

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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**LINDSEY R MANNING**  
Claimant

**COMPREHENSIVE REHAB INC**  
Employer

**APPEAL 17A-UI-07893-JCT**  
**ADMINISTRATIVE LAW JUDGE  
DECISION**

**OC: 07/09/17**  
**Claimant: Respondent (1)**

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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 27, 2017, (reference 01) unemployment insurance decision that allowed benefits. The parties were properly notified about the hearing. A telephone hearing was held on August 22, 2017. The claimant participated personally. The employer participated through Rachel Connor, administrative assistant. Stephany McKown, administrative director, also testified. Employer Exhibit 1 was received into evidence. The administrative law judge took official notice of the administrative records including the fact-finding documents. Based on the evidence, the arguments presented, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

**ISSUES:**

Was the claimant discharged for disqualifying job-related misconduct?  
Has the claimant been overpaid any 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: The claimant was employed full-time as a certified occupational therapist assistant and was separated from employment on June 29, 2017, when she was discharged.

The employer has rules of workplace etiquette which includes not discussing personal matters at the workplace. The claimant was aware of the employer's rules. The claimant's husband was also a patient for the employer, being treated at a facility other than the one she worked, causing the claimant to be both employee and wife of a patient.

Prior to discharge, the claimant was issued a warning on April 27, 2017 about discussing her personal life, when she was observed complaining about her home life, and her husband not qualifying for transportation services through the employer. In June 2017, the claimant was issued two warnings by Ms. Connor in response to missed documentation notes, and for excessive after-hours contact with management about her schedule. On June 14, 2017, the claimant met with Ms. McKown, who asked the claimant to draft an action plan. The evidence is disputed as to whether Ms. McKown also disclosed the claimant would at a minimum be placed on a 30 day probation and at a maximum, be discharged. On June 27, 2017, the claimant furnished her plan of action, which addressed, amongst other things, remaining professional and getting caught up on her documentation (Employer Exhibit 1). On June 27, 2017, the claimant was also observed by Ms. Connor leaning up against a wall in the staff area of a hallway, talking with physical therapist, Michael Gibson. Ms. Connor did not hear exactly what was being said but said the two appeared to be laughing and joking and discussing the claimant's husband's rehab exercises. Ms. Connor was unaware how long the conversation took place, who initiated it, or the contents. Neither the claimant nor Mr. Gibson were interviewed prior to the decision to discharge. Ms. Connor reported the conversation to Ms. McKown and the claimant was subsequently discharged.

The claimant indicated she and Mr. Gibson were transporting patients to and from the pool when he inquired about her husband's progress in rehab. He then informed her that even though he was not the treating physical therapist, that her husband's physical therapist from the treating facility had contacted him to discuss insurance issues affecting the claimant's husband. The conversation lasted approximately 5 to 10 minutes. The claimant also acknowledged on the same day, she failed to complete laundry duties, but acknowledged she forgot, and was not usually assigned to be a "rehab assistant".

The administrative record reflects that claimant has received unemployment benefits in the amount of \$2,610.00, since filing a claim with an effective date of July 9, 2017. The administrative record also establishes that the employer did participate in the July 25, 2017 fact-finding interview or make a witness with direct knowledge available for rebuttal. Ms. McKown and Ms. Connor both attended 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 for no disqualifying reason.

Iowa Code section 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 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:

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).

It is the duty of the administrative law judge as the trier of fact in this case, to determine the credibility of witnesses, weigh the evidence and decide the facts in issue. *Arndt v. City of LeClaire*, 728 N.W.2d 389, 394-395 (Iowa 2007). The administrative law judge may believe all, part or none of any witness's testimony. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996). In assessing the credibility of witnesses, the administrative law judge should consider the evidence using his or her own observations, common sense and experience. *Id.* In determining the facts, and deciding what testimony to believe, the fact finder may consider the following factors: whether the testimony is reasonable and consistent with other believable evidence; whether a witness has made inconsistent statements; the witness's appearance, conduct, age, intelligence, memory and knowledge of the facts; and the witness's interest in the trial, their motive, candor, bias and prejudice. *Id.* Assessing the credibility of the witnesses and reliability of the evidence in conjunction with the applicable burden of proof, as shown in the factual conclusions reached in the above-noted findings of fact, the administrative law judge concludes that the employer has not satisfied its burden to establish by a preponderance of the evidence that the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law.

