

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

BEAU M KEEGAN
Claimant

IA DEPT OF HUMAN SVCS/GLENWOOD
Employer

APPEAL 17A-UI-01224-H2T

**ADMINISTRATIVE LAW JUDGE
DECISION**

**OC: 01/01/17
Claimant: Respondent (2)**

Iowa Code § 96.5(2)a – Discharge/Misconduct
Iowa Code § 96.3(7) - Recovery of Benefit Overpayment
871 IAC 24.10 – Employer Participation in the fact-finding Interview

STATEMENT OF THE CASE:

The employer filed an appeal from the January 26, 2017, (reference 01) unemployment insurance decision that allowed benefits. The parties were properly notified about the hearing. A telephone hearing was held on February 23, 2017. Claimant did not participate. Employer participated through Natalie McEwan, Public Service Supervisor and Rick Jones, Treatment Administrator and was represented by Malia Maples of Employer's Edge, LLC. Employer's Exhibit 1 was entered and received into the record.

ISSUES:

Was the claimant discharged due to job connected 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: Claimant was employed full-time as a resident treatment worker beginning on December 1, 2014 through January 3, 2017, when he was discharged.

All of the residents in the home where the claimant was assigned to work have dual diagnoses of intellectual disability with a mental illness component. They are a fragile and vulnerable population. All have complicated behavioral support plans and need a safe, nurturing environment in order to progress appropriately. As Mr. Jones, the treatment administrator credibly testified at the hearing, "[a]n employee with ill intent can do a tremendous amount of damage." While the facility was the claimant's workplace, it is the resident's home.

On September 26, one of the residents in the home where the claimant worked reported that the claimant and some of his coworkers were mistreating another resident. On numerous occasions, the claimant and his coworkers would take CD's belonging to one of the residents who is particularly fragile as he suffers from schizophrenia. They would hide the CDs or refuse to let the resident have possession of his own belongings while they taunted him with verbal insults. They would continue their taunts and withholding of his possessions until the resident had a physical outburst. On occasion when the resident was napping they would wake him up abruptly and call him names in an effort to get him upset to the point where he would have a physical outburst. When the resident eventually did have an outburst, the claimant and his coworkers would laugh at him. The claimant and his coworkers were intentionally manipulating the resident in order to provoke a physical outburst.

Once the initial report was made on September 26, the claimant and his coworkers were suspended, with pay, while the employer conducted a thorough investigation. As of September 26, the claimant knew that his conduct was being investigated by the employer. As the investigation progressed, it had a ripple effect as more events were discovered and additional investigations were begun. The employer completed their investigation into the resident's complaint on October 13, but as the claimant was the subject of additional investigations, he remained on suspension while the employer completed the numerous other investigations.

On October 13, during an exit interview an employee who was resigning brought additional information regarding mistreatment of residents by employees to the employer's attention. As a result of the exit interview comments, the assistant superintendent and Ms. McEwen visited the former employee at his home to gather more information. They learned that on August 22, the claimant had been in an area of the house where he was not supposed to be working. He and his coworkers, witnessed two residents get into an altercation that resulted in an eye injury to one of the residents. The altercation happened after the residents had been teased and taunted by the workers, including the claimant. At least one resident asked the workers to stop teasing him, but they did not. In order to cover up that staff were in areas where they should not be, the claimant choreographed a false story and documentation about what had really occurred. As part of their plan, the claimant threatened a coworker by telling him that he knew how to get "probationary employees fired" if the coworker were to report what had really occurred. The investigation revealed that the claimant had falsified documents. The claimant's denial of involvement was not believed by the employer in light of all the investigatory details they discovered. This investigation was completed on November 8, but as other investigations were still ongoing the claimant remained suspended with pay.

The employer wanted to complete all of their investigations and left numerous employees, including the claimant, on suspension while the employer worked to discover the full scope of mistreatment of residents by employees. While the claimant was implicated in four or five investigations, the employer found that the claimant committed rule violations in the two incidents described above.

The claimant had been previously disciplined on June 7, 2016. He was disciplined for his failure to report a coworker referring to residents by derogatory names. He was specifically told that "abuse will not be tolerated." He was also put on notice that any further instances of this nature could result in further disciplinary action up to and including termination. (Employer's Exhibit 1, page 13)

Because the claimant had been warned previously and because the employer determined that the claimant did engage of abusive treatment of residents as well as falsification of documents, he was discharged on January 3, 2017, with a number of other coworkers.

The employer received the notice of fact-finding interview but chose not to participate in the interview because no one from their central office communicated with them that they could or should participate. The employer had ample opportunity to participate in the fact-finding interview but simply chose not to do so.

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 § 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).

Generally, continued refusal to follow reasonable instructions constitutes misconduct. *Gilliam v. Atlantic Bottling Company*, 453 N.W.2d 230 (Iowa App. 1990).

The employer's uncontroverted evidence establishes that the claimant engaged in repeated instances of abusive treatment of residents and allowed others to mistreat and abuse residents. The claimant had been warned in June 2016 for not reporting when he saw others mistreating residents. Even after warning, the claimant himself mistreated residents. His actions are

conduct not in the employer's best interests and are sufficient job connected misconduct to disqualify him from receipt of unemployment insurance benefits. Benefits are denied.

Iowa Code § 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 un rebutted 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 the claimant 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. The employer will not be charged for benefits if it is determined that they did participate in the fact-finding interview. Iowa Code § 96.3(7). 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 the benefits he received to the agency and the employer's account shall be charged.

DECISION:

The January 26, 2017, (reference 01) decision is reversed. The claimant was discharged from employment due to job-related misconduct. Benefits are withheld until such time as he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible. The claimant has been overpaid unemployment insurance benefits in the amount of \$3,129.00 and he is not obligated to repay the agency those benefits. The employer did not participate in the fact-finding interview and their account shall be charged.

Teresa K. Hillary
Administrative Law Judge

Decision Dated and Mailed

tkh/rvs