDERSON
Claimant

DAC INC
Employer

APPEAL 15A-UI-08448-JP-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 06/28/15
Claimant: Respondent (2)

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 16, 2015, (reference 01) unemployment insurance decision that allowed benefits. The parties were properly notified about the hearing. A telephone hearing was held on August 19, 2015. Claimant participated. Employer participated through Regional Director Melinda Haley. Jill Kent and Jennifer Harrington were present for the hearing on the employer's behalf, but did not testify. Employer Exhibit One was admitted into evidence with no objection.

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 as a direct support professional from May 30, 2014, and was separated from employment on June 29, 2015, when she was discharged.

As a direct support professional, claimant provided direct care to the employer's clients in a home setting. The clients relied on direct support professionals for their basic needs.

The employer has a social media policy. Employer Exhibit One. The policy prohibits employees from using social media to discuss work related details. Employer Exhibit One.

On June 28, 2015, claimant was using Facebook messenger to talk with a co-worker. The co-worker was working during their chat, but claimant was not working. They were talking about

a client of the employer. The co-worker had cut the hair of the client and had sent a picture to claimant through Facebook messenger. Claimant replied "liked it." Employer Exhibit One. Claimant and the co-worker then went on to discuss "how to fill out mileage sheets." Employer Exhibit One. Facebook messenger is a private discussion between the two parties. The employer became aware of the messaging when another employee reported the incident. Claimant never reported the June 28, 2015 messages to the employer.

On June 29, 2015, Ms. Haley interviewed the co-worker. Employer Exhibit One. Ms. Haley also reviewed the co-worker's Facebook messenger messages, including four pictures of the client. Employer Exhibit One. The co-worker deleted the messages and Ms. Haley testified the co-worker was disciplined. Employer Exhibit One. Ms. Haley then met with claimant regarding the incident. Claimant told Ms. Haley she did not remember the incident. Employer Exhibit One. Claimant logged into her Facebook account and deleted the messages. Claimant denied messaging "like it", and testified she only responded cool. Claimant testified that she did not receive any pictures from her co-worker. Claimant also testified the co-worker did use the client's initials in the message.

Claimant was warned on January 27, 2015 for having a discussion with another employee over Facebook messenger. Employer Exhibit One. Claimant did report this discussion to the employer; however, claimant waited a month to report it. Employer Exhibit One. The employer expressed to claimant that she needed to lead by example and to not use Facebook to discuss things with employees. Claimant was told she needed to report any further violations immediately to the employer. As a result of this incident, claimant was demoted from team lead to direct support professional. Employer Exhibit One.

The administrative record reflects that claimant has received unemployment benefits in the amount of \$2044.00, since filing a claim with an effective date of June 28, 2015, for the seven weeks ending August 15, 2015. The administrative record also establishes that 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 due to job-related misconduct. Benefits are denied.

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).

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). 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).

While the employer did not present the co-worker that was messaging claimant to provide sworn testimony or submit to cross-examination, the combination of Employer Exhibit One and Ms. Haley's testimony, when compared to claimant's recollection of the event, establish the employer's evidence as credible.

Workers in the medical or dependent care profession, reasonably have a higher standard of care required in the performance of their job duties. That duty is evident by the clients' they serve reliance on them for their basic needs. Claimant had been warned about her social media usage as it pertains to work. Employer Exhibit One. Claimant was aware of the privacy interest of the employer's clients. On June 28, 2015, claimant ignored her prior warnings and the client's privacy when she communicated with a co-worker through Facebook about a client. It is not persuasive that claimant had been drinking. The privacy standards apply regardless of whether claimant had been consuming alcohol. It is also not persuasive that the co-worker initiated the contact. Claimant knew she was to report any violation of the social media policy. Employer Exhibit One. Claimant never reported this violation to the employer. This violation was only discovered when another employee alerted the employer.

The employer has presented substantial and credible evidence that claimant violated the employer's social media policy after having been warned. This is disqualifying misconduct.

Iowa Code § 96.3(7)a-b, as amended in 2008, provides:

7. Recovery of overpayment of benefits.

a. If an individual receives benefits for which the individual is subsequently determined to be ineligible, even though the individual acts in good faith and is not otherwise at fault,

the benefits shall be recovered. The department in its discretion may recover the overpayment of benefits either by having a sum equal to the overpayment deducted from any future benefits payable to the individual or by having the individual pay to the department a sum equal to the overpayment.

If the department determines that an overpayment has been made, the charge for the overpayment against the employer's account shall be removed and the account shall be credited with an amount equal to the overpayment from the unemployment compensation trust fund and this credit shall include both contributory and reimbursable employers, notwithstanding § 96.8, subsection 5.

b. (1) If the department determines that an overpayment has been made, the charge for the overpayment against the employer's account shall be removed and the account shall be credited with an amount equal to the overpayment from the unemployment compensation trust fund and this credit shall include both contributory and reimbursable employers, notwithstanding § 96.8, subsection 5. However, provided the benefits were not received as the result of fraud or willful misrepresentation by the individual, benefits shall not be recovered from an individual if the employer did not participate in the initial determination to award benefits pursuant to § 96.6, subsection 2, and an overpayment occurred because of a subsequent reversal on appeal regarding the issue of the individual's separation from employment. The employer shall not be charged with the benefits.

