

**IOWA DEPARTMENT OF INSPECTIONS AND APPEALS
ADMINISTRATIVE HEARINGS DIVISION, UI APPEALS BUREAU**

CHRISTOPHER J TOPOREK
Claimant

HY VEE INC
Employer

APPEAL 22A-UI-14371-DH-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

**OC: 05/20/22
Claimant: Respondent (2)**

Iowa Code § 96.5(2)a - Discharge for Misconduct
Iowa Code § 96.5(1) - Voluntary Quit
Iowa Code § 96.3(7) - Recovery of Benefit Overpayment
Iowa Admin. Code r. 871-24.10 - Employer/Representative Participation Fact-finding Interview
Iowa Admin. Code r. 871-24.32(1)a - Discharge for Misconduct
Iowa Admin. Code r. 871-24.1(113)c - Discharge for Violation of Rules

STATEMENT OF THE CASE:

Employer, Hy-Vee, Inc., appealed the June 15, 2022, (reference 02) unemployment insurance decision that granted benefits so long as claimant was otherwise eligible due to the record not showing the 05/20/22 dismissal was for willful or deliberate misconduct. The parties were properly notified of the hearing. A telephone hearing was held on August 4, 2022, at 10:00AM. Claimant, Mr. Christopher Toporek, failed to participate. Employer, participated through Ms. Melissa Hill, party representative, Mr. Dan Anderson, store manager, Ms. Dorrie Decker, district Store director, and Ms. Angie Danielson, pharmacy supervisor. Judicial notice was taken of the administrative file including the 15-page appeal with documents, and DBRO. Employer's Exhibit R-1 was admitted as an exhibit.

ISSUES:

Was the separation a layoff, discharge for misconduct or a voluntary quit without good cause?
Was the claimant overpaid benefits?
Should claimant repay benefits and/or charge employer due to employer participation in fact finding?

FINDINGS OF FACT:

Having heard the testimony and reviewed all of the evidence in the record, the undersigned finds:

Claimant was employed as a full-time pharmacy manager with a varied schedule. His first day of work was 08/24/21. Claimant's last day of work was 05/20/22. On 05/20/22, claimant met with Mr. Anderson and Ms. Decker where he was told he was being discharged for violations of the workplace policies, some of which could have led to injuries up to and including death. The paperwork stated conduct unbecoming. See Appeal page 7 and Exhibit R-1, page 3.

Employer has an employee handbook that contains workplace policies. See Appeal page 5 and Exhibit R-1, page 11. Claimant received a copy of the handbook on the date he was hired and had access to an electronic on the company's intranet. The policy in question states poor performance including lack of effort, focus, skills, or ability. The below events were factored in the decision to terminate claimant.

May 16, 2022, claimant was providing a consult with a patient on a drug when asked if it needed to be refrigerated and told the patient it did not need to be refrigerated. A pharmacy technician had to intervene as it did need refrigerated, claimant's response was they did not teach him that in pharmacy school. The drug needs refrigerated for drug stability and a sticker actually would have been printed and placed on the prescription. The risk in not refrigerating impacts the efficacy of the drug. Basically, weakens the effectiveness and likely delays patient recovery. See Appeal page 9 and Exhibit R-1, page 5.

May 15, 2022, claimant used his "clinical judgment" to change a prescription for antibiotics from one without steroids to one that included steroids when the patient needed a nonsteroid antibiotic. The change was caught by one of the pharmacy technicians at the time of dispensing, so the patient never actually got the wrong prescription. Claimant told employer he did so due to a shortage of the original prescription but there was no shortage as the antibiotic in question had a good stock at employer's warehouse. See Appeal pages 10-11. However, Ms. Danielson testified that "clinical judgment" relates to the pharmacist has the authority to switch a prescription from a name brand to a generic, keeping the drug the same. What happened here was an actual change in the prescription, from one without a steroid to one with a steroid. Changing a prescription is not to take place without consultation with the prescriber, which did not take place. An antibiotic fights an infection, while a steroid fights inflammation. Steroids for use in the eye (for the case at hand) is an unpleasant experience, and the prescriber determined no steroid was needed. If not caught, it would have subjected patient to additional pain/discomfort and the possible side effects of steroids and possible eye damage from the steroids.

May 15, 2022, claimant committed a HIPPA violation by releasing sensitive patient information to another patient. Claimant was directed to create an incident report but neglected to do so. Both the employer by policy and the Iowa Board of Pharmacy by rules require an incident report. See Appeal page 8 and Exhibit R-1, page 4. Ms. Danielson testified due to claimant's errors, prescriptions for patients were being delivered to the wrong patient. Therefore, when a patient received someone else's prescription(s), they have now gained knowledge of a person's name, drug prescribed, and other identifiers on the prescription label. A risk, the patient does not realize the prescription is not theirs, take the prescription, and have harm by taking the nonprescribed prescription. This happened when claimant filled out some prescriptions and bagged them all together and not by individual name and date of birth. While some errors were caught, others were not.

