

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

JESSICA D HARLOW
Claimant

ASPIRE RESOURCES INC
Employer

APPEAL 19A-UI-07133-AW-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 07/21/19
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:

Employer/appellant filed an appeal from the August 27, 2019 (reference 01) unemployment insurance decision that allowed benefits. The parties were properly notified of the hearing. A telephone hearing was held on October 1, 2019, at 3:00 p.m. Claimant participated. Employer participated through Carey Bewyer, Human Resources Manager, and Larry Ewing, Default Prevention Supervisor. Employer's Exhibit 1 was admitted. Official notice was taken of the administrative record

ISSUES:

Whether claimant's separation was a discharge due to disqualifying job-related misconduct.
Whether claimant was overpaid benefits.
Whether claimant should repay those benefits and/or whether employer should be charged based upon its participation in the fact-finding interview.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed full-time as a default prevention counselor from November 6, 2017 until her employment with Aspire Resources Inc. ended on July 24, 2019. (Bewyer Testimony) Claimant worked Monday through Friday from 11:00 a.m. until 8:00 p.m. (Bewyer Testimony) Claimant's direct supervisor was Larry Ewing, Default Prevention Supervisor. (Bewyer Testimony)

Claimant's job duties included taking inbound customer service calls and making outbound debt collection calls. (Ewing Testimony) On July 23, 2019, employer listened to claimant's outbound debt collection calls; employer discovered that when claimant's calls were answered by a voicemail system claimant sometimes did not leave a message at the first prompt. (Ewing Testimony) Claimant would remain silent and wait for a second or third prompt to leave a message. (Ewing Testimony) Sometimes claimant did not leave a message at all. (Ewing Testimony) By delaying her message, claimant was extending the time between calls. (Ewing Testimony) Claimant did not purposely delay leaving a message to avoid taking calls but

understood that was the result of her actions. (Claimant Testimony) Claimant multitasked while performing her job. (Claimant Testimony) Claimant sometimes used the time between voicemail prompts to enter notes on accounts. (Claimant Testimony) Claimant had not been told that she could not do this. (Claimant Testimony) Claimant's work included debt collection in various states and for different types of accounts. (Claimant Testimony) The rules for debt collection varied by state and account type. (Claimant Testimony) Debt collectors are not permitted to leave messages in some states and for some account types. (Claimant Testimony) While claimant cannot recall the reason for not leaving messages on specific calls, the differing rules may explain her actions. (Claimant Testimony) On July 23, 2019, employer also discovered that claimant was not correctly coding some of her calls. (Ewing Testimony) Claimant received training when she began employment regarding how to properly code calls. (Ewing Testimony)

Employer has a policy prohibiting falsification of documentation. (Bewyer Testimony) The policy also states that falsification of documentation is punishable by termination of employment. (Bewyer Testimony) The policy is included in the employee handbook. (Bewyer Testimony) Claimant had access to and acknowledged review of the handbook. (Bewyer Testimony)

Claimant received no prior warnings for falsification of documentation, for entering the incorrect disposition codes or for not leaving messages for customers after the first voicemail prompt. (Bewyer Testimony) Claimant had prior warnings for attendance and job performance including her use of time between calls, work quality and error rate. (Claimant Testimony) Claimant did not believe her job was in jeopardy. (Claimant Testimony)

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 provided claimant is otherwise eligible.

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 disqualification shall continue 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:

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 of misconduct has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. *Reigelsberger v. Emp't Appeal Bd.*, 500 N.W.2d 64, 66 (Iowa 1993); accord *Lee v. Emp't Appeal Bd.*, 616 N.W.2d 661, 665 (Iowa 2000). 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).

A determination as to whether an employee's act is misconduct does not rest solely on the interpretation or application of the employer's policy or rule. A violation is not necessarily disqualifying misconduct even if the employer was fully within its rights to impose discipline up to or including discharge for the incident under its policy. 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). 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).

Claimant's actions that led to her termination were the result of errors, bad judgment or misunderstanding. Claimant's actions do not evince a willful or wanton disregard of employer's interest. Claimant did not deliberately violate or disregard standards of behavior which employer had a right to expect of her. To the extent claimant's actions can be characterized as carelessness or negligence, they did not manifest wrongful intent or evil design or show an intentional and substantial disregard of the employer's interests. Claimant received no prior warnings regarding the conduct for which she was terminated. 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. While claimant received initial job training when she began her employment, training or general notice to staff about a policy or process is not considered a disciplinary warning. Claimant's warnings for attendance and job performance were not related to the actions that led to her termination. The employer's simple accrual of a certain number of warnings counting towards discharge does not establish repeated negligence or deliberation and is not dispositive of the issue of misconduct for the purpose of determining eligibility for unemployment insurance benefits.

Employer has not met its burden of proving disqualifying job-related misconduct. Benefits are allowed provided claimant is otherwise eligible. Because claimant's separation was not disqualifying, the issues of overpayment, repayment and chargeability are moot.

DECISION:

The August 27, 2019 (reference 01) unemployment insurance decision is affirmed. Benefits are allowed provided claimant is otherwise eligible. The issues of overpayment, repayment and chargeability are moot.

Adrienne C. Williamson
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Decision Dated and Mailed

acw/rvs