

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

KIRK A FERNEAU

Claimant

APPEAL 20A-UI-01127-CL-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

THE CONLEY GROUP INC

Employer

OC: 12/29/19

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:

On February 7, 2020, the employer filed an appeal from the January 31, 2020, (reference 01) unemployment insurance decision that allowed benefits based on a separation from employment. The parties were properly notified about the hearing. A telephone hearing was held on February 24, 2020. Claimant participated. Employer participated through office manager Theresa Lees. Employer's Exhibits 1 through 4 were received.

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 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 May 8, 2019. Claimant last worked as a full-time security officer. Claimant was separated from employment on December 31, 2019, when he was terminated.

At the outset of the employment, employer and claimant signed a Certification Training Agreement in which claimant agreed to pass the Certified Protection Officer (CPO) examination within the first 120 days of employment. The agreement states that if claimant does not pass the examination within the first 120 days of employment, he will be terminated. The agreement also states that the examination should be scheduled in advance to allow time for a retest, if needed.

September 8, 2019, was the deadline for claimant to pass the examination. By that date, claimant had not even scheduled the examination because he was dealing with personal issues.

Michael Shannon gave claimant a verbal deadline of October 21, 2019, to pass the examination.

Claimant did not take the examination prior to the October 21, 2019, deadline. Employer gave claimant a written reprimand and a new deadline of November 20, 2019, by which to pass the examination. The reprimand stated claimant could be terminated if he did not meet this requirement.

Claimant gave his best efforts in studying for the examination.

On November 7, 2019, claimant took the examination. Employer was notified approximately ten days later that he did not pass. Employer verbally informed claimant of the results and that it was going to double check the results with the test administrator. Employer informed claimant he would not be allowed to try again, as the 120-day deadline to pass the test had long expired.

On December 9, 2019, employer heard from the test administrator that the results were correct.

On December 16, 2019, employer gave claimant a two-week notice of his termination. Employer allowed claimant to work until December 30, 2019, which was his last day of work.

REASONING AND CONCLUSIONS OF LAW:

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

Iowa Code § 96.5(2)a provides:

An individual shall be disqualified for benefits, regardless of the source of the individual's wage credits:

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.

The employer has the burden to prove the claimant was discharged for job-related misconduct. *Cosper v. Iowa Dep't of Job Serv.*, 321 N.W.2d 6 (Iowa 1982). The question is not whether the employer made the correct decision in ending claimant's employment, 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). Misconduct justifying termination of an employee and misconduct warranting denial of unemployment insurance benefits are two different things. *Pierce v. Iowa Dep't of Job Serv.*, 425 N.W.2d 679 (Iowa Ct. App. 1988).

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 is not 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). 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.

In this case, employer knew claimant failed the examination on approximately November 17, 2019. Employer allowed claimant to continue to work while it verified the results. Employer knew the results were correct as of December 9, 2019. But employer allowed claimant to continue to work for over three additional weeks after that. 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.

Because claimant is allowed to receive benefits, the issues regarding overpayment of benefits are moot and will not be discussed further in this decision.

DECISION:

The January 31, 2020, (reference 01) unemployment insurance decision is affirmed. Claimant was separated for no disqualifying reason. Claimant is eligible to receive unemployment insurance benefits, provided claimant meets all other eligibility requirements.



Christine A. Louis
Administrative Law Judge
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February 28, 2020
Decision Dated and Mailed

cal/scn