

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

Claimant

APPEAL 18A-UI-01990-JC-T

Employer

**ADMINISTRATIVE LAW JUDGE
PUBLIC DECISION**

**OC: 01/14/18
Claimant: Respondent (2)**

Iowa Code § 235B.6(2)(d)(4) - Dependent Adult Abuse – access to confidential information
Iowa Code § 235B.8 - Dependent Adult Abuse – redissemination of confidential information
Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Code § 96.5(1) – Voluntary Quitting
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/appellant filed an appeal from the February 1 2018 (reference 01) unemployment insurance decision that allowed benefits based upon the claimant's separation from employment.

On March 9, 2018, a short pre-hearing conference was held and recorded. The claimant participated personally. The director of human resources participated on behalf of the employer. The purpose of the conference was to address outstanding issues related to evidence and the claimant's request for postponement. The claimant's request for postponement was granted. The parties were properly notified of the second hearing and a telephone hearing was held on April 9, 2018. The claimant participated personally. The employer was represented by the director of human resources. The administrator, and quality and compliance officer also testified. Employer Exhibits 1 through 14, and Claimant Exhibits A, B, and C were admitted. The administrative law judge also took administrative notice of the claimant's unemployment insurance benefits records as well as the fact-finding documents.

ISSUES:

Shall the hearing record and decision be publicly disclosed?
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: The claimant was employed full-time as a team leader. This employer assists clients who have mental health issues with their daily living tasks in a residential home. The claimant was

employed from 2015 until January 12, 2018, when he was discharged for failure to complete required documentation (Employer Exhibit 12).

The claimant's job duties involved providing direct care and supervision for clients. The claimant worked in a home with four residents. The employer had a policy which required employees to document their interactions within 72 hours of contact (Employer Exhibit 6). The claimant received a copy of the employer's policies during hire (Employer Exhibit 1). An employee would enter documentation in the employer's "Full Circle" software, electronically sign it, and the employer would then use the information contained for Medicaid billing. The claimant was aware of the importance of the documentation, based upon his position as a team leader, and through continued in-service training (Employer Exhibit 1). The claimant had also participated in a decision to discharge one of his team members in the past for a failure to submit proper documentation

In 2017, the claimant received warnings related to medication errors (Employer Exhibits 2, 3, 4). During his November 2, 2017 review, the claimant was informed he needed improvement on timeliness of work, including reports and documentation (Employer Exhibit 7). He was then issued a warning on November 28, 2017, after his manager discovered missing documentation for multiple days in October (Employer Exhibit 5).

The claimant was then placed on a final warning in response to missing narcotics in the residence that he supervised (Employer Exhibit 8). This warning was administered during his shift on January 8, 2018, and he was informed any additional policy infraction could result in his discharge. At the meeting, the claimant specifically asked if the warning pertained to medication issues only or "anything I do wrong", in terms of possible dismissal. The employer clarified *any* future policy violation could result in discharge.

The claimant worked on January 8, 9 and 10, 2018, and did not complete his required documentation on all four residents as required. The claimant completed two of four required reports for both January 8 and 9, 2018. (The claimant was still technically within the 72 hour time frame to complete his January 10, 2018 documentation when discharged).

The claimant stated he did not do his documentation on January 8, 2018, because he let a trainee practice doing it. The employer asserted this employee was not far enough along in the on-the-job training to be qualified to do documentation, but rather was to shadow the claimant. On January 9, 2018, the claimant admitted he did not do his required documentation for two residents. He had no further explanation why. Upon review of the claimant's documentation and missing documentation, and in light of his final warning tendered on January 8, 2018, the employer discharged the claimant on January 12, 2018.

The administrative record reflects that claimant has received unemployment benefits in the amount of \$4,587.00, since filing a claim with an effective date of January 14, 2018. The administrative record also establishes that the employer did participate in the fact-finding interview or make a witness with direct knowledge available for rebuttal. The director of human resources participated for the employer.

REASONING AND CONCLUSIONS OF LAW:

The first issue to be addressed in this case is the effect of the confidentiality requirements of Iowa Code § 235B.6(2)(d)(4) and Iowa Code § 235B.8.

Iowa Code § 235B.8 prohibits the redissemination of dependent adult abuse information. Iowa Code § 235B.8 must be followed despite conflicting provisions of the Iowa Open Records Act (Iowa Code chapter 22), the Iowa Administrative Procedure Act (APA) (Iowa Code chapter 17A), and Iowa Employment Security Law (Iowa Code chapter 96). Iowa Code § 22.2(1)

provides: "Every person shall have the right to examine and copy a public record and to publish or otherwise disseminate a public record or the information contained in a public record."

The appeal documents, exhibits, decision, and audio recording in an unemployment insurance case would meet the definition of "public record" under Iowa Code § 22.1-3. Iowa Code § 17A.12(7) provides that contested case hearings "shall be open to the public." Under Iowa Code § 96.6(3), unemployment insurance appeals hearings are to be conducted pursuant to the provisions of chapter 17A. The unemployment insurance rules provide that copies of all presiding officer decisions shall be kept on file for public inspection at the administrative office of the department of workforce development. Iowa Admin. Code r. 871-26.17(3).

