

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

MARY E SLETTEN

Claimant

MAINSTREAM LIVING INC

Employer

APPEAL NO. 21A-UI-20580-B2T

**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 07/18/21

Claimant: Respondent (2)

Iowa Code § 96.5-2-a – Discharge for Misconduct
Iowa Code § 96.3-7 – Recovery of Overpayment of Benefits
871 IA Admin. Code 24(10) – Employer Participation in Fact Finding

STATEMENT OF THE CASE:

Employer filed an appeal from a decision of a representative dated September 15, 2021, reference 01, which held claimant eligible for unemployment insurance benefits. After due notice, a hearing was scheduled for and held on November 8, 2021. Claimant participated personally. Employer participated by Marcanne Lynch, Ed Biebel, and Trudy Luettens. Employer's Exhibits 1-11 and Claimant's Exhibit A were admitted into evidence.

Claimant left the hearing after one hour to return to her employment at a school. Claimant did not give testimony prior to her leaving the hearing. Claimant did not alert the ALJ at the start of the hearing that such accommodations should be made for claimant's testimony prior to her leaving.

ISSUES:

Whether claimant was discharged for misconduct?

Whether claimant was overpaid benefits?

If claimant was overpaid benefits, should claimant repay benefits or should employer be charged due to employer's participation or lack thereof in fact finding?

Is the claimant eligible for FPUC or LWAP benefits?

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds: Claimant last worked for employer on July 16, 2021. Employer discharged claimant on July 22, 2021 because claimant acted negative and dismissive when confronted about her leaving fecal matter in multiple places in a house where she worked that came from a client she was signed off to care for.

Claimant worked as a part time LPN for employer. In her job claimant worked at a house with five severely disabled clients. On July 16, 2021 claimant worked with two other workers in the house. One of them was a recent hire that was being trained.

Claimant did not have supervisory duties over the other employees at the house, but she had signed off to provide care for the particular individual that had the bowel movement remnants in many areas of the house. In addition to the claimant's client's outfit having feces not washed off from it, additionally, there were fecal remnants on the sink, and in the laundry room.

Claimant additionally filled out daily reports at 2:30 in the afternoon stating that medicines and food that were to be delivered shortly before she completed her shift at 7:00 pm had been delivered at 2:30 in the afternoon. Employer argued that either claimant filled out her reports incorrectly or she was feeding and giving medicines hours before they were to be given.

When this matter was brought to claimant's attention, she acted as though recording the cares given to patients was not important and denied that her client even defecated on the date in question, although proof of the action existed throughout various rooms of the house.

Claimant has received state unemployment benefits in the amount of \$3,450.00.

Employer was called by IWD on a Saturday morning when no one was working at the registered line. Employer called back on Tuesday morning (Monday was Labor Day), but information was not able to be provided to the fact finder prior to the decision being issued as the fact finder did not return the call.

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).

Iowa Code section 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.

A claimant is not qualified to receive unemployment insurance benefits if an employer has discharged the claimant for reasons constituting work connected misconduct. Iowa Code § 96.5-2-a. Before a claimant can be denied unemployment insurance benefits, the employer has the burden to establish the claimant was discharged for work-connected misconduct. *Cosper v. Iowa Department of Job Service*, 321 N.W.2d 6 (Iowa 1982), Iowa Code § 96.5-2-a.

The gravity of the incident, number of policy violations and prior warnings are factors considered when analyzing misconduct. In this matter, the evidence established that claimant was discharged for an act of misconduct when claimant violated employer's policy concerning properly cleaning fecal material from multiple areas while working with a client; properly recording cares given to a client; and acting in a respectful and caring manner when given guidance by superiors. With claimant acting as a caregiver to deeply affected clients, it is of prime importance for an LPN to follow health and safety standards. Claimant fell far short, and was then indifferent when her errors were pointed out.

The last incident, which brought about the discharge, constitutes misconduct because claimant is a health care professional and acted in a manner not caring for patients' health and safety. The administrative law judge holds that claimant was discharged for an act of misconduct and, as such, is disqualified for the receipt of unemployment insurance benefits.

The overpayment issue was addressed. Claimant has received \$3,450.00 in state unemployment benefits. Said payments are overpayments.

The issue of employer participation was addressed. While employer did not substantially participate in fact finding, said lack of participation was not employer's fault. Employer was called on a Saturday morning for fact finding, when administrators were not in the office. Employer tried to return to call early on Tuesday morning (after Labor Day) but could not participate in fact finding.

DECISION:

The decision of the representative dated September 15, 2021, reference 01, is reversed. Unemployment insurance benefits shall be withheld until claimant has worked in and been paid wages for insured work equal to ten times claimant's weekly benefit amount, provided claimant is otherwise eligible.

Claimant was overpaid benefits in this matter in the amount of \$3,450.00. Neither claimant nor employer should be charged for overpayment as IWD attempted to contact employer outside of business hours to conduct fact finding. Payment shall be secured through IWD fund.



Blair A. Bennett
Administrative Law Judge

December 8, 2021
Decision Dated and Mailed

bab/scn