

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

**ROSALINDA H ERWIN**  
Claimant

**CARE INITIATIVES**  
Employer

**APPEAL 16A-UI-12079-H2T**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**OC: 10/16/16**  
**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 November 3, 2016, (reference 01) unemployment insurance decision that allowed benefits. The parties were properly notified about the hearing. A telephone hearing was held on November 30, 2016. Claimant chose not to participate personally, but did submit a written statement. Claimant's written statement was entered and received into the record as claimant's exhibit A. Employer participated through Kaitlyn Devin, Administrator; Sara Brownlee, Dietary Manager; and Alyce Smolsky, Equifax hearing representative. Employer's exhibits 1 through 4A were 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 cook beginning on November 30, 2010 through August 18, 2016, when she was discharged. The claimant was discharged for violating the resident's rights policy. On August 8 one of the residents asked the claimant for a second helping of dinner. The claimant told the resident she was getting fat and would not give her any more food until she checked with the charge nurse to see if it was ok. Under the employer's policies, a copy of which had been given to the claimant, any resident is allowed food whenever they want it. The claimant had been trained on the policy. It was not up to the claimant to decide if more food was or was not medically necessary or dangerous for the resident. When the charge nurse told the claimant that she was obligated to give the resident more food if she asked for it the claimant gave the resident additional food. The claimant slammed the plate of food down in front of the resident. The resident was so upset she refused to eat the additional food that was given to her.

The next day the resident complained to Ms. Brownlee and told her that she was not going to eat during mealtimes when the claimant worked. The resident was upset and ashamed that the claimant had criticized her for wanting more food. As the facility was the resident's home, under the employer's policies, the resident was allowed more food even if an employee believed it was not necessary or a good idea. The claimant clearly did not want to provide additional food to the resident as she went to check with the charge nurse before given the resident more food.

The employer conducted an investigation and believed the resident's version of events that the claimant had spoken to her in a disrespectful manner. The claimant had been previously disciplined for a verbal altercation with another employee in the dining room in front of residents. The claimant had also spoken harshly to the administrator Ms. Devine. Under the employer's policies, even one instance of "personally insulting" a resident could lead to discharge. Other residents had complained about how the claimant was rude and would make comments about how some residents made messes at the table when they ate.

The claimant has received unemployment benefits after the separation on a claim with an effective date of October 16, 2016.

The employer did participate personally in the fact-finding interview through Phyllis Farrell who provided essentially the same information to the fact-finder as was provided at the appeal hearing.

#### **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 rules and policies made clear to claimant that even one instance of personally insulting conduct would lead to discharge. The claimant had been trained on the employer's policies. It was not within her authority to refuse food to a resident, or to even tell a resident that she had to check with the charge nurse before serving the resident more food. The claimant's checking with the charge nurse before serving the resident more food persuade the administrative law judge that she did not want to give the resident a second helping of dinner.

The resident's was known to the dietary manager as a competent reporter of events and as a non-complainer. Because the resident was so upset, crying and emotional while making the complaint to Ms. Brownlee, her complaint was found to be credible. The employer also knew that the claimant has spoken harshly to manager and to other employees. The employer's investigation convinced them that the claimant did make a personally insulting comment to a resident. The employer's evidence, including the first hand testimony of Ms. Brownlee who spoke directly with the resident, convinces the administrative law judge that the claimant did tell a resident she did not need more food because she was getting fat. Such conduct is a violation of the resident's rights and is conduct not in the employer's best interest. As the claimant had been previously warned about how she spoke to others, her actions are misconduct sufficient to disqualify her 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 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 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 participated in the fact-finding interview the claimant is obligated to repay the benefits she received to the agency and the employer's account shall not be charged.

**DECISION:**

The November 3, 2016, (reference 01) 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 \$326.00 and she is obligated to repay the agency those benefits. The employer did participate in the fact-finding interview and their account shall not be charged.

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Teresa K. Hillary  
Administrative Law Judge

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Decision Dated and Mailed

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