In this case, it would defeat the purpose of Iowa Code § 235B.8 of restricting redissemination to permit the confidential information to be disclosed to the general public. Therefore, the public decision in this case is issued without identifying information. A decision with identifying information will be issued to the parties; but that decision, the audio record, and any documents in the administrative file shall be sealed and not publicly disclosed.

For the reasons that follow, the administrative law judge concludes the claimant was discharged for job-related misconduct.

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).

Iowa Admin. Code r. 871-24.32(4) provides:

(4) Report required. The claimant's statement and employer's statement must give detailed facts as to the specific reason for the claimant's discharge. Allegations of

misconduct or dishonesty without additional evidence shall not be sufficient to result in disqualification. If the employer is unwilling to furnish available evidence to corroborate the allegation, misconduct cannot be established. In cases where a suspension or disciplinary layoff exists, the claimant is considered as discharged, and the issue of misconduct shall be resolved.

The employer has the burden of proof in establishing disqualifying job related 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). 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 of the administrative code definition of misconduct is on deliberate, intentional or culpable acts by the employee. *Id.*

It is the duty of the administrative law judge as the trier of fact in this case, to determine the credibility of witnesses, weigh the evidence and decide the facts in issue. *Arndt v. City of LeClaire*, 728 N.W.2d 389, 394-395 (Iowa 2007). The administrative law judge may believe all, part or none of any witness's testimony. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996). In assessing the credibility of witnesses, the administrative law judge should consider the evidence using his or her own observations, common sense and experience. *Id.* In determining the facts, and deciding what testimony to believe, the fact finder may consider the following factors: whether the testimony is reasonable and consistent with other believable evidence; whether a witness has made inconsistent statements; the witness's appearance, conduct, age, intelligence, memory and knowledge of the facts; and the witness's interest in the trial, their motive, candor, bias and prejudice. *Id.* After assessing the credibility of the witnesses who testified during the hearing, considering the applicable factors listed above, and using her own common sense and experience, the Administrative Law Judge concludes that the employer has satisfied its burden to establish by a preponderance of the evidence that the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law.

Generally, continued refusal to follow reasonable instructions constitutes misconduct. *Gilliam v. Atlantic Bottling Co.*, 453 N.W.2d 230 (Iowa Ct. App. 1990). The question of whether the refusal to perform a specific task constitutes misconduct must be determined by evaluating both the reasonableness of the employer's request in light of all circumstances and the employee's reason for noncompliance. *Endicott v. Iowa Dep't of Job Serv.*, 367 N.W.2d 300 (Iowa Ct. App. 1985).

The employer in this case has a reasonable written policy which requires employees submit written documentation within 72 hours of meeting with a resident (Employer Exhibit 6). This documentation is relied upon by the employer to complete its Medicaid billing and be paid. The credible evidence presented is the claimant was trained and knew the consequences of failing to timely submit documentation within 72 hours of visits. The claimant also worked in the capacity as a team leader, and as such, would be reasonably held to a higher standard, as he was in a leadership role. The claimant should have been setting a positive example, upholding the employer's policies and promoting the employer's best interests. The claimant had even participated in discipline of other employees on his team when they had failed to complete documentation, and could have reasonably anticipated he too, would be subject to discipline if he did not complete his documentation.

Based on the claimant's disciplinary history, he had been repeatedly disciplined for both medication administration issues and a failure to complete documentation as required (Employer Exhibit 2, 3, 4, 5). The claimant was specifically warned about documentation most recently on November 28, 2017, before his final warning on January 8, 2018, for a missing

narcotic. The claimant knew his job was in jeopardy when the warning was issued on January 8, 2018 during his shift (Employer Exhibit 8) and knew any violation of policy violation could be grounds for dismissal. This was evidenced by the claimant's clarification during the discipline meeting that "anything I do wrong" (not just medication issues) could result in discharge.

In light of his final warning on January 8, 2018, the claimant did not complete his documentation for two residents both on January 8 and 9, 2018. The claimant's explanation that he let a new trainee "practice" documentation does not negate his responsibility to ensure proper documentation for his shifts were completed. The claimant had no explanation for his failure to timely complete his January 9, 2018 documentation. The claimant has failed to provide persuasive evidence to support his non-compliance. The administrative law judge is persuaded the claimant knew or should have known his conduct was contrary to the best interests of the employer. Therefore, based on the evidence presented, the claimant was discharged for misconduct. Benefits are denied.

The final issue is whether the claimant must repay his overpayment of benefits and the employer can be relieved of charges.

Iowa Code § 96.3(7)a-b 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 § 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 § 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 states pursuant to § 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.

Because the claimant's separation was disqualifying, benefits were paid to which he was not entitled. The claimant has been overpaid benefits in the amount of \$4,587.00. 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 it 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 received benefits but was not eligible for those benefits. The employer satisfactorily participated in the scheduled fact-finding interview. Since the employer did participate in the fact-finding interview, the claimant is obligated to repay the benefits he received and the employer's account shall not be charged.

DECISION:

The February 1, 2018, (reference 01) initial decision is reversed. The claimant was discharged from employment due to job-related misconduct. Benefits are withheld until such time as he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible. The claimant has been overpaid benefits in the amount of \$4,587.00 and is obligated to repay the benefits. The employer's account is relieved of charges associated with the claim.

Jennifer L. Beckman
Administrative Law Judge

Decision Dated and Mailed

jlb/scn