IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

REBEKAH F POWELL Claimant **IMMANUEL** Employer	**APPEAL 17A-UI-02139-JP-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 01/08/17** **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 February 17, 2017, (reference 01) unemployment insurance decision that allowed benefits. The parties were properly notified about the hearing. A telephone hearing was held on March 20, 2017. Claimant did not participate. Employer participated through hearing representative Thomas Kuiper, operations manager Elizabeth Saar, and dietician Jesse Potelka. Official notice was taken of the administrative record of claimant's benefit payment history, 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 full-time as a dietary manager from March 2, 2015, and was separated from employment on January 13, 2017, when she was discharged.

The employer is a day center for elderly people. The employer provides meals to its participants. The employer has a performance improvement plan, which is a progressive disciplinary policy. The employer may skip steps depending on the seriousness of the incident.

On December 30, 2016, while claimant was on vacation, a dietary aide attempted to record the fridge temperatures, but the dietary aide discovered that the fridge temperatures had already been prerecorded by claimant for December 30, 2016. Claimant is normally responsible for recording the fridge temperatures, but because she was on vacation, the dietary aide was

responsible. The fridge temperatures are recorded with pen and paper and initialed by the person that performed the recording. For December 30, 2016, claimant initialed that she had recorded the temperature for both the morning and the evening checks for the day; however, claimant was on vacation and not at the employer on December 30, 2016. December 30, 2016 was the only day claimant was on vacation and no one witnessed claimant at the employer on December 30, 2016. The dietary aide reported the incident to Ms. Potelka and Ms. Potelka told the dietary aide to rerecord the fridge temperatures. If the fridge temperatures were incorrect and food was held at an unsafe temperature, it could pose a huge health risk.

On January 2, 2017, Ms. Potelka questioned claimant about the fridge temperature logs. Claimant stated she accidently marked the wrong day, but did not say what day should have been marked. Ms. Potelka reviewed the December 2016 temperature logs and there were no blank days. Claimant quickly redirected the conversation to the cleaning logs (employees initial on the cleaning logs once a cleaning task has been completed). Claimant told Ms. Potelka that she was concerned about things not actually being done on the cleaning list. Claimant provided a list of concerns to Ms. Potelka. Ms. Potelka had claimant retrieve some of the recent cleaning logs and approximately 60% of items on claimant's list of concerns, claimant had signed off as having been completed. Ms. Potelka brought this to claimant's attention and claimant told Ms. Potelka that she needed to redo the cleaning list and that would help. Ms. Potelka told claimant she was very concerned about the situation, and she would follow up with claimant about this situation. If things are not cleaned or not cleaned properly, it could pose a health risk.

Ms. Potelka then met with Ms. Saar and the employer. On January 13, 2017, the employer discharged claimant.

On October 12, 2016, the employer gave claimant a final written warning for inaccurate ordering of food that resulted in too much food and a large amount of wasted food. Claimant was also warned for not ordering enough of the correct food. Claimant was further warned about a large number of expired items in the inventory after a kitchen audit was conducted. Claimant admitted to the employer that she made the mistakes and acknowledged that she was not organized. Claimant was warned that her job was in jeopardy. After the final written warning, the dietician went over the process of ordering and inventory control with claimant, which claimant improved for approximately two months. On March 29, 2016, the employer gave claimant a final written warning for verbally arguing with a coworker in a public area. Ms. Saar had to separate claimant and the coworker. Claimant was warned that if a similar incident happened again, she would be discharged. On December 22, 2015, the employer gave claimant a written warning for calling the cook a name. Claimant stated she was joking, but the cook did not believe claimant was joking. On July 6, 2015, the employer gave claimant a verbal warning for not logging temperatures on the fridge and freezer. Claimant was required to log the temperatures twice a day.

The administrative record reflects that claimant has not received unemployment benefits since filing a claim with an effective date of January 8, 2017. The administrative record also establishes that the employer did participate in the fact-finding interview.

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:
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> 2. Discharge for misconduct. If the department finds that the individual has been discharged for misconduct in connection with the individual's employment:
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> 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.
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> (1) Definition.
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> 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). Generally, continued refusal to follow reasonable instructions constitutes misconduct. *Gilliam v. Atlantic Bottling Co.*, 453 N.W.2d 230 (Iowa Ct. App. 1990).

Workers that prepare food reasonably have a higher standard of care required in the performance of their job duties to ensure public safety and health. The employer is entitled to establish reasonable work rules and expect employees to abide by them. The employer reasonably required claimant to record the fridge temperature twice a day to ensure the food was being stored at the proper temperature. When claimant was absent from work, a dietary aide would record this information. Even though the dietary aide was supposed to check the fridge temperatures on December 30, 2016, claimant prerecorded the fridge temperatures and signed off on them. Claimant's actions could have created a health risk if the fridge malfunctioned and the employer erroneously relied on claimant's pre-recordings. Claimant's

statement to Ms. Potelka that she accidently recorded the wrong day is not persuasive. If claimant had accidently recorded a different day's fridge temperatures as December 30, 2016, presumably there would have been a day that did not have any fridge temperature recordings in December 2016; however, Ms. Potelka credibly testified that there were not any blank days in December 2016. Furthermore, on January 2, 2017, claimant raised concerns about the cleaning list not being properly followed, but when the employer reviewed the cleaning log and claimant's concerns, it was discovered that approximately 60% of claimant's concerns were about claimant's own cleaning that claimant had signed off on.

The employer has presented substantial and credible evidence that claimant failed to properly record the fridge temperatures after having been warned. The employer has a duty to protect the safety of its food and its participants. Claimant conduct was contrary to the best interests of the employer. This is disqualifying misconduct. Benefits are denied.

Iowa Code § 96.3(7)a-b, as amended in 2008, provides:

> 7. Recovery of overpayment of benefits.
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> 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.
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> 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.
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> (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.
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> (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.

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 not received benefits since filing a claim for benefits and the employer did participate in the fact-finding interview.

DECISION:

The February 17, 2017, (reference 01) unemployment insurance decision is reversed. Claimant was discharged from employment due to job-related misconduct. Benefits are withheld until such time as claimant has worked in and been paid wages for insured work equal to ten times her weekly benefit amount, provided she is otherwise eligible.

Claimant has not been overpaid unemployment insurance benefits because benefits have not been paid on this claim. The employer did participate in the fact-finding interview.

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Jeremy Peterson
Administrative Law Judge

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Decision Dated and Mailed

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