

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

AMY BELTZ
Claimant

APPEAL 23A-UI-10608-SN-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

GRAND HAVEN HOMES INC
Employer

**OC: 10/22/23
Claimant: Respondent (1)**

Iowa Code § 96.5(2)a – Discharge
Iowa Admin. Code r. 871-24.32(1)a – Discharge
Iowa Code § 96.3(7) – Recovery of Benefit Overpayment
Iowa Admin. Code r. 871-24.10 – Recovery of Benefit Overpayment

STATEMENT OF THE CASE:

The employer, Grand Haven Homes Inc., filed an appeal from the November 9, 2023, (reference 01) unemployment insurance decision that granted benefits based upon the conclusion she was discharged, but disqualifying misconduct was not established. The parties were properly notified of the hearing. A telephone hearing was scheduled to be held on November 30, 2023, at 8:00 a.m. The claimant participated. Charge Nurse Kylie Guider was present to offer testimony in support of the claimant. The employer was ready to participate through Consultant Senior Living Solutions Morgan Brunscheen and Administrator Rob Richardson. This administrative law judge postponed the hearing because the claimant said she could not view the employer's exhibits.

The hearing was rescheduled to occur on December 14, 2023, at 8:00 a.m. The claimant participated and testified. Charge Nurse Kylie Guider was not present. The employer participated through Ms. Brunscheen and Mr. Richardson. Exhibits 1, 2, 3, 4, 5, 6, 7, A, B, C, D, E, F, and G were received into the record.¹ Official notice was taken of the agency records.

ISSUES:

Was the claimant discharged for disqualifying job-related misconduct?

Whether the claimant has been overpaid benefits? Whether the claimant is excused from repayment of benefits due to the employer's non-participation?

FINDINGS OF FACT:

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

¹ The third page of the claimant's exhibit packet was not admitted as part of Exhibit A. It is a portion of her written statement that is not relevant to the separation.

The claimant was employed full-time as an assistant director of nursing from November 2021, until she was separated from employment on October 26, 2023, when she was terminated.

The employer has an employee manual. The claimant received it on November 17, 2021. The employer provided a copy of its disciplinary procedures, which are contained in the employee manual. The disciplinary procedures state, "Negligence or any careless action which endangers the life or safety of another person," can lead to discipline up to and including termination. It also states, "Failure to perform job assignments in a satisfactory or safe manner and/or failure to adhere to the job description," can lead to discipline up to and including termination. The employer provided a copy of the disciplinary procedures and the claimant's acknowledgement of the employee manual. (Exhibit 3)

The claimant also received dependent adult abuse mandatory reporter training on July 1, 2021. This training emphasizes that the claimant should report all incidents that could be construed as dependent adult abuse such as a fight among residents or intoxication of a coworker to the Department of Inspections, Appeals, and Licensing ("DIAL"). There is a two-hour window to make this kind of report. The employer provided a copy of a certificate the claimant received upon completion of this training. (Exhibit 3) It is not uncommon for these reports to be made by text message by practice.

The claimant returned from a leave of absence due to an injury in July 2023. The claimant was well behind her work tasks upon return because there were not enough people filling in for her during her absence. The claimant struggled to catch up given the new tasks she was assigned to perform and the pre-existing backlog during a 40-hour work week. The employer provided visit notes and emails from Ms. Brunscheen stating that the claimant was not completing this work soon enough. (Exhibits 5, 7) The claimant asked for help, but no help was provided due to staffing issues. The claimant performed to the best of her ability.

In January 2023, the claimant advocated to report a possible abuse incident roughly three weeks after it was known to the provisional administrator and Ms. Guider.

On September 18, 2023, Ms. Guider told the claimant that she had two shots of liquor earlier that night. Initially, the claimant thought that Ms. Guider was just trying to get out of her shift that night and so she did not take any further action. After being informed that Ms. Guider went in, the claimant sent a text message to the nurse on duty to ask if Ms. Guider appeared like she was intoxicated. This nurse offered that she did not think Ms. Guider was intoxicated.

On September 19, 2023, Ms. Guider informed the claimant the following morning that the nurse on duty refused to let her assist, presumably because she was fearful that she was intoxicated. The claimant did not believe she had an emergent situation to report given these reports from those involved about what occurred. She reasoned some investigation needed to happen regarding the alcohol, but she found her reports credible to conclude that the alcohol likely did not impact patient care or other duties. The claimant planned to report on the situation to Mr. Richardson when he returned from a conference on September 21, 2023.

On September 20, 2023, Mary Jane, a social worker, informed Ms. Brunscheen of the circumstances on September 18, 2023. Ms. Brunscheen then informed Mr. Richardson about the incident, so that he could investigate the incident.

On September 25, 2023, the claimant received a written warning for the incident occurring on September 18, 2023. The employer provided a copy of this written warning. (Exhibit 2) The

written warning placed the claimant on a probationary period for 90 days after its issuance. Ms. Guider was placed on probation around the same time.

At 10:30 a.m. on October 24, 2023, the claimant received a report from Ms. Guider that two residents had been fighting, but also that Ms. Guider had broken up the fight. Ms. Guider informed the claimant that she sent a text message to Mr. Richardson, so that he could inform DIAL.

At 10:50 p.m. on October 24, 2023, the claimant sent two text messages to Mr. Richardson about the fight between two residents earlier that night. The claimant did not call Mr. Richardson because she believed Ms. Guider had already informed him. She was just passing on what information she had for his investigation. Mr. Richardson did not see the text message until 5:30 a.m. on October 25, 2023.

