

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

CLAIMANT
Claimant

APPEAL 22A-UI-16167-DH-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

EMPLOYER
Employer

**OC: 07/17/22
Claimant: Respondent (2)**

Iowa Code § 96.5(2)a - Discharge for Misconduct
Iowa Code § 96.5(1) - Voluntary Quit
Iowa Code § 96.3(7) - Recovery of Benefit Overpayment
Iowa Admin. Code r. 871-24.10 - Employer/Representative Participation Fact-finding Interview
Iowa Admin. Code r. 871-24.32(1)a - Discharge for Misconduct
Iowa Admin. Code r. 871-24.1(113)c - Discharge for Violation of Rules

STATEMENT OF THE CASE:

Employer filed an appeal from the August 8, 2022, (reference 01) unemployment insurance decision that granted benefits do long as claimant met all other eligibility requirements based upon the record showing no willful or deliberate misconduct for the 07/18/22, dismissal from work. The parties were properly notified of the hearing. A telephone hearing was held on September 14, 2022, at 11:00AM. Claimant personally participated. Employer participated through a party representative, and a vice-president of operations. Judicial notice was taken of the administrative record, and DBRO. Neither party offered exhibits. Claimant thought factfinding documents would be a part of the record, however, neither party had made such a request and therefore, to the extent there is any factfinding documents, they are not made a part of the record.

During the hearing, an individual made reference to an outside agency finding that cannot be disseminated pursuant to Iowa Code Chapter 235B. Therefore, the administrative law judge excludes these portions from the record, has sealed the record, and has not considered testimony regarding these references when making the determination. Submissions by the parties and the audio file are ordered sealed.

ISSUES:

Was the separation a layoff, discharge for misconduct, or a voluntarily quit without good cause?
Was claimant overpaid benefits, and if so, should claimant repay the benefits?
Should the employer's account be charged and at what level did they participate in factfinding?

FINDINGS OF FACT:

Having heard the testimony and reviewed the evidence in the record, the undersigned finds:

Claimant's first day of employment with employer was 10/02/08, and their last day worked was 07/10/22. Claimant was a full-time CNA (certified nursing assistant), CMA (certified medication aid) with a set schedule. Employer is a long term residential skilled care facility. Claimant was discharged on 07/18/22, for a violation of workplace rules – abuse of a resident as found by the facility. This resident is referred to as Resident A.

Employer became aware of potential abuse of Resident A on 07/10/22 that took place on 07/10/22 in the dining room. It was witnessed by other employees and residents. Resident A is on a hospice care plan. Once placed on hospice care, and individual is not anticipated to live much longer. Employer conducted an investigation into the allegation through interviewing 4 of employer's employees, including claimant. Employer found that claimant spoke to Resident A in a loud and gruff voice, as corroborated by three witnesses. Employer found claimant physically grabbed Resident A's face with their hand and turned the face toward claimant, as corroborated by two witnesses. Claimant admitted to the action of physically touching and turning the face, but asserts it was done gently. Employer found claimant threatened Resident A with denying them the ability to visit their father, which is a part of Resident A's hospice care plan, as corroborated by one witness. Employer found claimant name called Resident A (bullheaded) as corroborated by all four witnesses (one of which was claimant).

Employer has an employee handbook with workplace policies/rules. Claimant had access to an electronic handbook at the time of hire in October 2008 and most recently in September 2019 (when employer was acquired by the current owner). The handbook addresses issues regarding employee conduct/residential abuse in four different areas of the handbook. First, there is a section regarding residents'/patients' right to be free from abuse and to be treated with dignity. Second, there is a section that focuses on the care and standard of conduct to be given, revolving around the respect and dignity of our residents. Third, there is a section involving the rules of conduct that lists things that fall under abuse. Lastly, disciplinary process section, that addresses how discipline is to be handled and that abuse can lead to discharge for a single action without prior warning, if warranted.

