

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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**VANESSA NUÑO**  
Claimant

**MERCY HEALTH SERVICES – IOWA CORP**  
Employer

**APPEAL 17A-UI-09117-DL-T**  
**ADMINISTRATIVE LAW JUDGE  
DECISION**

**OC: 07/30/17**  
**Claimant: Respondent (2)**

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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 August 29, 2017, (reference 04) unemployment insurance decision that allowed benefits based upon a discharge from employment. The parties were properly notified about the hearing. A telephone hearing was held on September 22, 2017. Claimant participated. Employer participated through employee relations consultant Becki Wahlberg and disability case manager Carol Benjamin. Employer's Exhibit 1 was received (these documents include claimant's proposed exhibits that were mixed together).

**ISSUE:**

Was the claimant discharged for disqualifying job-related misconduct?  
Has the claimant been overpaid unemployment insurance benefits, and if so, can the repayment of those benefits to the agency be waived?  
Can 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: Claimant was employed as a full-time CNA through June 30, 2017. The employer discharged her because she failed to provide medical documentation to keep her off work after she had been released to return to work on May 31, 2017 with permanent restrictions. On January 27, 2017, Sunil Bansal, M.D. performed a Functional Capacity Evaluation (FCE) test related to her November 23, 2015, work-related lower back injury. Her last day of work was May 23, 2017. Claimant had worked light duty escorting patients to testing areas but that still caused her pain. At one point she tried working while using a wheelchair. Dr. Bansal found her to have reached maximum medical improvement (MMI) of the permanent injury on the date of his examination and assigned an impairment rating as eight percent of the whole person. (Employer's Exhibit 1 p. 18-22) On April 19, 2017, he assigned restrictions of "no lifting over 25 pounds occasionally, and no lifting over 15 pounds frequently. No frequent bending or twisting. Sitting, standing, and walking as tolerated. Being in any one position for too long causes her discomfort. No sitting

for more than 60 minutes, no standing for more than 30 minutes, no walking for more than 30 minutes at a time.” (Employer’s Exhibit 1 p. 22)

In May 2017, claimant had provided a Family and Medical Leave Act (FMLA) leave application to the workers’ compensation assigned physician, Dr. Cassen who did not want to sign the application because of the FCE result and release to work. (Employer’s Exhibit 1 p. 24-27) Certified Nurse Practitioner (CNP) Arthur Pepper recommended on June 1, 2017, that she remain off work until she could be examined by a specialist. (Employer’s Exhibit 1 p. 2) Claimant did not provide this note to the employer. On June 26, 2017, Wahlberg notified claimant via e-mail that she would have to submit FMLA paperwork by June 28 if she needed to remain off work. Later that day claimant responded that she was still in pain and cannot walk 100 yards without experiencing pain. (Employer’s Exhibit 1 p. 24) On June 28, 2017, claimant notified Benjamin via e-mail that she could not see her doctor until June 30 so could not turn the FMLA application that day. She received no response from Benjamin. Because she was unable to drive and her daughter had a work conflict, the appointment was rescheduled for July 6, 2017. She did not notify the employer of the date change. Claimant then forwarded the FMLA document to personal physician Heather Kleeman, D.O. at Stanford Clinic on June 30 and attended the rescheduled appointment on July 6, 2017. (Employer’s Exhibit 1 p. 3-6) Because the employer did not have any communication from claimant about her medical status and did not receive FMLA authorization, a termination letter was mailed on July 6, 2017, explaining that she was discharged for failure to report some absences or provide medical documentation to support the absences in June 2017.

The administrative record reflects that claimant has received unemployment benefits in the amount of \$412.00, since filing a claim with an effective date of July 30, 2017, for the one week-ending August 5, 2017. The administrative record also establishes that the employer did not participate in the fact-finding interview or provide written documentation that, without rebuttal, would have resulted in disqualification.

#### **REASONING AND CONCLUSIONS OF LAW:**

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment due to job-related misconduct.

Iowa Code section 96.5(2)a provides:

##### **Causes for disqualification.**

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 Admin. Code r. 871-24.32(7) provides:

(7) Excessive unexcused absenteeism. Excessive unexcused absenteeism is an intentional disregard of the duty owed by the claimant to the employer and shall be considered misconduct except for illness or other reasonable grounds for which the employee was absent and that were properly reported to the employer.

Generally, continued refusal to follow reasonable instructions constitutes misconduct. *Gilliam v. Atlantic Bottling Co.*, 453 N.W.2d 230 (Iowa Ct. App. 1990). The employer is entitled to make reasonable requests for limited information from an employee who has an extended absence and expect the employee to abide by them. The employer has presented substantial and credible evidence that claimant failed to provide medical documentation or excuse supporting her absence during June 2017, and did not maintain adequate communication with the employer about the rescheduling of the June 30, 2017, medical appointment to July 6, 2017. Therefore, the claimant's absences for the month of June 2017, were not properly reported or excused.

The administrative law judge further concludes that the claimant has been overpaid unemployment insurance benefits.

Iowa Code section 96.3(7)a-b, as amended in 2008, provides:

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. The employer shall not be relieved of charges if benefits are paid because the employer or an agent of the employer failed to respond timely or adequately to the department's request for information relating to the payment of benefits. This prohibition against relief of charges shall apply to both contributory and reimbursable employers.

(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.

(2) An accounting firm, agent, unemployment insurance accounting firm, or other entity that represents an employer in unemployment claim matters and demonstrates a continuous pattern of failing to participate in the initial determinations to award benefits, as determined and defined by rule by the department, shall be denied permission by the department to represent any employers in unemployment insurance matters. This subparagraph does not apply to attorneys or counselors admitted to practice in the courts of this state pursuant to section 602.10101.

Iowa Admin. Code r. 871-24.10 provides:

**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.

Because the claimant's separation was disqualifying, benefits were paid to which she was not entitled. The unemployment insurance law provides that benefits must be recovered from a claimant who receives benefits and is later determined to be ineligible for benefits, even though the claimant acted in good faith and was not otherwise at fault. However, the overpayment will not be recovered when it is based on a reversal on appeal of an initial determination to award benefits on an issue regarding the claimant's employment separation if: (1) the benefits were not received due to any fraud or willful misrepresentation by the claimant and (2) the employer did not participate in the initial proceeding to award benefits. There is no evidence the benefits were received due to any fraud or willful misrepresentation by the claimant. The employer's protest and fact-finding document statements regarding the separation did not provide dates and particular circumstances of the incident or incidents, including, in the case of discharge, the act or omissions of the claimant. The named witness was not available at the number provided. This is contrary to the basic requirement of the rule to establish participation. In this case, the claimant has received benefits but was not eligible for those benefits. Since the employer did not participate in the fact-finding interview the claimant is not obligated to repay to the agency the benefits she received and the employer's account shall be chargeable.

**DECISION:**

The August 29, 2017, (reference 04) unemployment insurance decision is reversed. The claimant was discharged from employment due to job-related misconduct. Benefits are withheld until such time as she has worked in and been paid wages for insured work equal to ten times her weekly benefit amount, provided she is otherwise eligible. The claimant has been overpaid unemployment insurance benefits in the amount of \$412.00 and is not obligated to repay the agency those benefits. The employer did not participate in the fact-finding interview and its account shall be charged.

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Dévon M. Lewis  
Administrative Law Judge

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Decision Dated and Mailed

dml/rvs