While past acts and warnings can be used to determine the magnitude of the current act of misconduct, a discharge for misconduct cannot be based on such past act(s). The termination of employment must be based on a current act. See 871 IAC 24.32(8). In determining whether the conduct that prompted the discharge constituted a "current act," the administrative law judge considers the date on which the conduct came to the attention of the employer and the date on which the employer notified the claimant that the conduct subjected the claimant to possible discharge. See also *Greene v. EAB*, 426 N.W.2d 659, 662 (Iowa App. 1988).

In an at-will employment environment, an employer may discharge an employee for any number of reasons or no reason at all if it is not contrary to public policy, but if it fails to meet its burden of proof to establish job related misconduct as the reason for the separation, it incurs potential liability for unemployment insurance benefits related to that separation. The employer has the burden of proof in establishing disqualifying job misconduct. *Cosper v. Iowa Department of Job Service*, 321 N.W.2d 6 (Iowa 1982). 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. IDJS*, 364 N.W.2d 262 (Iowa 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. IDJS*, 425 N.W.2d 679 (Iowa 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 Department of Job Service*, 351 N.W.2d 806 (Iowa App. 1984).

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. See 871 IAC 24.32(4). When it is in a party’s power to produce more direct and satisfactory evidence than is actually produced, it may fairly be inferred that the more direct evidence will expose deficiencies in that party’s case. See *Crosser v. Iowa Dept. of Public Safety*, 240 N.W.2d 682 (Iowa 1976).

In this case, the credible evidence presented is the claimant was aware and had been warned not to engage in personal discussions at the workplace. The claimant most recently was spoken to by the employer on June 14, 2017 about leaving personal matters at home. The claimant’s husband was also an employer patient, and at times, appeared to blur the identities as an employee versus a patient’s wife. The final incident occurred on June 27, 2017 when a physical therapist who was not her husband’s therapist, asked the claimant how her husband was doing and then relayed that his physical therapist had contacted him about insurance issues related to the claimant’s husband’s care.

When analyzing conduct for a finding of misconduct, the focus is on deliberate, intentional, or culpable acts by the employee. See *Gimbel v. Employment Appeal Board*, 489 N.W.2d 36, 39 (Iowa Ct. App. 1992). The administrative law judge recognizes the employer’s policy and prior warnings to the claimant to not discuss personal matters at work, but is not persuaded the claimant willfully or deliberately violated the employer’s policies or expectations by engaging in a short five to ten minute discussion with a physical therapist, in which he initiated asking the claimant questions about her husband and relayed information about her husband’s therapist contacting him. Neither the claimant, nor Mr. Gibson, the physical therapist, were questioned about the contents of the discussion before discharge, and Mr. Gibson did not attend the hearing. Rather, Ms. Connor assumed the conversation was personal in nature based on the excerpt she heard. The gravity of the incident, number of policy violations and prior warnings are also factors considered when analyzing misconduct. Based on the evidence presented, the administrative law judge concludes the claimant’s admitted conduct of speaking with Mr. Gibson briefly about her husband’s care and insurance matters, after he questioned her, while standing in the hallway, was not egregious enough to warrant immediate discharge, or support a finding of misconduct. Therefore, while the employer may have had good business reasons to support discharge, misconduct has not been established, and benefits are allowed.

Nothing in this decision should be interpreted as a condemnation of the employer’s right to terminate the claimant for violating its policies and procedures. The employer had a right to follow its policies and procedures. The analysis of unemployment insurance eligibility, however, does not end there. This ruling simply holds that the employer did not meet its burden of proof to establish the claimant’s conduct leading separation was misconduct under Iowa law.

Because the claimant is eligible for benefits, the issues of overpayment and relief of charges are moot.

**DECISION:**

The July 27, 2017, (reference 01) decision is affirmed. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided she is otherwise eligible. Any benefits claimed and withheld shall be paid, provided she is otherwise eligible. The claimant has not been overpaid benefits. The employer's account is not relieved of charges associated with the claim.

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Jennifer L. Beckman  
Administrative Law Judge

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Decision Dated and Mailed

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