

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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**JOSE P MARTINEZ**  
Claimant

**AJS OF DES MOINES INC**  
Employer

**APPEAL 16A-UI-08215-DB-T**  
**ADMINISTRATIVE LAW JUDGE  
DECISION**

**OC: 07/03/16**  
**Claimant: Respondent (2)**

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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 in Fact-finding Interviews

**STATEMENT OF THE CASE:**

The employer/appellant filed an appeal from the July 25, 2016, (reference 01) unemployment insurance decision that allowed benefits based upon claimant's discharge from employment. The parties were properly notified of the hearing. A telephone hearing was held on August 16, 2016. The claimant, Jose P. Martinez, participated personally and through an interpreter provided by CTS Language Link. The employer, AJS of Des Moines Inc., participated through Human Resources Coordinator Joan Hitzel and witness Joe Rice. Employer's Exhibits 1 – 3 were admitted.

**ISSUES:**

Was the claimant discharged for disqualifying job-related misconduct?  
Did claimant voluntarily quit the employment with good cause attributable to employer?  
Is claimant is overpaid benefits?  
Should the claimant repay benefits and/or charge employer due to employer participation in the fact finding interview?

**FINDINGS OF FACT:**

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed full time as a production technician. This employer is in the flood and water restoration business. Claimant was responsible for responding to calls for cleaning. Claimant was employed from September 24, 2015 until June 9, 2016 when he was discharged from employment.

This employer requires employees to work a rotating "on-call" week. See Exhibit 2. When emergency calls come in during non-business hours, on-call workers will be required to respond within company mandated response times. See Exhibit 2. This policy was given to the claimant and he understood that he was on-call during the weekend of June 4, 2016 and June 5, 2016.

On March 30, 2016 claimant received a written disciplinary warning for not answering calls for work while on-call over the weekend. See Exhibit 1. The written disciplinary warning further stated that you must answer all calls from the employer while the employee is on-call. See Exhibit 1. If your phone is not working, you should notify management. See Exhibit 1. You should resolve the issue as soon as possible. See Exhibit 1. The written warning further stated that any further infraction of this policy will result in disciplinary action up to and including termination of employment. See Exhibit 1.

The final incident occurred on Saturday June 4, 2016 and Sunday June 5, 2016. Claimant knew that he was one of two on-call workers during this weekend. Claimant knew prior to June 4, 2016 that his cellular telephone was not working properly because the battery was not working.

Claimant stayed at his ex-wife's home that weekend because she had a working telephone that he could use. Claimant gave his ex-wife's telephone number to another supervisor named Eric; however, Eric was not the supervisor on duty for this weekend. The schedule for weekend on-call duty is posted by the time clock for employees to review. The assigned supervisor is listed on this schedule. The assigned supervisor for this weekend was Jake Broderick. Claimant knew that Mr. Broderick was the assigned supervisor for that weekend. Claimant did not give Mr. Broderick his ex-wife's telephone number for purposes of reaching him while he was on-call even though he knew that it was his responsibility to be available to respond to on-call jobs that were placed over the weekend. Mr. Broderick called claimant on seven different occasions over the June 4 – 5, 2016 weekend for emergency jobs that needed responded to. Claimant did not answer the calls. Claimant did not call the employer over the weekend to check in to see if anyone had tried to get in contact with him.

Claimant then became ill on Monday June 6, 2016 through Wednesday June 8, 2016. Claimant did not inform the employer that he was ill and could not come to work. Claimant visited his physician and received a doctor's note for his illness excusing him from work on June 6, 2016 through June 8, 2016. Claimant reported to work on Thursday, June 9, 2016 and presented his doctor's note to Mr. Rice. Claimant was discharged for failing to work on Saturday June 4, 2016 and Sunday June 5, 2016 when he was not ill.

Claimant has received unemployment insurance benefits in the gross amount of \$1,866.00 for the weeks between July 9, 2016 and August 13, 2016. Mr. Rice participated in the fact-finding interview on behalf of the employer.

#### **REASONING AND CONCLUSIONS OF LAW:**

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

As a preliminary matter, I find that the Claimant did not quit. Claimant was discharged from employment.

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.

Iowa Admin. Code r.871-24.32(8) provides:

(8) Past acts of misconduct. While past acts and warnings can be used to determine the magnitude of a current act of misconduct, a discharge for misconduct cannot be based on such past act or acts. The termination of employment must be based on a current act.

Further, 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). 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 of the administrative code definition of misconduct is on deliberate, intentional or culpable acts by the employee. *Id.* 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). Further, 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 law limits disqualifying misconduct to substantial and willful wrongdoing or repeated carelessness or negligence that equals willful misconduct in culpability. *Lee v. Employment Appeal Bd.*, 616 N.W.2d 661 (Iowa 2000).

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 finds that Mr. Rice’s testimony is more credible than claimant’s.

Prior to his discharge claimant had received a written warning for this exact same conduct. He had failed to respond to calls placed by the employer to him while he was on-call. Claimant’s job duties included responding to emergency jobs that were placed while claimant was on-call.

Misconduct can be found when a Claimant was discharged for refusing to complete job tasks after his shift because he created the extra job tasks by working too slow. *Boyd v. Iowa Dept. of Job Serv.*, 377 N.W.2d 1 (Iowa Ct. App. 1985). Continued refusal to follow reasonable instructions constitutes misconduct. *Gilliam v. Atlantic Bottling Co.*, 453 N.W.2d 230 (Iowa Ct. App. 1990).

To establish misconduct that will disqualify employee from unemployment compensation benefits, employer must prove conduct by employee consisted of deliberate acts or omissions or evinced such carelessness as to indicate wrongful intent. Claimant admitted that he knew his telephone was not working properly prior to being on-call June 4, 2016 and June 5, 2016. Claimant intentionally stayed at his ex-wife’s home that weekend because she had a working telephone. Claimant did not give his ex-wife’s telephone number to the supervisor for that weekend. Claimant knew who the supervisor was for that weekend because it was posted with the schedule. Claimant never called the employer during the course of the weekend to confirm if anyone had tried to contact him. Claimant knew that his job duties included responding to emergency jobs that were placed over the weekend.

Further, claimant had been warned this exact same behavior in March of 2016. The final incident of failing to be available for on-call jobs over the weekend of June 4, 2016 and June 5,

2016, combined with the fact that claimant had been warned prior for violating this same policy amounts to misconduct. This was not simply one occasion of negligence but a pattern of his deliberate disregard of the employer's interests. As such, benefits must be denied.

Because benefits are denied, overpayment of benefits must be addressed.

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 state 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 § 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 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. Claimant was overpaid six weeks for benefit weeks ending 07/09/16 through 08/13/16 for a total amount of \$1,866.00. 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 received benefits but was not eligible for those benefits. Since the employer did participate in the fact-finding interview the claimant is obligated to repay to the agency the benefits he received and the employer's account shall not be charged.

**DECISION:**

The July 25, 2016, (reference 01) unemployment insurance decision is reversed. Claimant was discharged from employment for job-related misconduct. Unemployment benefits are withheld in regards to this employer until such time as he is deemed eligible. The claimant has been overpaid unemployment insurance benefits in the amount of \$1,866.00 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.

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Dawn Boucher  
Administrative Law Judge

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Decision Dated and Mailed

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