

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

MANDI J. BORST
Claimant

**OPTIMUM REAL ESTATE MANAGEMENT
LLC**
Employer

APPEAL 24A-UI-00478-CS-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

**OC: 11/26/23
Claimant: Respondent (1)**

Iowa Code §96.5(2)a-Discharge/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 January 12, 2024, the employer/appellant filed an appeal from the January 3, 2024, (reference 01) unemployment insurance decision that allowed benefit based on claimant being dismissed on November 28, 2023 for unsatisfactory work. The hearing was originally scheduled for January 30, 2024. Due to exhibit issues the hearing was rescheduled. The parties were properly notified about the hearing. A telephone hearing was held on February 14 2024. Claimant participated. Chris Swanson was present as a witness for the claimant but was not called to testify. Employer participated through Human Resources Coordinator, Amy Clark. Kellie Gottner was present as a witness for the employer but was not called to testify.

Employer's exhibits 1, 2, 3, 4, 5, and 6 were not admitted into the record. Exhibit 7 was not admitted into the record. Claimant's exhibits A, B, C, D, E, F, G, H, I, J, K, L, M, N, O, P, Q, R, S, T, U, V, W, X, Y, Z, AA, BB, CC, DD, EE, FF, GG, HH, II, JJ, KK, LL, MM, NN, and OO into the record. Administrative notice was taken of claimant's unemployment insurance benefits records, including DBRO.

ISSUES:

- I. Was the separation a layoff, discharge for misconduct, or voluntary quit without good cause?
- II. Is the claimant overpaid benefits?
- III. Should claimant repay benefits?
- IV. Should the employer be charged due to employer participation in fact finding?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant began working for employer on August 12, 2019. Claimant last worked as a full-time Marketing Director.

During the course of claimant's employment, the employer was never satisfied with claimant's performance. Claimant received a written warning for her job performance on June 20, 2022. On November 16, 2023, the employer placed claimant on a personal improvement plan (PIP) due to her performance. The employer determined claimant was not meeting deadlines, not submitting daily tasks lists, not submitting quarterly reports to the leadership team, not training or educating team members on the company's marketing programs and products, not providing strategic guidance to leadership team to increase property occupancy and revenue, and not identifying website inaccuracies and correcting them. (Exhibit 4). The employer gave claimant until December 1, 2023 to improve her performance. (Exhibit 4). Claimant was put on notice she could be terminated if her performance did not improve. (Exhibit 4).

On November 16, 2023, Claimant responded to the PIP by asking for more information and specific details on the areas she needs to improve upon to preserve her job. (Exhibit 5). Specifically claimant requested the employer provide her with the deadlines she missed, asked for examples of which vendors she was not following up with, and requested the employer's website standards or guidance on where should could find the employer's standards. (Exhibit 5). Claimant requested more guidance on how to provide strategic guidance to the leadership team in increase property occupancy and revenue. (Exhibit 5). Claimant also stated her concerns with being left out of marketing decisions and meetings. (Exhibit 5). Claimant also pointed out the requirement for the quarterly reports was a new requirement that was not previously required of her and should not have been placed on the personal improvement plan. (Exhibit 5).

On November 17, 2023, the employer responded to claimant's email. (Exhibit S). Specifically the employer told claimant that if she was being left out of decisions she should "share [her] marketing expertise and involve [herself] as appropriate." (Exhibit S pg. 1). The employer also states: "we need the Marketing Director to be able to self-identify tasks in order to accomplish the position objectives. This position needs to be proactive and relatively autonomous in partnering with operations teams to achieve occupancy and income goals for the properties." (Exhibit S, pg. 1).

Claimant was absent from work due to being ill on November 27, 2023 and November 28, 2023. Claimant notified the employer she would be absent due to her illness. On November 28, 2023, claimant was notified by email that she was discharged due to not meeting the requirements outlined in the plan. (Exhibit 6). Additionally, claimant was discharged due to being counseled multiple times regarding her job duties, not performing her job while on company time and choosing not to perform her duties.

The employer received claimant's daily task reports and believed claimant should have been able to perform more tasks during her workday. The employer did not provide evidence of claimant doing other things while she was supposed to be working. The employer did not provide evidence claimant was intentionally trying to perform her job duties incorrectly.

