

**IOWA DEPARTMENT OF INSPECTIONS AND APPEALS
ADMINISTRATIVE HEARINGS DIVISION, UI APPEALS BUREAU**

CASSANDRA M STRUBE
Claimant

ATRIUM VILLAGE INC
Employer

APPEAL 23A-UI-00334-DZ-T

**AMENDED
ADMINISTRATIVE LAW JUDGE
DECISION**

**OC: 01/30/22
Claimant: Respondent (2)**

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 Participation in Fact-Finding Interview

STATEMENT OF THE CASE:

Atrium Village Inc, the employer/appellant, filed an appeal from the Iowa Workforce Development (IWD) January 9, 2023 (reference 11) unemployment insurance (UI) decision. The decision allowed REGULAR (state) UI benefits because IWD concluded that the employer had dismissed Ms. Strube from work on November 30, 2022 for a non-disqualifying reason. The Iowa Department of Inspections and Appeals UI Appeals Bureau mailed notices of hearing to the employer and Ms. Strube. A telephone hearing was held on January 31, 2023. The employer participated through Kristine Tomash, administrator, and Kim Sandberg, president of the board of directors. Ms. Strube did not participate in the hearing. The administrative law judge took official notice of the administrative record and admitted Employer's Exhibits 1-7.

The undersigned administrative law judge previously issued a decision in this matter, dated February 3, 2023. The record in this matter has not been reopened. This amended decision is issued, based on the already closed record, to correct the overpayment amount.

ISSUES:

Did the employer discharge Ms. Strube from employment for disqualifying job-related misconduct?
Was Ms. Strube overpaid benefits?
If so, should she repay the benefits?

FINDINGS OF FACT:

Having reviewed the evidence in the record, the administrative law judge finds: Ms. Strube began working for the employer on November 7, 2022. She worked as a full-time administrator. Ms. Tomash was also an administrator training Ms. Strube to take over. Ms. Strube's employment ended on November 30, 2022.

On Tuesday, November 29 at about 5:45 p.m., Ms. Strube asked the on-duty charge nurse (Nurse A) to borrow the nurse's keys because Ms. Strube was locked out of her guest room. Ms. Strube was staying in a guest room on the employer's grounds. The charge nurse's keys included a master key that could unlock the guest room and a key to the area where the employer kept the emergency medication kit. The medicines in the kit are not prescribed to any person; they are for emergency use for anyone. The charge nurse is the only employee who had a key to the area where the employer kept the emergency medication kit. Nurse A gave Ms. Strube the charge nurse's keys. Ms. Strube returned the keys to Nurse A a short time later.

The next morning, November 30, the day-shift nurse (Nurse B) came to work to start their 6:00 a.m. shift. Ms. Strube was outside and walked to Nurse B's car. Ms. Strube said that she was outside helping with a bookfair and was locked out of the building. Nurse B walked Ms. Strube into the building. Nurse B observed that Ms. Strube was incoherent, appeared to be cold, was not wearing a coat or shoes, wearing one sock but the toe area was ripped, and her toe was bleeding. Nurse B asked Nurse A to come to the break room to assess Ms. Strube. Nurse A did so. Ms. Strube repeated that she was at the bookfair outside. Nurse B made the same observations as Nurse A. Nurse B asked Ms. Strube if she had taken anything recently. Ms. Strube stated that she had taken her prescribed medicines and drank water. Nurse A and B concluded that they should call emergency services to get care for Ms. Strube. They did so.

When the paramedics arrived, they asked Nurse A and Nurse B what medicines Ms. Strube had taken. Nurse B went to Ms. Strube's guest room to gather Ms. Strube's medicines. In the guest room Nurse B saw many loose pills in at least two different areas on the floor outside of a bottle, an open box that contained pills and pill bottles on the windowsill. Nurse B observed the apartment was disheveled. Nurse B took the box of pills and pill bottles and gave them to the paramedics. Nurse B went to the administrator's office to find a telephone number to notify Ms. Strube's emergency contact of the situation. Nurse B saw a sock on the floor, the window was open, a plant was torn apart, and things were thrown about on the desk and on the floor. Nurse B contacted Ms. Tomash and the office manager. The office manager came to work and made the same observations that Nurse B did about the administrator's office. The office manager also saw that the phones were off the hook.

