

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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**RETHA L ADAMS**  
Claimant

**IA DEPT OF HUMAN SVCS-AREA & COUN**  
Employer

**APPEAL 18A-UI-04230-LJ-T**  
**ADMINISTRATIVE LAW JUDGE**  
**DECISION**

**OC: 03/11/18**  
**Claimant: Respondent (2)**

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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 March 28, 2018, (reference 01) unemployment insurance decision that allowed benefits based upon a determination that claimant was discharged and the employer failed to establish willful or deliberate misconduct. The parties were properly notified of the hearing. A telephone hearing was held on April 30, 2018. The claimant, Retha L. Adams, participated. The employer, Iowa Department of Human Services, participated through Brian Fegley, Income Maintenance Administrator; Brenda Njus, Income Maintenance Supervisor; Dawn Ringena, Income Maintenance Supervisor; Nicole Vigil, Claims Specialist with Employer's Edge; and Malia Maples of Employer's Edge represented the employer. Employer's Exhibits 1 through 25 were received and admitted into the record. The administrative law judge took official notice of the administrative record and the fact-finding documentation.

**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 full-time, most recently as an income maintenance worker, from December 18, 1992, until March 1, 2018, when she was discharged. As an income maintenance worker, claimant's normal work hours were from 8:00 a.m. until 4:30 p.m. If claimant wanted or needed to work beyond her normal work hours, she was expected to request and receive supervisor approval prior to working any extra hours. On February 6, claimant worked an extra thirty minutes without supervisor authorization. Claimant did this because she had been talked to earlier that day about being behind on some of her work. Claimant admits she did not have authorization from her supervisor to work any additional time that day. Claimant was out on a disciplinary suspension from February 7 through February 13, 2018. When she returned to

work on February 14, 2018, claimant was immediately placed on a paid suspension pending the outcome of an investigation into the February 6 incident.

Claimant had received warnings in the past for working outside her normal work hours. On January 19, 2018, claimant was given a written directive/corrective action plan for several issues. One of these issues was working outside of her normal work schedule without authorization. Claimant was instructed, "You will not work outside of the approved hours without prior approval from your supervisor." (Exhibit 3) This document stated that failure to follow the directives included in it would result in disciplinary action. Additionally, claimant had received multiple disciplinary actions related to absences from work without authorization and failure to follow supervisory instructions. Most recently, claimant was placed on a five-day suspension and issued a final warning for this issue on February 6, 2018. (Exhibit 2) Claimant had received a written directive/corrective action plan for this issue on October 6, 2017. (Exhibits 6 and 7) On August 25, 2017, she received a three-day unpaid suspension for being absent from work without supervisory authorization and failing to follow supervisory directions. (Exhibit 8 and 9) On April 21, 2017, claimant received a one-day suspension without pay for the same issue. (Exhibits 10 and 11) Additionally, on March 24, 2017, claimant received a written reprimand for being absent from work without authorization from her supervisor and for failing to follow supervisory directions. Claimant received discipline for these same issues in 2015 and 2016 as well. (Exhibits 12 and 13) The employer maintains that other employees have been talked to and/or disciplined for similar issues.

The administrative record reflects that claimant has received unemployment benefits in the amount of \$3,185.00, since filing a claim with an effective date of March 11, 2018, for the seven weeks ending April 28, 2018. The administrative record also establishes that the employer did not participate in the fact-finding interview. Claims specialist Nicole Vigil sent the Claims Department an email on March 20, 2018, with the employer's proper contact person and telephone number for the March 27 fact-finding interview. Vigil instructed the fact-finder to contact Vicki Hendershot at her office number. On March 27 at 9:57 a.m., the fact-finder attempted to contact Vigil at her telephone number. Vigil was not available when this call came in, and it went to her voicemail.

#### **REASONING AND CONCLUSIONS OF LAW:**

For the reasons that follow, the administrative law judge concludes claimant was discharged from employment for disqualifying, job-related misconduct. Benefits are withheld.

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 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). 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. In this case, on February 6, 2018, claimant chose to work an extra thirty minutes without receiving approval from her supervisor. Claimant had been warned on one prior occasion that she was not permitted to work outside her normal hours of work without supervisory approval. Additionally, claimant had received numerous prior warnings for failing to get supervisory approval for absences and for failing to follow supervisory instructions. The average employee in claimant's situation would certainly know her job was in jeopardy for working outside her scheduled work hours without receiving approval from her supervisor. While claimant contends that other employees did this and did not receive discipline, she did not provide any specific names or details and the employer denies this is true. The administrative law judge finds that the employer has established that claimant was discharged from employment for disqualifying, job-related misconduct. Benefits are withheld.

The next issue is whether claimant has been overpaid benefits. 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 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 benefits were not received due to any fraud or willful misrepresentation by claimant. Additionally, the employer did not participate in the fact-finding interview. Thus, claimant is not obligated to repay to the agency the benefits she received.

The law also states that an employer is to be charged if “the employer failed to respond timely or adequately to the department’s request for information relating to the payment of benefits. . .” Iowa Code § 96.3(7)(b)(1)(a). Here, the employer responded to the notice of a fact-finding interview by emailing information identifying the phone number at which the proper representatives could be reached for the fact-finding interview. Benefits were paid, but not because the employer failed to respond timely or adequately to the agency’s request for

information relating to the payment of benefits. Instead, benefits were paid because the employer did not receive a call from the agency. Employer thus cannot be charged. Since neither party is to be charged then the overpayment is absorbed by the fund.

**DECISION:**

The March 28, 2018, (reference 01) unemployment insurance decision is reversed. 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 \$3,185.00 and is not obligated to repay the agency those benefits. The employer did not participate in the fact-finding interview through no fault of its own, and its account shall not be charged. The overpayment shall be absorbed by the fund.

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Elizabeth A. Johnson  
Administrative Law Judge

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Decision Dated and Mailed

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