

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

SHERRIE L FUNKE
Claimant

APPEAL NO. 22A-UI-17837-JT-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

**ABILIT HOLDINGS GLENWOOD PLACE
LLC**
Employer

**OC: 09/04/22
Claimant: Respondent (2)**

Iowa Code Section 96.5(2)(a) – Discharge for Misconduct
Iowa Code Section 96.3(7) - Overpayment

STATEMENT OF THE CASE:

On October 10, 2022, the employer filed a timely appeal from the September 30, 2022 (reference 01) decision that allowed benefits to the claimant, provided the claimant met all other eligibility requirements, and that held the employer's account could be charged for benefits, based on the deputy's conclusion that the claimant was discharged on August 25, 2022 for no disqualifying reason. After due notice was issued, a hearing was held on November 1, 2022. Sherrie Funke (claimant) participated. Julie Laxton of Paychex represented the employer and presented additional testimony through Lisa Hall and Araceli Pecina. The administrative law judge took official notice of the Agency's record of benefits disbursed to the claimant and received Exhibits 1 through 5 into evidence. Exhibit 1 is the August 25, 2022 Counseling Documentation Form. Exhibit 2 consists of two pages of policy from the employee handbook. Exhibit 3 is the handbook acknowledgment. Exhibit 4 is the statement from the retirement home resident. Exhibit 5 is the statement from Ms. Pecina. The administrative law judge took official notice of the fact-finding materials for the limited purpose of determining whether the employer participated in the fact-finding interview and, if not, whether the claimant engaged in fraud or intentional misrepresentation in connection with the fact-finding interview.

ISSUES:

Whether the claimant was discharged for misconduct in connection with the employment.
Whether the claimant was overpaid benefits.
Whether the claimant must repay overpaid benefits.
Whether the employer's account may be charged.

FINDINGS OF FACT:

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

Sherrie Funke (claimant) was employed by Abilit Holdings Glenwood Place, L.L.C. as a full-time housekeeper from December 2020 until August 25, 2022, when Lisa Hall, Director, discharged

her from the employment. The employer operates Glenwood Place, a retirement home in Marshalltown.

At the start of the employment, the employer provided the claimant with an employee handbook. The handbook included the following Gifts and Gratuity policy:

Employees shall not accept gratuities or gifts of any kind from residents, their family members or their conservators. This prohibition includes, but is not limited to, cash, gift cards, food, clothing, special accommodations, favors, discounts, etc. Violation of this policy may result in disciplinary action, up to and including termination of employment. Gifts provided for community use, rather than an individual employee, will be permitted with approval from the Community Director.

Immediately after the Gifts and Gratuity policy, the handbook includes a Conflict of Interest policy that prohibits "Accepting or soliciting a gift, tip, favor, or service from a resident, vendor, or customer." The Conflict of Interest policy included the following directive:

If you are unsure whether an activity might violate this policy, please talk to your supervisor. It is imperative that you disclose to your supervisor as soon as possible the existence of any of the above potential conflicts."

The employer uniformly enforces the above policies. The claimant was all relevant times aware of the above policies.

On August 14 or 15, 2022, a Glenwood Place resident went to the office of Araceli Pecina, Assistant Director, and reported the claimant had borrowed money from the resident, had agreed to repay the resident during the following pay period, but that the claimant had not repaid the resident as promised. The claimant had indeed borrowed money from resident. Though the claimant asserts she accepted money from the resident in April 2022, the resident reported the transaction had taken place in August 2020. The claimant was aware that borrowing money from the resident violated the employer's Gifts and Gratuity policy and the Conflict on Interest policy at the time the claimant accepted money from the resident. The employer first learned of the claimant borrowing money from the resident in violation of the employer's policies when the resident made her report to Ms. Pecina on August 14 or 15, 2022. After Ms. Pecina spoke with the resident, Ms. Hall also spoke with the resident.

On August 25, 2022, Ms. Hall met with the claimant for the purpose of discharging the claimant from the employment. The claimant admitted to accepting money from the resident and admitting to knowing her action violated the employer's policy.

The claimant established an original claim for benefits that was effective September 4, 2022. The claimant received \$1,395.00 in benefits for four weeks between September 4, 2022 and October 1, 2022. This employer is the sole base period employer.

On September 29, 2022, an Iowa Workforce Development Benefits Bureau deputy held a fact-finding interview that addressed the claimant's separation from the employer. The employer participated in writing and submitted most of the same exhibits the employer submitted for the appeal hearing. The employer's documents were sufficient, if unrebutted, to establish a discharge based on misconduct in connection with the employment. When the deputy made contact with the employer's agent, Employers Edge, the agent declined to participate in the fact-finding interview call and asked the deputy to consider documents provided by the employer. The claimant by and large provided a candid statement to the deputy. However, the claimant

intentionally misstated a material fact when she told the deputy it never occurred to her that accepting money from the resident would violate the employer's policy. The claimant was well aware that her action violated the employer's policy at the time she accepted the money from the resident.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code section 96.5(2)(a) provides:

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:

a. The disqualification shall continue 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). The Legislature recently codified the misconduct definition along with a list of types of disqualifying misconduct. See Iowa Code section 96.5(2)(d). The list of conduct constituting misconduct in connection with the employment includes "Knowing violation of an reasonable and uniformly enforced rule of an employer." See Iowa Code section 96.5(2)(d)(2).