Ms. Tomash notified that board of directors of the situation and the board called an emergency meeting that day. The board decided to call the Johnson County Sheriff because of the many loose pills in Ms. Strube's guest room. The sheriff's deputy asked the employer to check the employer's emergency medication kit to see if medicines were missing. Nurse B did so and noticed that two medicines were missing from the kit. Ms. Tomash and members of the board went to Ms. Strube's guest room. They saw over 100 loose pills throughout the room and opened packaging that matched the two missing medicines from the emergency medication kit. The medicines were not in the opened packaging. The employer contacted the pharmacy that put together the emergency medication kit. The pharmacy confirmed that the opened packaging matched the medicines that were missing from the kit. When the sheriff's deputy arrived, the deputy searched the guest room.

While the board was meeting Ms. Strube called the employer. Ms. Sandberg talked with Ms. Strube. Ms. Strube told Ms. Sandberg that she would not be attending work the next day because she was being admitted to the hospital. Ms. Strube also explained that someone she did not know had attacked her in the employer's facility and she had blanked out. Ms. Sandberg brought this information to the board. The board did not believe Ms. Strube.

The employer's policy provides that an employee is subject to immediate termination of employment for willful destruction of the employer's property, unauthorized removal of the

employer's property from the premises, and misuse of drugs. The board concluded that Ms. Strube had violated the employer's policy. The board decided to terminate Ms. Strube's employment effective immediately. Ms. Sandberg called Ms. Strube on November 30 and told her the same. The employer mailed Ms. Strube a letter the next day, December 1, also saying the same.

Ms. Strube has received \$3,997.00 in REGULAR (state) UI benefits between December 4, 2022 and January 21, 2023. The employer participated in the fact-finding interview.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the employer discharged Ms. Strube from employment for job-related misconduct.

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 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.

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 such 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.

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.

The Iowa Supreme Court has held that this definition accurately reflects the intent of the legislature.¹

The employer has the burden of proof in establishing disqualifying job misconduct.² The issue is not whether the employer made a correct decision in separating the claimant from employment, but whether the claimant is entitled to unemployment insurance benefits.³ Misconduct must be “substantial” to warrant a denial of job insurance benefits.⁴

The employer is entitled to establish reasonable work rules and expect employees to abide by them. The employer has presented credible evidence that Ms. Strube took medicines from the emergency medication kit in violation of the employer's policy. This is disqualifying, job-related misconduct. Benefits are denied.

The administrative law judge further concludes Ms. Strube has been overpaid REGULAR (state) UI benefits in the gross amount of \$3,997.00 and she should repay these benefits.

Iowa Code §96.3(7) provides, in pertinent part:

7. Recovery of overpayment of benefits.

a. If an individual receives benefits for which the individual is subsequently determined to be ineligible, even though the individual acts in good faith and is not otherwise at fault, the benefits shall be recovered. The department in its discretion may recover the overpayment of benefits either by having a sum equal to the overpayment deducted from any future benefits payable to the individual or by having the individual pay to the department a sum equal to the overpayment.

b. (1) (a) If the department determines that an overpayment has been made, the charge for the overpayment against the employer's account shall be removed and the account shall be credited with an amount equal to the overpayment from the unemployment compensation trust fund and this credit shall include both contributory and reimbursable employers, notwithstanding section 96.8, subsection 5.

(b) However, provided the benefits were not received as the result of fraud or willful misrepresentation by the individual, benefits shall not be recovered from an individual if the employer did not participate in the initial determination to award benefits pursuant to section 96.6, subsection 2, and an overpayment occurred because of a subsequent reversal on appeal regarding the issue of the individual's separation from employment.

Iowa Admin. Code r. 871-24.10 provides:

¹ *Huntoon v. Iowa Department of Job Service*, 275 N.W.2d 445, 448 (Iowa 1979).

