

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

**SHANITA R STEPHENS**  
Claimant

**CARE INITIATIVES**  
Employer

**APPEAL 15A-UI-11386-JP-T**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**OC: 09/20/15**  
**Claimant: Respondent (2)**

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 October 6, 2015, (reference 01) unemployment insurance decision that approved benefits. The parties were properly notified about the hearing. A telephone hearing was held on October 27, 2015. Claimant did not participate. Employer participated through representative, Lesley Buhler, director of nursing, Miriam Selusi, registered nurse, Terry Rash, and unemployment insurance consultant, Phyllis Farrell. Employer Exhibit One was admitted into the record with no objection.

**ISSUES:**

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 part time as a certified nursing assistant (CNA) from October 3, 2014, and was separated from employment on September 18, 2015, when she was discharged.

Claimant was discharged after she was found sleeping during her shift. Claimant worked the night shift (10:00 p.m. to 6:30 a.m.) from September 17, 2015 to September 18, 2015. The night shift supervisor caught claimant sleeping between 5:00 a.m. and 5:30 a.m. on September 18, 2015. Claimant was sleeping in a chair in the lounge. After employees woke claimant up, she returned to work. Ms. Selusi arrived approximately 30 minutes later after claimant was woken up. Ms. Selusi spoke with claimant and she admitted she had been sleeping. Claimant stated she had told Ms. Rash that she had not been feeling well. Claimant did not request to go home or for the employer to find a replacement.

The employer is long-term intermediate care and skilled care. The residents rely on claimant for their basic needs. The potential harm that claimant created by sleeping was that the residents were not supervised and their needs were not met. Claimant is required to do checks on the residents throughout the night to make sure they are safe, clean, dry, hydrated, etc. Claimant missed some of these checks by sleeping. Before claimant was woken up, the supervisor triggered a call that simulated a resident's call for assistance and it did not wake claimant up. Employer Exhibit One. Ms. Rash also observed that the call for assistance did not wake up claimant. Employer Exhibit One. Claimant had been assigned to station 4. Claimant was the only CNA assigned to station 4. Claimant was responsible for residents on station 4. After working for the employer, Ms. Rash testified that she has realized how easily residents can quickly fall. It could have been damaging if a resident fell while claimant was asleep.

Under the employer's policy, an employee caught sleeping on the job is immediately discharged. Employer Exhibit One. This policy applies to all employees. Employer Exhibit One. Claimant had received the policy. Employer Exhibit One.

The administrative record reflects that claimant has received unemployment benefits in the amount of \$778.00, since filing a claim with an effective date of September 20, 2015, for the five weeks ending October 24, 2015. The administrative record also establishes that the employer did participate in the fact-finding interview or make a first-hand witness available for rebuttal 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. Benefits are denied.

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).

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). 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). 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 employer is entitled to establish reasonable work rules and expect employees to abide by them. Workers in the medical or dependent care profession, reasonably have a higher standard of care required in the performance of their job duties. That duty is evident by the residents' reliance on them for their basic needs. The employer is a long-term intermediate care and skilled care. The residents relied on claimant for their basic needs. Claimant, a CNA, was working the night shift (10:00 p.m. to 6:30 a.m.) from September 17, 2015 to September 18, 2015 and was responsible for station 4. The night shift supervisor caught claimant sleeping between 5:00 a.m. and 5:30 a.m. on September 18, 2015. Claimant told the employer that she had not been feeling well that day, yet she did not request to go home or for the employer to find a replacement. Before claimant was woken up, the supervisor triggered a call that simulated a resident's call for assistance and it did not wake claimant up. Employer Exhibit One. Claimant's sleeping during shift left the residents on her station unattended; this created the possibility of harm not only to the residents, but the employer as well. Claimant's sleeping was compounded by the fact that the employer triggered a call while she was sleeping that simulated a resident's call for assistance, but she did not wake up to respond, thus illustrating that the residents well-being was at risk while she was sleeping.

The employer has presented substantial and credible evidence that claimant was sleeping during her shift and did not respond when the employer triggered a call for assistance in violation of a known company policy. The employer has presented substantial and credible evidence that claimant was acting against the best interests of the employer and the safety of its residents. This is disqualifying misconduct without prior warning. 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.

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 § 96.8, subsection 5.

b. (1) 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 § 96.8, subsection 5. 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 § 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. The employer shall not be charged with the benefits.

(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 states pursuant to § 602.10101.

871 IAC 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 § 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 § 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 § 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 § 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 § 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 § 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. 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), Iowa Admin. Code r. 871-24.10. In this case, the claimant has received benefits but was not eligible for those benefits. Since the employer did participate in the fact-finding interview the claimant is obligated to repay to the agency the benefits she received and the employer's account shall not be charged.

#### **DECISION:**

The October 6, 2015, (reference 01) 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 \$778.00 and is obligated to repay the agency those benefits. The employer did participate in the fact-finding interview and its account shall not be charged.

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Jeremy Peterson  
Administrative Law Judge

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Decision Dated and Mailed

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