

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

NATHAN L VALEN
Claimant

ACKERMAN PLUMBING SERVICES INC
Employer

APPEAL 24A-UI-01277-LJ-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

**OC: 12/17/23
Claimant: Respondent (2)**

Iowa Code § 96.5(2)a – Discharge from Employment
Iowa Code § 96.3(7) – Recovery of Benefit Overpayment

STATEMENT OF THE CASE:

On February 1, 2024, employer Ackerman Plumbing Services Inc. filed an appeal from the January 24, 2024 (reference 02) unemployment insurance decision that allowed benefits, determining that claimant was dismissed on December 20, 2023 and the employer did not establish he was discharged for willful or deliberate misconduct. The Unemployment Insurance Appeals Bureau mailed notice of the hearing on February 8, 2024. Administrative Law Judge Elizabeth A. Johnson held a telephonic hearing at 8:00 a.m. on Thursday, February 22, 2024. Claimant Nathan L. Valen did not appear and did not participate. Employer Ackerman Plumbing Services Inc. participated through Corey Ackerman, President. Stacy Ackerman was present but did not testify. Employer's Exhibit 1 was received and admitted into the record. The administrative law judge took official notice of the administrative record.

ISSUES:

Whether claimant was discharged from employment for 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 began working for Ackerman Plumbing Services on October 2, 2023. He worked full-time hours as a plumbing apprentice. Claimant held this position until December 21, 2023, when General Manager Nathan Klostermann discharged him for misrepresenting his experience on his application, resulting in claimant failing to competently perform his job.

Claimant struggled to meet the employer's expectations throughout his employment. When he was hired, claimant indicated he has the abilities of a plumbing apprentice at the end of his second year of apprenticeship. Ackerman disagreed with this assessment and found him unable to perform even basic first-year apprenticeship tasks. Claimant could not operate essential plumbing and construction tools, including a tape measure. Other plumbers had to return to the jobs claimant had completed and fix his errors; claimant's jobs often resulted in

leaky pipes that someone had to clean up after him. Claimant failed to ask questions, instead insisting that he knew what he was doing and causing damage or problems as a result. He did not have a single week of employment during which he consistently met the employer's expectations of him.

Claimant also had difficulty reporting to work on time. He was late to work on December 20, 2023. Ackerman personally observed claimant arrive five minutes late. Claimant had not let anyone know he was going to be late, and he did not give a reason for arriving late. Claimant had arrived five minutes late the day prior, December 19. He did not call anyone to report he would be late, and he did not give a reason for arriving late.

When Ackerman assessed claimant's performance at the time of his 90-day review, he determined he needed to discharge claimant. He was unable to competently perform the duties of a plumbing apprentice position; he repeatedly failed to come to work on time; and he had never met the employer's expectations. Nathan Klostermann, the employer's general manager, discharged claimant at the time of his 90-day review.

Claimant opened the claim for unemployment insurance benefits effective January 7, 2024. He has filed no weekly continued claims for benefits and he has received no benefits.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes claimant was discharged from employment for disqualifying, job-related misconduct. Benefits are withheld.

Iowa Code section 96.5(2)(a) and (d) provide:

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.

...

d. For the purposes of this subsection, "*misconduct*" means a deliberate act or omission by an employee that constitutes a material breach of the duties and obligations arising out of the employee's contract of employment. Misconduct is 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 even 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. Misconduct by an individual includes but is not limited to all of the following:

(1) Material falsification of the individual's employment application.

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 focus is on deliberate, intentional, or culpable acts by the employee.

The Iowa Court of Appeals found substantial evidence of misconduct in testimony that the claimant worked slower than he was capable of working and would temporarily and briefly improve following oral reprimands. *Sellers v. Emp't Appeal Bd.*, 531 N.W.2d 645 (Iowa Ct. App. 1995). Generally, continued refusal to follow reasonable instructions constitutes misconduct. *Gilliam v. Atlantic Bottling Co.*, 453 N.W.2d 230 (Iowa Ct. App. 1990). 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).

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.

Discharge within a probationary period, without more, is not disqualifying. 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).

Here, claimant was never able to perform his job to the employer's satisfaction and meet the expectations of his employer. However, the evidence in the record indicates claimant misrepresented his skills and experience as that of a third-year plumbing apprentice. After claimant was hired and began working for the employer, his actions illustrated this misrepresentation. Not only was he unable to operate essential plumbing tools such as a hammer drill; claimant could not even successfully use a tape measure. This problem was

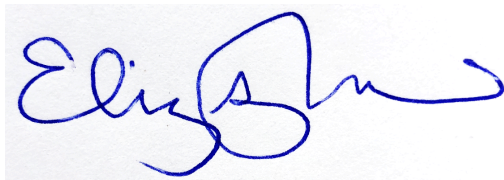
compounded by claimant's refusal to ask for help when he needed it. While ordinarily an employee who can never meet his employer's expectations and is discharged as a result is eligible for benefits, that is not the case when such an employee misrepresents himself to obtain the employment and – unsurprisingly – finds himself unable to perform the job. The employer has established claimant was discharged for disqualifying, job-related misconduct when he misrepresented himself to obtain employment. Benefits are withheld.

As claimant received no unemployment benefits since separating from this employer, the issues of overpayment and chargeability are moot.

DECISION:

The January 24, 2024 (reference 02) unemployment insurance decision is reversed. The employer discharged claimant from employment due to job-related misconduct. Benefits are withheld until such time as the claimant has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible.

The issues of overpayment and chargeability are moot.



Elizabeth A. Johnson
Administrative Law Judge

February 27, 2024
Decision Dated and Mailed

lj/scn

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:

**Iowa Employment Appeal Board
6200 Park Avenue Suite 100
Des Moines, Iowa 50321
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:

**Iowa Employment Appeal Board
6200 Park Avenue Suite 100
Des Moines, Iowa 50321
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 adquiriera 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.