² *Cosper v. Iowa Dep't of Job Serv.*, 321 N.W.2d 6 (Iowa 1982).

³ *Infante v. Iowa Dep't of Job Serv.*, 364 N.W.2d 262 (Iowa Ct. App. 1984).

⁴ *Newman v. Iowa Dep't of Job Serv.*, 351 N.W.2d 806 (Iowa Ct. App. 1984).

Employer and employer representative participation in fact-finding interviews.

(1) "Participate," as the term is used for employers in the context of the initial determination to award benefits pursuant to Iowa Code section 96.6, subsection 2, means submitting detailed factual information of the quantity and quality that if unrebutted would be sufficient to result in a decision favorable to the employer. The most effective means to participate is to provide live testimony at the interview from a witness with firsthand knowledge of the events leading to the separation. If no live testimony is provided, the employer must provide the name and telephone number of an employee with firsthand information who may be contacted, if necessary, for rebuttal. A party may also participate by providing detailed written statements or documents that provide detailed factual information of the events leading to separation. At a minimum, the information provided by the employer or the employer's representative must identify the dates and particular circumstances of the incident or incidents, including, in the case of discharge, the act or omissions of the claimant or, in the event of a voluntary separation, the stated reason for the quit. The specific rule or policy must be submitted if the claimant was discharged for violating such rule or policy. In the case of discharge for attendance violations, the information must include the circumstances of all incidents the employer or the employer's representative contends meet the definition of unexcused absences as set forth in 871—subrule 24.32(7). On the other hand, written or oral statements or general conclusions without supporting detailed factual information and information submitted after the fact-finding decision has been issued are not considered participation within the meaning of the statute.

(2) "A continuous pattern of nonparticipation in the initial determination to award benefits," pursuant to Iowa Code section 96.6, subsection 2, as the term is used for an entity representing employers, means on 25 or more occasions in a calendar quarter beginning with the first calendar quarter of 2009, the entity files appeals after failing to participate. Appeals filed but withdrawn before the day of the contested case hearing will not be considered in determining if a continuous pattern of nonparticipation exists. The division administrator shall notify the employer's representative in writing after each such appeal.

(3) If the division administrator finds that an entity representing employers as defined in Iowa Code section 96.6, subsection 2, has engaged in a continuous pattern of nonparticipation, the division administrator shall suspend said representative for a period of up to six months on the first occasion, up to one year on the second occasion and up to ten years on the third or subsequent occasion. Suspension by the division administrator constitutes final agency action and may be appealed pursuant to Iowa Code section 17A.19.

(4) "Fraud or willful misrepresentation by the individual," as the term is used for claimants in the context of the initial determination to award benefits pursuant to Iowa Code section 96.6, subsection 2, means providing knowingly false statements or knowingly false denials of material facts for the purpose of obtaining unemployment insurance benefits. Statements or denials may be either oral or written by the claimant. Inadvertent misstatements or mistakes made in good faith are not considered fraud or willful misrepresentation.

This rule is intended to implement Iowa Code section 96.3(7)“b” as amended by 2008 Iowa Acts, Senate File 2160.

Ms. Strube has been overpaid REGULAR (state) UI benefits in the gross amount of \$3,997.00 because she is not eligible to receive these benefits per this decision. Since the employer participated in the fact-finding interview, Ms. Strube should repay these benefits.

DECISION:

The January 9, 2023 (reference 11) UI decision is REVERSED. The employer discharged Ms. Strube from employment for job-related misconduct. Benefits are withheld until such time as Ms. Strube has worked in and been paid wages for insured work equal to ten times her weekly UI benefit amount, as long as no other decision denies her UI benefits.

Ms. Strube has been overpaid REGULAR (state) UI benefits in the gross amount of \$3,997.00. Since the employer participated in the fact-finding interview, Ms. Strube is required to repay these benefits.



Daniel Zeno
Administrative Law Judge

February 9, 2023
Decision Dated and Mailed

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APPEAL RIGHTS. If you disagree with this 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
4th Floor – Lucas Building
Des Moines, Iowa 50319
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
4th Floor – Lucas Building
Des Moines, Iowa 50319
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.