

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

BONNIE L KEARNS
Claimant

CRESTVIEW ACRES INC
Employer

APPEAL 17A-UI-09975-NM-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

**OC: 09/03/17
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 September 26, 2017, (reference 01) unemployment insurance decision that allowed benefits. The parties were properly notified of the hearing. A telephone hearing was held on October 16, 2017. The claimant participated and testified. The employer participated through Administrator Lindsey Henschel. Employer's Exhibits 1 through 5 were received into evidence.

ISSUES:

Was the claimant discharged for disqualifying job-related misconduct?
Has the claimant been overpaid any unemployment insurance benefits, and if so, can the repayment of those benefits to the agency be waived?
Can any 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 as the laundry and housekeeping supervisor from July 12, 1999, until this employment ended on September 6, 2017, when she was discharged.

Henschel was hired as the administrator of the employer, a care facility, in May 2017. When Henschel started, she did a general audit of the cleanliness of the building and found it to be very dirty. Henschel outlined her expectations for getting the building clean to claimant, but felt things were not being addressed in a timely manner. Based on these concerns, on July 10, 2017, Henschel issued Kearns an education form. (Exhibit 1). The form outlines that Henschel expects all areas on the facility to be cleaned and notes particular areas of concern with cleanliness around fire doors, air vents, staff areas, unoccupied rooms, and deep cleans.

On July 27, 2017, claimant was issued disciplinary action following the employer's annual audit from the Iowa Department of Inspections and Appeals (DIA). (Exhibit 2). The DIA audit found

several areas of concerns including cob webs, dirt, and grime in and around doors and windows throughout the facility. The employer was written up by DIA for its cleanliness violations and issued a fine. At the time claimant was issued the disciplinary action, she was given a suspension and told she had 30 days to fix the problem areas or she would be discharged. Claimant acknowledged the disciplinary action she received from Henschel, but testified she believed all issues had been corrected within three weeks of the July 27 disciplinary action.

On August 30, 2017, Henschel did an audit of the cleaning in an unoccupied room. (Exhibit 3). Henschel found cob webs, dirt, dust, and grime throughout the room, including in the closet, on the bed frame, door frame, TV, fixtures, and sprinkler heads. Henschel explained the dust on the sprinkler heads was of particular concern as it could cause the sprinklers not to work properly, posing a fire hazard. Henschel gave claimant a detailed list of her findings and explained how the room should be cleaned.

On September 1, 2017, Henschel went back to re-inspect the room. Upon re-inspection Henschel found there was still dust on the sprinkler heads, bed frame, and TV. She also found dirt on the corners of the closet floor and grime on the doors. Claimant testified she told Henschel maintenance would have to clean the sprinklers because her duster could get caught in them and cause water to spray in the room. Claimant acknowledged there were some dust spots on the bed frame she had missed, but testified she could not get the dirt and grime off the floor because it was covered in wax. Claimant explained in order to get the dirt off, maintenance would first have to strip the wax. Henschel testified, following her inspection on September 1, she was able to clean the sprinklers with a small duster and all sprinklers have been cleaned in this manner without incident. Henschel also testified that another employee was able to remove the floor dirt and grime by scraping with a putty knife. Henschel testified she believed claimant was capable of doing the work as instructed, as her conversations with other employees and a review of claimant's employee file indicated she had been able to meet expectations without issue up until the last few years. The decision was then made to end claimant's employment.

The claimant filed a new claim for unemployment insurance benefits with an effective date of September 3, 2017. The claimant filed for and received a total of \$834.00 in unemployment insurance benefits for the weeks between September 3 and October 7, 2017. Both the employer and the claimant participated in a fact finding interview regarding the separation on September 25, 2017. The fact finder determined claimant qualified for benefits.

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.

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).

The employer is entitled to establish reasonable work rules and expect employees to abide by them. Here, the employer has a duty to provide a living environment for its residents that is safe and clean. Henschel outlined specific cleaning expectations she had for the claimant. The employer has presented substantial and credible evidence that claimant failed to comply with these expectations after having been warned. Claimant received a final written warning on July 27, 2017 and understood her job was in jeopardy if things did not improve. Henschel clearly identified what needed to be done differently when she performed her audit on August 30, but claimant still failed to follow her instructions in cleaning several areas. Despite these warnings, claimant continued to engage in similar behavior. This is disqualifying misconduct.

The next issue in this case is whether the claimant was overpaid unemployment insurance benefits.

Iowa Code § 96.3(7) provides, in pertinent part:

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.

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 § 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 § 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 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 they did participate in the fact-finding interview. Iowa Code § 96.3(7). 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, claimant is obligated to repay to the agency the benefits she received and the employer's account shall not be charged.

DECISION:

The September 26, 2017, (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 \$834.00 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.

Nicole Merrill
Administrative Law Judge

Decision Dated and Mailed

nm/scn