Speaking to Resident A in a loud and gruff voice does not honor the resident's integrity and dignity, nor does it keep in offering the highest level of care. It violates the resident's rights as they have the right to be free from verbal and mental abuse, to be treated with respect and if not so treated, be disciplined up to and including discharge.

Physically grabbing Resident A's face with their hand and turned the face toward claimant does not honor the resident's integrity and dignity, nor does it keep in offering the highest level of care. It violates the resident's rights as they have the right to be free from physical and mental abuse, to be treated with respect and if not so treated, be disciplined up to and including discharge. Claimant doesn't believe she "grabbed" the face, but does acknowledge touching the face, in order to make them finish eating their meal. However, Resident A, on a hospice care plan has the right to refuse food if they so choose and are not to be forced to eat.

Threatening Resident A with denying them the ability to visit their father, which is a part of Resident A's hospice care plan does not honor the resident's integrity and dignity, nor does it keep in offering the highest level of care. It violates the resident's rights as they have the right to be free from verbal and mental abuse, to be treated with respect and if not so treated, be disciplined up to and including discharge.

Calling Resident bullheaded does not honor the resident's integrity and dignity, nor does it keep in offering the highest level of care. It violates the resident's rights as they have the right to be free from verbal and mental abuse, to be treated with respect and if not so treated, be disciplined up to and including discharge. Claimant acknowledges doing so, but in a joking way, which makes it not abusive.

The July 10, 2022, incident coupled with claimant's years of experience were the only items factored into claimant's discharge. Claimant was discharged by employer. Claimant sought a review by employer, which took place and her discharge for misconduct was kept in place by employer.

Claimant filed a claim for unemployment benefits with an original claim date of 07/17/22. Her weekly benefit amount is \$551.00. She filed for benefits for one week only, the benefit week ending 07/23/22 and she was paid \$551.00 on her claim for that one week. Claimant filed for no other weeks. The employer participated in fact finding through the submission a response of the notice of hearing and documents after the factfinding call, as well as participated in a telephone interview. Based upon the submission prior to the factfinding call, employer did not participate at a sufficient level in factfinding as to have it count as participating in factfinding.

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:

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.

871 IAC 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.

Iowa Admin. Code r. 871-24.1 provides:

Definitions.

Unless the context otherwise requires, the terms used in these rules shall have the following meaning. All terms which are defined in Iowa Code chapter 96 shall be construed as they are defined in Iowa Code chapter 96.

24.1(113) *Separations*. All terminations of employment, generally classifiable as layoffs, quits, discharges, or other separations.

c. *Discharge*. A discharge is a termination of employment initiated by the employer for such reasons as incompetence, violation of rules, dishonesty, laziness, absenteeism, insubordination, failure to pass probationary period.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. *Huntoon v. Iowa Department of Job Service*, 275 N.W.2d 445, 448 (Iowa 1979).

The employer has the burden of proof in establishing disqualifying job misconduct. *Cosper v. Iowa Dep't of Job Serv.*, 321 N.W.2d 6 (Iowa 1982). The issue is not whether the employer made a correct decision in separating claimant, but whether the claimant is entitled to unemployment insurance benefits. *Infante v. Iowa Dep't of Job Serv.*, 364 N.W.2d 262 (Iowa Ct. App. 1984). The Iowa Court of Appeals found substantial evidence of misconduct in testimony that the claimant worked slower than he was capable of working and would temporarily and briefly improve following oral reprimands. *Sellers v. Emp't Appeal Bd.*, 531 N.W.2d 645 (Iowa Ct. App. 1995). Generally, continued refusal to follow reasonable instructions constitutes misconduct. *Gilliam v. Atlantic Bottling Co.*, 453 N.W.2d 230 (Iowa Ct. App. 1990). Misconduct must be "substantial" to warrant a denial of job insurance benefits. *Newman v. Iowa Dep't of Job Serv.*, 351 N.W.2d 806 (Iowa Ct. App. 1984). Poor work performance is not misconduct in the absence of evidence of intent. *Miller v. Emp't Appeal Bd.*, 423 N.W.2d 211 (Iowa Ct. App. 1988).