(2) An accounting firm, agent, unemployment insurance accounting firm, or other entity that represents an employer in unemployment claim matters and demonstrates a continuous pattern of failing to participate in the initial determinations to award benefits, as determined and defined by rule by the department, shall be denied permission by the department to represent any employers in unemployment insurance matters. This subparagraph does not apply to attorneys or counselors admitted to practice in the courts of this states pursuant to § 602.10101.

871 IAC 24.10 provides:

Employer and employer representative participation in fact-finding interviews.

(1) "Participate," as the term is used for employers in the context of the initial determination to award benefits pursuant to Iowa Code § 96.6, subsection 2, means submitting detailed factual information of the quantity and quality that if unrebutted would be sufficient to result in a decision favorable to the employer. The most effective means to participate is to provide live testimony at the interview from a witness with firsthand knowledge of the events leading to the separation. If no live testimony is provided, the employer must provide the name and telephone number of an employee with firsthand information who may be contacted, if necessary, for rebuttal. A party may also participate by providing detailed written statements or documents that provide detailed factual information of the events leading to separation. At a minimum, the information provided by the employer or the employer's representative must identify the dates and particular circumstances of the incident or incidents, including, in the case of discharge, the act or omissions of the claimant or, in the event of a voluntary separation, the stated reason for the quit. The specific rule or policy must be submitted if the claimant was discharged for violating such rule or policy. In the case of discharge for attendance violations, the information must include the circumstances of all incidents the employer or the employer's representative contends meet the definition of unexcused absences as

set forth in 871—subrule 24.32(7). On the other hand, written or oral statements or general conclusions without supporting detailed factual information and information submitted after the fact-finding decision has been issued are not considered participation within the meaning of the statute.

(2) “A continuous pattern of nonparticipation in the initial determination to award benefits,” pursuant to Iowa Code § 96.6, subsection 2, as the term is used for an entity representing employers, means on 25 or more occasions in a calendar quarter beginning with the first calendar quarter of 2009, the entity files appeals after failing to participate. Appeals filed but withdrawn before the day of the contested case hearing will not be considered in determining if a continuous pattern of nonparticipation exists. The division administrator shall notify the employer’s representative in writing after each such appeal.

(3) If the division administrator finds that an entity representing employers as defined in Iowa Code § 96.6, subsection 2, has engaged in a continuous pattern of nonparticipation, the division administrator shall suspend said representative for a period of up to six months on the first occasion, up to one year on the second occasion and up to ten years on the third or subsequent occasion. Suspension by the division administrator constitutes final agency action and may be appealed pursuant to Iowa Code § 17A.19.

(4) “Fraud or willful misrepresentation by the individual,” as the term is used for claimants in the context of the initial determination to award benefits pursuant to Iowa Code § 96.6, subsection 2, means providing knowingly false statements or knowingly false denials of material facts for the purpose of obtaining unemployment insurance benefits. Statements or denials may be either oral or written by the claimant. Inadvertent misstatements or mistakes made in good faith are not considered fraud or willful misrepresentation.

This rule is intended to implement Iowa Code § 96.3(7)“b” as amended by 2008 Iowa Acts, Senate File 2160.

Because the claimant’s separation was disqualifying, benefits were paid to which she was not entitled. The unemployment insurance law provides that benefits must be recovered from a claimant who receives benefits and is later determined to be ineligible for benefits, even though the claimant acted in good faith and was not otherwise at fault. However, the overpayment will not be recovered when it is based on a reversal on appeal of an initial determination to award benefits on an issue regarding the claimant’s employment separation if: (1) the benefits were not received due to any fraud or willful misrepresentation by the claimant and (2) the employer did not participate in the initial proceeding to award benefits. The employer will not be charged for benefits if it is determined that they did participate in the fact-finding interview. Iowa Code § 96.3(7), Iowa Admin. Code r. 871-24.10. In this case, the claimant has received benefits but was not eligible for those benefits. Since the employer did participate in the fact-finding interview the claimant is obligated to repay to the agency the benefits she received and the employer’s account shall not be charged.

DECISION:

The July 16, 2015, (reference 01) unemployment insurance decision is reversed. The claimant was discharged from employment due to job-related misconduct. Benefits are withheld until

such time as she has worked in and been paid wages for insured work equal to ten times her weekly benefit amount, provided she is otherwise eligible.

The claimant has been overpaid unemployment insurance benefits in the amount of \$2044.00 and is obligated to repay the agency those benefits. The employer did participate in the fact-finding interview and its account shall not be charged.

Jeremy Peterson
Administrative Law Judge

Decision Dated and Mailed

jp/css