

**IN THE IOWA ADMINISTRATIVE HEARINGS DIVISION
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

KELCEY M BOHLKE
Claimant

MERCY HEALTH SERVICES-IOWA CORP
Employer

APPEAL 24A-UI-02301-AR-T
**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 02/04/24
Claimant: Respondent (1)

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:

On February 27, 2024, the employer filed an appeal from the February 21, 2024, (reference 01) unemployment insurance decision that allowed benefits based on the determination that claimant was discharged from employment without a showing of disqualifying misconduct. The hearing was originally scheduled for March 25, 2024, at 1:00 p.m. At the time of the originally scheduled hearing, the employer's offered exhibits had not arrived for claimant. The parties agreed to reschedule in order to correct the evidentiary issue. The hearing was rescheduled for March 29, 2024, by telephone. At the time of the newly scheduled hearing, the parties waived proper notice the hearing. Claimant, Kelcey M. Bohlke, participated. Employer, Mercy Health Services-Iowa Corp., participated through Hearing Representative Emily Franks, who did not testify, with testifying witnesses Chief HR Officer Julie Anfinson and Director of Critical Care Services Lorene Rice. Employer's Exhibits A through H were admitted. The administrative law judge took official notice of the administrative record.

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 began working for employer on July 10, 2017. Claimant last worked as a full-time registered nurse (RN). Claimant was separated from employment on February 2, 2024, when she was discharged.

The employer maintains a policy regarding physician orders that is compliant with the rules established by the Iowa Board of Nursing. Nurses are not authorized to establish patient care orders independently. Nurses are expected to follow through on patient care orders established by an authorized provider. If the nurse disagrees with an order based on their own judgment or knowledge of standard of care, they are expected to inform the ordering provider they object to the order and note that in the patient record.

On January 27, 2024, around 9:00 or 9:30 a.m., claimant and Dr. Gharalbeh were in a patient's room together. The patient had a foley catheter placed. Dr. Gharalbeh mentioned that the foley should be removed. Claimant did not understand this to be a verbal order. She did not put the order in the patient's chart and did not remove the foley catheter. Dr. Gharalbeh also ordered that the patient be transferred out of ICU to a general care floor. Claimant did enter the order for transfer to the general care floor. Dr. Gharalbeh told claimant to follow up with Dr. Wei, who would oversee the patient on his new floor, if she had questions.

Around 10:30 or 11:00 a.m., the surgeon, Dr. Hegvik, saw the patient. He mentioned that claimant would need surgery to address a wound. Claimant did not speak with Dr. Hegvik about the foley at that time, because she did not think about it. Sometime around this time, claimant and the patient spoke about the foley. The patient was in pain and was concerned that removing the foley would only cause more pain. The patient was also aware he would need surgery. Claimant and the patient discussed leaving the foley in place until after the surgery. Claimant thought this was in keeping with the standard of care, as well, because reinsertion of the foley carried risk of infection. Claimant messaged Dr. Wei, who agreed with claimant's recommendation to leave the foley in place. Claimant was unclear who was overseeing the patient's care, because the patient was being transferred between levels of care.

Later in the day, Dr. Gharalbeh spoke with another nurse on claimant's unit, Tony Henderson. He noticed that the order to remove the foley was not in the patient's record. He had Henderson enter the order. Claimant saw the order in the patient's chart sometime thereafter and removed the order. She noted why she had done so in the chart.

Around 6:00 p.m., Dr. Gharalbeh was back on the unit and noticed the patient still had the foley. He approached claimant and asked why. Claimant told him that she had not taken the foley out. Dr. Gharalbeh got very angry and demanded that claimant enter and follow through with the order to take the foley out. Claimant messaged Dr. Wei, as well, to inform him of what had occurred. Dr. Wei agreed with the removal of the foley. Claimant removed the patient's foley around 6:15 p.m. that evening.

Dr. Gharalbeh called the administrator on call and informed her that claimant had not carried out his order as instructed. Also at this time, claimant approached the charge nurse, Kristin, and told her what had occurred. Kristin agreed with claimant's assessment of the situation and encouraged claimant to use the employer's Voice It system to report the incident.

The following day, claimant spoke with her supervisor, Abbi Smith, regarding the Voice It report. Smith scheduled a time to speak with claimant more extensively. However, later in the day, Smith informed claimant that she would need to remove claimant from the schedule because of a pending investigation into the incident. During that following week, the employer investigated the incident. It interviewed Dr. Gharalbeh, Kristin, another nurse on shift, and claimant. At the conclusion of the investigation, the employer concluded that claimant did not acknowledge that she acted outside of the scope of her license, and it discharged her from employment on February 2, 2024. Claimant had not received previous warnings for similar conduct.