On October 26, 2023, Mr. Richardson and Ms. Brunscheen terminated the claimant for sending a text message notification to Mr. Richardson rather than calling him or making the report to DIAL directly. The employer provided a copy of the termination notice. (Exhibit 4) The termination notice only references the write up the claimant received in September 2023. There is no mention of any performance reason beyond these two events stated. Mr. Richardson and Ms. Brunscheen did not reference this write up during the termination meeting, nor was the claimant presented with the termination notice.

Ms. Guider was not terminated.

The following section of the findings of fact display the findings necessary to resolve the overpayment issue:

The claimant has not received unemployment insurance benefits after the separation.

REASONING AND CONCLUSIONS OF LAW:

The administrative law judge concludes the employer has not met its burden to show the claimant engaged in work-related misconduct. Benefits are granted, provided she is otherwise eligible for benefits.

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 individual shall be disqualified for benefits 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).

Iowa Code section 96.5(2)b, c 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:

b. Provided further, if gross misconduct is established, the department shall cancel the individual's wage credits earned, prior to the date of discharge, from all employers.

c. Gross misconduct is deemed to have occurred after a claimant loses employment as a result of an act constituting an indictable offense in connection with the claimant's employment, provided the claimant is duly convicted thereof or has signed a statement admitting the commission of such an act. Determinations regarding a benefit claim may be redetermined within five years from the effective date of the claim. Any benefits paid to a claimant prior to a determination that the claimant has lost employment as a result of such act shall not be considered to have been accepted by the claimant in good faith.

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.

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). 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). 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). 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 decision in this case rests, at least in part, on the credibility of the witnesses. 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.*

After assessing the credibility of the witnesses who testified during the hearing, reviewing the exhibits submitted by the parties, considering the applicable factors listed above, and using his own common sense and experience, the administrative law judge finds the claimant's version of events to be more credible than the employer's recollection of those events.

The conduct for which claimant was discharged was merely an isolated incident of poor judgment. As Ms. Brunscheen acknowledged on the hearing record, the claimant did not willfully or intentionally violate a rule in this case, rather the final incident and previous incidents were the result of her negligence. Iowa Admin. Code r. 871-24.32(1)a states that negligence or carelessness can only be disqualifying if it is "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." No such showing can be made on this record, primarily because the employer has given quite different forms of negligence as the asserted reasons. For instance, the claimant's performance is in a completely different category than failing to report intoxication of a coworker or a fight between two residents. The administrative law judge finds no evidence the claimant's performance was a reason for discharge.

To the extent that the circumstances surrounding each accident were not similar enough to establish a pattern of misbehavior, the employer has only shown that claimant was negligent. "[M]ere negligence is not enough to constitute misconduct." *Lee v. Employment Appeal Board*, 616 N.W.2d 661, 666 (Iowa 2000). A claimant will not be disqualified if the employer shows only "inadvertencies or ordinary negligence in isolated instances." 871 IAC 24.32(1)(a). When looking at an alleged pattern of negligence, previous incidents are considered when deciding whether a "degree of recurrence" indicates culpability. Claimant was careless, but the carelessness does not indicate "such degree of recurrence as to manifest equal culpability, wrongful intent or evil design" such that it could accurately be called misconduct. Iowa Admin. Code r. 871-24.32(1)(a); *Greenwell v. Emp't Appeal Bd.*, No. 15-0154 (Iowa Ct. App. Mar. 23, 2016). Ordinary negligence is all that is proven here.

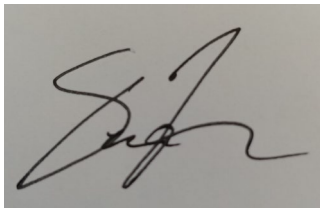
The administrative law judge further finds that the record shows the claimant was not acting in a course of conduct “of such degree of recurrence as to manifest equal culpability, wrongful intent or evil design, or to show an intentional and substantial disregard of the employer’s interests or of the employee’s duties and obligations to the employer.” See Iowa Admin. Code r. 871-24.32(1)a. The claimant explained that she thought Ms. Guider had already reported the incident. The same can be said with the incident on September 18, 2023. At worst this was negligence for the claimant to rely on her instincts and trust her reports that it was not an emergent situation. That is not enough for the demanding standard of misconduct.

Furthermore, the employer was not uniformly enforcing this rule as required under Iowa Code section 96.5(2)d. Ms. Guider remains an employee despite having multiple incidents in which she did not report. Instead of failing to report an intoxicated employee to management, Ms. Guider was the intoxicated employee. The administrative law judge does not find the employer’s argument that Ms. Guider had less authority persuasive on this record. It is acknowledged that the employer can have a higher standard for leadership. That can only go so far to inflate the failure to report versus the one that is sometimes the incident to report as well.

Because the employer has failed to establish disqualifying misconduct, benefits are allowed, provided claimant is otherwise eligible.

DECISION:

The November 9, 2023, (reference 01) unemployment insurance decision is AFFIRMED. The employer has failed to meet its burden to show the claimant engaged in intentional or knowing violation of work rules. Benefits are granted, provided she is otherwise eligible for benefits.



Sean M. Nelson
Administrative Law Judge II
Iowa Department of Inspections & Appeals
Administrative Hearings Division – UI Appeals Bureau

December 15, 2023
Decision Dated and Mailed

smn/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:

**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:

**Employment Appeal Board
6200 Park Avenue Suite 100
Des Moines, Iowa 50321
Fax: (515)281-7191
Online: 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.