Claimant filed for benefits with an effective date of November 26, 2023. Claimant's gross weekly benefit amount is \$604.00. (DBRO). Claimant began receiving benefits December 3,

2023 and has received them through February 10, 2024. Claimant has received ten weeks of benefits worth a gross total of \$6,040.00.

The employer participated in the fact-finding interview with Iowa Workforce Development (IWD). Employer participated through phone and also provided documents to the IWD representative.

REASONING AND CONCLUSIONS OF LAW:

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

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

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.

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 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. Misconduct by an individual includes but is not limited to all of the following:

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

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

(3) Intentional damage of an employer's property.

(4) Consumption of alcohol, illegal or nonprescribed prescription drugs, or an impairing substance in a manner not directed by the manufacturer or a combination of such substances, on the employer's premises in violation of the employer's employment policies.

(5) Reporting to work under the influence of alcohol, illegal or nonprescribed prescription drugs, or an impairing substance in an off-label manner, or a combination of such substances, on the employer's premises in violation of the employer's employment policies, unless the individual is compelled to work by the employer outside of scheduled or on-call working hours.

- (6) Conduct that substantially and unjustifiably endangers the personal safety of coworkers or the general public.
- (7) Incarceration for an act for which one could reasonably expect to be incarcerated that result in missing work.
- (8) Incarceration as a result of a misdemeanor or felony conviction by a court of competent jurisdiction.
- (9) Excessive unexcused tardiness or absenteeism.
- (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.
- (11) Failure to maintain any licenses, registration, or certification that is reasonably required by the employer or by law, or that is a functional requirement to perform the individual's regular job duties, unless the failure is not within the control of the individual.
- (12) Conduct that is libelous or slanderous toward an employer or an employee of the employer if such conduct is not protected under state or federal law.
- (13) Theft of an employer or coworker's funds or property.
- (14) Intentional misrepresentation of time worked or work carried out that results in the individual receiving unearned wages or unearned benefits.

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).

Iowa Admin. Code r. 871-24.32(4) provides:

(4) Report required. The claimant's statement and 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 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). 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). 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). "Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of benefits." *Lee v. Employment Appeal Bd.*, 616 N.W.2d 661, 665 (Iowa 2000).

To establish misconduct that will disqualify employee from unemployment compensation benefits, employer must prove conduct by employee consisted of deliberate acts or omissions or evinced such carelessness as to indicate wrongful intent. It should not be accepted as a given fact that an employer's subjective standards set the measure of proof necessary to establish misconduct; to do so skews procedure, forcing employees to prove that they are not capable of doing their job or that they had no intent to commit misconduct, thereby impermeably shifting the burden from employer to employee. *Kelly v. Iowa Dept. of Job Service*, 386 N.W.2d 552 (Iowa 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).

The employer has failed to prove the claimant acted in any deliberate way to breach the duties or obligations of her employment contract. The employer failed to prove claimant acted with 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.

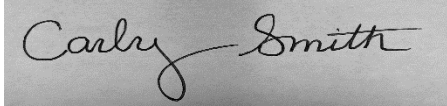
The employer testified that they were never satisfied with claimant's work performance. The employer did not establish that claimant knew how to perform her job and intentionally chose not to perform it. The evidence shows claimant asked for more guidance from the employer to perform her job to their standards. The employer essentially told claimant to figure it out on her own. Claimant attempted to meet the employer's vague standards but was not successful. Not performing work to the employer's standard is not misconduct under Iowa law unless there is evidence of intent. The employer did not provide evidence showing claimant intentionally did not perform her job to the employer's standard. As such, employer has failed to prove that claimant was discharged for job related misconduct that disqualifies claimant from benefits. Benefits are allowed.

Since claimant is allowed benefits, the issues of whether claimant was overpaid benefits and whether the employer participated in the fact-finding interview are moot.

DECISION:

The January 3, 2024, (reference 01) unemployment insurance decision is AFFIRMED. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided claimant is otherwise eligible.

The issues of whether claimant was overpaid benefits and whether the employer participated in the fact-finding interview are moot.

A handwritten signature in black ink that reads "Carly Smith". The signature is written in a cursive style with a horizontal line extending from the end of the name.

Carly Smith
Administrative Law Judge

February 20, 2024
Decision Dated and Mailed

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 adquiera 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.