May 4, 2022, claimant committed a medical error in providing too many pills in a prescription, requiring an incident report which claimant failed to do so document. Both the employer by policy and the Iowa Board of Pharmacy by rules require an incident report and as of the date of termination, claimant had failed to provide an incident report. See Appeal pages 12, 13 and Exhibit R-1, pages 8, 9. Ms. Danielson testified of the negative impact of giving too many dosages of the medication and it being dependent of drug itself.

Ms. Danielson testified regarding the employer policy and Iowa Board of Pharmacy requirement of incident reporting and negative impact on employer via the Iowa Board of Pharmacy for not complying with requirements. Claimant was creating an atmosphere where the potential for patient harm was unduly high given the number of errors being made in such a short time frame.

Claimant had a previous discipline, which the act itself was not factored into the termination, but the fact he was warned as to a policy violation and as a department head and medical professional, he needed to be aware of and follow the policies was factored into the current discipline. See Appeal page 6. Claimant knew or should have known his job was in jeopardy given the prior discipline and him placing patients' safety at risk. Termination was selected due to the number of mistakes and nature of mistakes which place the safety of others at risk.

Claimant filed a claim for unemployment benefits with an original claim date of 05/22/22. His weekly benefit amount is \$531. He filed for benefits and was paid \$2,124.00 on his claim for 4 weeks beginning 05/22/22 and ending 06/18/22. The employer participated in fact finding, both through the submission of documents and in a telephone 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.

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.

Iowa Admin. Code r. 871-24.1 provides:

Definitions.

Unless the context otherwise requires, the terms used in these rules shall have the following meaning. All terms which are defined in Iowa Code chapter 96 shall be construed as they are defined in Iowa Code chapter 96.

24.1(113) *Separations*. All terminations of employment, generally classifiable as layoffs, quits, discharges, or other separations.

c. *Discharge*. A discharge is a termination of employment initiated by the employer for such reasons as incompetence, violation of rules, dishonesty, laziness, absenteeism, insubordination, failure to pass probationary period.

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. 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.

As set forth in the factfinding section, on May 16, 2022, claimant incorrectly advised a patient that the prescription they had did not need refrigerated. A pharmacy technician stepped in to advise that the drug does indeed need refrigerated. Then on May 15, 2022, claimant changed a prescription without consultation with the prescriber, calling it a "clinical judgment" which that is only switching a prescription from a name brand to a generic. The change at hand added a steroid, which placed the patient at additional pain and discomfort and exposed them to risk of harm/injury to their eye. The reason for the change was a was a shortage of the antibiotic, but in reality, employer's supply at the warehouse was more than sufficient to cover the need. Again, on May 15, 2022, was packaging filled prescriptions together but was not ensuring that the bundles packaged all belonged to the same household. As such there were multiple HIPPA violations in that a patient received the medications not just for themselves/their household but for others. This violates HIPPA in that the pharmacy disclosed patient name and prescription (other items on the pharmacy label – address, doctor, etcetera) to someone else entirely. Then, when directed to fill out an incident report, claimant failed to do so. May 4, 2022, claimant overfilled a prescription by too many extra pills. The potential harm was addressed upon for this and the other policy violations. Claimant was directed to submit an incident report. Over the next 16 days, claimant did not submit an incident report.

The employer has presented substantial and credible evidence that claimant violated workplace rules regarding conduct. Many of the rule violations placed other's safety at risk with most being caught. Some of the violations were of law (HIPPA) or of Iowa Board of Pharmacy rules. While employer classified these as performance issues and conduct unbecoming, the performance issues were also described as rule violations that jeopardized the wellbeing of others. Coupled with claimant being disciplined for a rule violation that put his own safety at issue, and claimant being told that as the department head and a medical professional that he needs to be following policies and future policy violation would cost him his job. The misconduct is disqualifying. Benefits are denied.

The next issue is whether claimant has been overpaid benefits. Iowa Code § 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.

Because the claimant's separation was disqualifying, any benefits paid on the claim would be benefits to which he was not entitled. 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 participated in the fact-finding interview through submission of documents, and they participated in a telephone fact finding interview. The employer adequately participated. Therefore, claimant was overpaid \$2,124.00 in regular unemployment benefits that is to be paid back.

DECISION:

The June 15, 2022, (reference 02) unemployment insurance decision that granted benefits so long as claimant was otherwise eligible is **REVERSED**. Claimant was discharged for misconduct on May 20, 2022. Claimant was overpaid \$2,124.00 in regular unemployment insurance benefits that are to be repaid. The employer shall not be charged as they adequately participated in factfinding. 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.



Darrin T. Hamilton
Administrative Law Judge

December 6, 2022
Decision Dated and Mailed

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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:

**Employment Appeal Board
4th Floor – Lucas Building
Des Moines, Iowa 50319
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:

**Employment Appeal Board
4th Floor – Lucas Building
Des Moines, Iowa 50319
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 adquiera 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.