

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

KELLY ORILEY
Claimant

WORTH EXTERIORS INC
Employer

APPEAL 24A-UI-08227-LJ-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

**OC: 08/25/24
Claimant: Appellant (2)**

Iowa Code § 96.5(2)a – Discharge from Employment

STATEMENT OF THE CASE:

On September 18, 2024, claimant Kelly O’Riley filed an appeal from the September 13, 2024 (reference 01) unemployment insurance decision that denied benefits, determining employer Worth Exteriors Inc. discharged him on August 26, 2024 for engaging in conduct not in the best interest of the employer. The Unemployment Insurance Appeals Bureau mailed notice of the hearing on September 20, 2024. Administrative Law Judge Elizabeth A. Johnson held a telephonic hearing at 2:00 p.m. on Thursday, October 3, 2024. Claimant Kelly O’Riley personally participated. Employer Worth Exteriors Inc. participated through Susan Arnold, HR Consultant; Chris Worthington, Owner/CEO; and Sabrina Strobel, Office Manager. Claimant’s Exhibits C-1 through C-26 were received and admitted into the record without objection. Employer’s Exhibits E-1 through E-7 were received and admitted into the record without objection.

ISSUE:

Whether claimant was discharged from employment for any disqualifying reason.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds:

Claimant began employment in March 2008. Most recently, he worked full-time hours as a Vice President and Superintendent, overseeing work crews on a daily basis. Claimant’s employment ended on August 26, 2024, when the employer discharged him.

The employer became dissatisfied with claimant on August 19, after Worthington was not able to reach him around 4:00pm. When claimant answered the phone - after Worthington had called four or five times in a row - he explained that he was at football practice with his son. Claimant had coached his son’s football teams throughout his employment, and the employer had allowed him the flexibility to adjust his work hours to participate in this activity with his son. After Worthington reached the claimant, he contacted Arnold and asked her to investigate claimant and determine whether the employer needed to take disciplinary action against him.

Arnold investigated by pulling claimant’s work vehicle GPS records and by talking with his coworkers and several clients about his work performance. Arnold learned claimant routinely

requested to review the “check sheets” before they went to Worthington for review and payment. Sometimes, he moved charges attributable to a particular subcontractor from one job to another to get the numbers to come out correctly. Claimant was not taking funds to enrich himself or giving discounts or breaks inappropriately.

Arnold discovered that claimant had been looking for other employment. Claimant had logged into his work computer using his personal Apple ID, so all of his personal messages were accessible through the work computer. Arnold also reviewed GPS records and discovered that claimant was speeding in his work vehicle on numerous occasions between June 17 and August 26, 2024. Worthington had access to the GPS reports documenting employees’ locations and speeds throughout claimant’s employment. Finally, Arnold spoke with Strobel and with Tiffany, the employer’s social media manager, and learned that occasionally, they had difficulty reaching claimant.

After Arnold completed her investigation, she presented her findings to Worthington. Together, they determined that claimant should be discharged. Worthington had informal conversations with claimant about work issues throughout the employment relationship. However, claimant was never disciplined for his driving, for the way he completed check sheets, for his attitude, or for any other issues. Claimant was not aware his job was in any jeopardy until Arnold and Worthington notified him that they wanted to meet with him on August 26.

REASONING AND CONCLUSIONS OF LAW:

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

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: ...

(2) Knowing violation of a reasonable and uniformly enforced rule of an employer...

(6) Conduct that substantially and unjustifiably endangers the personal safety of coworkers or the general public...

(10) Falsification of any work-related report, task, or job that could expose the employer or coworkers to legal liability or sanction for violation of health or safety laws.

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.

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). 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(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.

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.

The current act requirement prevents an employer from saving up acts of misconduct and springing them on an employee when an independent desire to terminate arises. For example, an employer may not convert a layoff into a termination for misconduct by relying on past acts. *Milligan v. EAB*, 10-2098, slip op. at 8 (Iowa App. June 15, 2011). If an employer acts as soon

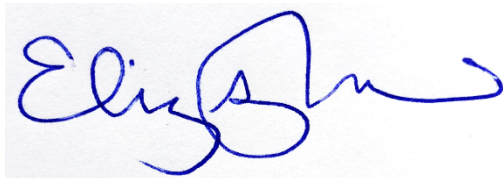
as it reasonably could have under the circumstances, then the act is current. A reasonable delay may be caused by a legitimate need to investigate and decide on a course of disciplinary action.

According to both Arnold and Worthington, Worthington had constant access to the GPS records that showed travel speeds. The record shows that Worthington did not become interested in these reports until after claimant did not pick up the phone when Worthington wanted to talk to him. Additionally, claimant challenged the GPS speed-tracking accuracy. Because claimant was never warned or disciplined for his driving speeds in the work vehicle, he could not raise these concerns with the employer or independently document his driving speed.

Claimant Kelly O'Riley performed his job to the best of his ability, based on his understanding of his employer's expectations of him. The employer did not issue him any warnings or reprimands during his sixteen-year tenure with Worth Exteriors, and he had no notice that the employer was dissatisfied with anything he was doing. If Worth Exteriors expected claimant to conform to certain expectations or face discharge, appropriate (preferably written), detailed, and reasonable notice should have been given. The employer has not met its burden of proving that claimant was discharged for disqualifying, job-related misconduct. Benefits are allowed, provided claimant is otherwise eligible.

DECISION:

The September 13, 2024 (reference 01) unemployment insurance decision is reversed. The employer discharged claimant from employment for no disqualifying reason. Benefits are allowed, provided he is otherwise eligible.



Elizabeth A. Johnson
Administrative Law Judge

October 8, 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.