Misconduct serious enough to warrant discharge is not necessarily serious enough to warrant a denial of job insurance benefits. Such misconduct must be "substantial." *Newman v. Iowa Dep't of Job Serv.*, 351 N.W.2d 806 (Iowa Ct. App. 1984). The focus of the administrative code definition of misconduct is on deliberate, intentional or culpable acts by the employee. *Id.*

When based on carelessness, the carelessness must actually indicate a "wrongful intent" to be disqualifying in nature. *Id.* Negligence does not constitute misconduct unless recurrent in nature; a single act is not disqualifying unless indicative of a deliberate disregard of the employer's interests. *Henry v. Iowa Dep't of Job Serv.*, 391 N.W.2d 731 (Iowa Ct. App. 1986).

Further, poor work performance is not misconduct in the absence of evidence of intent. *Miller v. Emp't Appeal Bd.*, 423 N.W.2d 211 (Iowa Ct. App. 1988). The law limits disqualifying misconduct to substantial and willful wrongdoing or repeated carelessness or negligence that equals willful misconduct in culpability. *Lee v. Employment Appeal Bd.*, 616 N.W.2d 661 (Iowa 2000).

Claimant knew of the policies and their duties and violated the policies by the conduct set forth in the findings of fact. Claimant physically touched Resident A in an effort to force them to eat when they had the right to refuse food as a hospice care patient. In the process, claimant called Resident A bullheaded, and to try to get them to eat, threatened to deny visits with their father. Claimant spoke to claimant in a loud and gruff voice.

The employer is entitled to establish reasonable work rules and expect employees to abide by them. The employer has presented substantial and credible evidence the rules were violated. The matter is bad enough that it is contrary to the best interests of the employer and is disqualifying misconduct, even without prior warnings. Claimant was discharged for misconduct on 07/18/22.

The next issues are whether claimant has been overpaid benefits and if so whether she has to repay them and whether claimant sufficiently participated in factfinding and whether the employer's account should be charged.

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.

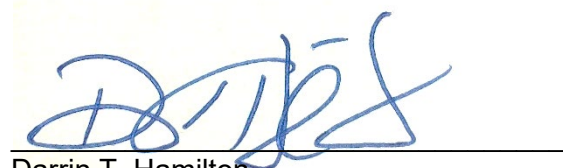
This rule is intended to implement Iowa Code section 96.3(7)“b” as amended by 2008 Iowa Acts, Senate File 2160.

Because the claimant's separation was disqualifying, any benefits paid on the claim would be benefits 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.

Claimant was granted benefits for one week, but no is determined to be ineligible. The employer participated in the fact-finding interview through a telephone fact finding interview. However, employer advises that they submitted documents but only after the fact-finding hearing date. The employer's participation was not at an adequate level and therefore claimant shall not repay the benefit and the employer's account shall be charged for the \$551.00 overpayment in regular unemployment benefits.

DECISION:

The August 8, 2022, (reference 01) unemployment insurance decision that granted benefits do long as claimant met all other eligibility requirements based upon the record showing no willful or deliberate misconduct for the 07/18/22, dismissal from work is **REVERSED**. The claimant was discharged from employment due to job-related misconduct. Benefits are withheld until such time as they have worked in and been paid wages for insured work equal to ten times their weekly benefit amount, provided they are otherwise eligible. Claimant was overpaid \$551.00 in regular unemployment benefits but does not have to pay it back as they were originally granted benefits, but it is no reversed and the employer did not adequately participate in the fact-finding hearing.



Darrin T. Hamilton
Administrative Law Judge

December 6, 2022
Decision Dated and Mailed

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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> 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 adquiera 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.