The employer has the burden of proof in this matter. See Iowa Code section 96.6(2). Misconduct must be substantial in order to justify a denial of unemployment benefits. Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of unemployment benefits. See *Lee v. Employment Appeal Board*, 616 N.W.2d 661 (Iowa 2000). The focus is on deliberate, intentional, or culpable acts by the employee. See *Gimbel v. Employment Appeal Board*, 489 N.W.2d 36, 39 (Iowa Ct. App. 1992).

While past acts and warnings can be used to determine the magnitude of the current act of misconduct, a discharge for misconduct cannot be based on such past act(s). The termination of employment must be based on a current act. See Iowa Admin. Code r.871 -24.32(8). In determining whether the conduct that prompted the discharge constituted a “current act,” the administrative law judge considers the date on which the conduct came to the attention of the employer and the date on which the employer notified the claimant that the conduct subjected the claimant to possible discharge. See also *Greene v. EAB*, 426 N.W.2d 659, 662 (Iowa App. 1988).

Allegations of misconduct or dishonesty without additional evidence shall not be sufficient to result in disqualification. If the employer is unwilling to furnish available evidence to corroborate the allegation, misconduct cannot be established. See 871 IAC 24.32(4).

The evidence in the record establishes an August 25, 2022 discharge for a current act of misconduct in connection with the employment. The claimant knowingly violated the employer's reasonable and uniformly enforced Gifts and Gratuities policy and Conflict of Interest policy when the claimant accepted money from the retirement home resident. The policy was in place to prevent the retirement home residents from being exploited. The claimant's conduct was adverse to the resident in question and exposed the employer to potential liability. The claimant knew these things at the time the claimant accepted money from the resident. Regardless of whether the conduct occurred in April or August, the conduct first came to the employer's attention on August 1 and Gratuities policy and Conflict of Interest policy when the claimant accepted money from the retirement home resident. The policy was in place to prevent the retirement home residents from being exploited. The claimant's conduct was adverse to the resident in question and exposed the employer to potential liability. The claimant knew these things at the time the claimant accepted money from the resident. Regardless of whether the conduct occurred in April or August, the conduct first came to the employer's attention on August 14 or 15, 2022, and therefore constituted a “current act” in connection with the August 25, 2022 discharge. The claimant is disqualified for benefits until she has worked in and been paid wages for insured work equal to 10 times her weekly benefit amount. The claimant must meet all other eligibility requirements.

The unemployment insurance law requires that benefits be recovered from a claimant who receives benefits and is later deemed ineligible for benefits even if the claimant acted in good faith and was not at fault. However, a claimant will not have to repay an overpayment when an initial decision to award benefits on an employment separation issue is reversed on appeal if two conditions are met: (1) the claimant did not receive the benefits due to fraud or willful misrepresentation, and (2) the employer failed to participate in the initial proceeding that awarded benefits. In addition, if a claimant is not required to repay an overpayment because the base period employer failed to participate in the initial proceeding, the base period employer's account will be charged for the overpaid benefits. Iowa Code § 96.3(7)(a) and (b).

The claimant received \$1,395.00 in benefits for four weeks between September 4, 2022 and October 1, 2022, but this decision disqualifies her for those benefits. Accordingly, the benefits are an overpayment of benefits.

Iowa Administrative Code rule 871-24.10(1) defines employer participation in fact-finding interviews as follows:

Employer and employer representative participation in fact-finding interviews.

24.10(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.

The documentation the employer submitted for the fact-finding interview satisfied the participation requirement. The documents were sufficient, if unrebutted, to establish misconduct in connection with the employment by a preponderance of the evidence. Because the employer participated in the fact-finding interview within the meaning of the law, the claimant is required to repay the overpaid benefits. The employer's account will be relieved of liability for benefits, including liability for benefits already paid.

DECISION:

The September 30, 2022 (reference 01) decision is reversed. The claimant was discharged on August 25, 2022 for misconduct in connection with the employment. The claimant is disqualified for unemployment benefits until she has worked in and been paid wages for insured work equal to 10 times her weekly benefit amount. The claimant must meet all other eligibility requirements. The claimant is overpaid \$1,395.00 in benefits for four weeks between September 4, 2022 and October 1, 2022. The claimant must repay the overpaid benefits. The employer's account is relieved of liability for benefits, including liability for benefits already paid.



James E. Timberland
Administrative Law Judge

November 15, 2022
Decision Dated and Mailed

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
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>.

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 está en línea en <https://www.legis.iowa.gov/docs/code/17A.19.pdf>.

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.