The administrative record indicates that claimant filed a claim for unemployment insurance benefits with an effective date of February 4, 2024. Her weekly benefit amount is \$604.00. She has filed weekly continuing claims between February 4, 2024, and March 23, 2024. She has received unemployment insurance benefits in the amount of \$4,228.00. The employer substantially participated in the fact-finding interview.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes that claimant was discharged from employment for no disqualifying reason.

Iowa Code section 96.5(2)(a) and (d) provide:

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 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.

...

d. For the purposes of this subsection, "*misconduct*" means a deliberate act or omission by an employee that constitutes a material breach of the duties and obligations arising out of the employee's contract of employment. Misconduct is 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 even 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. Misconduct by an individual includes but is not limited to all of the following:

- (1) Material falsification of the individual's employment application.
- (2) Knowing violation of a reasonable and uniformly enforced rule of an employer.
- (3) Intentional damage of an employer's property.
- (4) Consumption of alcohol, illegal or nonprescribed prescription drugs, or an impairing substance in a manner not directed by the manufacturer, or a combination of such substances, on the employer's premises in violation of the employer's employment policies.
- (5) Reporting to work under the influence of alcohol, illegal or nonprescribed prescription drugs, or an impairing substance in an off-label manner, or a combination of such substances, on the employer's premises in violation of the

employer's employment policies, unless the individual is compelled to work by the employer outside of scheduled or on-call working hours.

(6) Conduct that substantially and unjustifiably endangers the personal safety of coworkers or the general public.

(7) Incarceration for an act for which one could reasonably expect to be incarcerated that results in missing work.

(8) Incarceration as a result of a misdemeanor or felony conviction by a court of competent jurisdiction.

(9) Excessive unexcused tardiness or absenteeism.

(10) Falsification of any work-related report, task, or job that could expose the employer or coworkers to legal liability or sanction for violation of health or safety laws.

(11) Failure to maintain any license, registration, or certification that is reasonably required by the employer or by law, or that is a functional requirement to perform the individual's regular job duties, unless the failure is not within the control of the individual.

(12) Conduct that is libelous or slanderous toward an employer or an employee of the employer if such conduct is not protected under state or federal law.

(13) Theft of an employer or coworker's funds or property.

(14) Intentional misrepresentation of time worked or work carried out that results in the individual receiving unearned wages or unearned benefits.

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).

A determination as to whether an employee's act is misconduct does not rest solely on the interpretation or application of the employer's policy or rule. A violation is not necessarily disqualifying misconduct even if the employer was fully within its rights to impose discipline up to or including discharge for the incident under its policy. 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). What constitutes misconduct justifying termination of an employee and what misconduct warrants denial of unemployment insurance benefits are two separate decisions. *Pierce v. Iowa Dep't of Job Serv.*, 425 N.W.2d 679 (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 is on deliberate, intentional, or culpable acts by the employee.

Here, the employer has not carried its burden of establishing that claimant acted with intent to commit misconduct. The employer interpreted claimant's actions as a willful failure to follow the orders established by a physician. However, claimant's credible testimony indicates that she did not even realize an order had been issued to begin, and then consulted with the physician she

thought was overseeing the patient's care, who agreed with claimant's recommendation and the patient's wishes that the foley not be removed. What transpired was, at worst, a miscommunication among the patient's care team. The question is not whether the employer was correct in discharging claimant, but whether claimant acted in a willful or deliberate manner such that she should be disqualified from receiving unemployment insurance benefits; the employer has not so demonstrated. The separation is not disqualifying.

Because the separation is not disqualifying, the issues of overpayment, repayment, and participation are moot.

DECISION:

The February 21, 2024, (reference 01) unemployment insurance decision is AFFIRMED. Claimant was discharged from employment on February 2, 2024, for no disqualifying reason. Benefits are allowed, provided claimant is otherwise eligible. The issues of overpayment, repayment, and participation are moot.



Alexis D. Rowe
Administrative Law Judge

April 2, 2024
Decision Dated and Mailed

ar/scn

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:

**Iowa Employment Appeal Board
6200 Park Avenue Suite 100
Des Moines, Iowa 50321
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:

**Iowa Employment Appeal Board
6200 Park Avenue Suite 100
Des Moines, Iowa 50321
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 adquiriera 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.