

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

ALLISON J ROBBINS
Claimant

APPEAL 23A-UI-06402-AR-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

SS THERAPY AND CONSULTING LTD
Employer

**OC: 03/26/23
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 June 23, 2023, the employer filed an appeal from the June 15, 2023, (reference 02) unemployment insurance decision that allowed benefits based upon the determination that claimant was discharged from employment without a showing of disqualifying misconduct. The parties were properly notified of the hearing. A telephone hearing was held on July 28, 2023. The claimant, Allison J. Robbins, participated, and was represented by Attorney Andrew LeGrant. The employer, SS Therapy and Consulting, Ltd., participated through Clinical Director and Owner Michelle Stewart-Sandusky, and was represented by Attorney Austin Maas. No exhibits 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 was employed full time as a clinical therapist from August 10, 2021, until this employment ended on March 30, 2023, when she was discharged.

Throughout her employment, claimant struggled to meet the employer's expectations for her performance. Specifically, the employer took issue with some of claimant's billing practices, maintenance of the electronic health records, and calendar maintenance. Claimant, at times, accidentally double-booked clients and did not ensure copays were paid at the time of service. Claimant also struggled with appropriate billing codes. She was not aware of these issues until Stewart-Sandusky issued her a performance improvement plan (PIP) on February 22, 2023. That PIP laid out expectations regarding billing, copays, and calendar maintenance for claimant.

Claimant attempted to improve her performance after the issuance of the February 22, 2023, PIP.

The employer did not see substantial improvement in claimant's performance, so on March 27, 2023, Stewart-Sandusky issued claimant another PIP. This new PIP laid out the same expectations for claimant's improved performance, and added some concerns that had arisen in the interim after Stewart-Sandusky became aware that claimant was interacting with a minor client without the consent of a parent. The client had come in for an initial assessment. Claimant asked for her age, which she stated was 16.5. Claimant asked for proof of the client's age, which she did not have. Claimant sent her home with a permission form for her parent to complete. Claimant did not complete the assessment because she determined it was inappropriate to do so. Thereafter, claimant emailed with the client and there was discussion of claimant acting as a professional reference because the client was applying for a job. Claimant had spoken with her supervisor—the person who was providing supervision for claimant's licensure—regarding whether this was appropriate; they had agreed that this was not ethically problematic. Stewart-Sandusky disagreed, and believed that claimant had crossed ethical and professional boundaries by continuing to interact with a minor client without parental consent and by discussing whether claimant could act as a reference. These concerns were included on the March 27, 2023, PIP. Claimant was given 30 days to meet performance expectations.

On March 30, 2023, claimant notified Stewart-Sandusky by text that she would not participate in a Map Day for which she had volunteered. Map Days occur once per month and require three clinicians. These are the busiest days for the employer, and the clinicians volunteer for these Map Days two months in advance. The Map Day the next Monday had been scheduled since January. Claimant told Stewart-Sandusky that she had found coverage for half the day. She also told Stewart-Sandusky that she felt their relationship had become "toxic." Claimant's failure to either participate in the Map Day or find coverage for the whole day left Stewart-Sandusky in a difficult position because of the nature of Map Days and how busy they are. Stewart-Sandusky discharged claimant on March 30, 2023, for continued failure to meet the employer's performance expectations and for the refusal to participate in Map Day. Claimant did not know that her refusal to participate in the Map Day would result in her discharge.

Claimant concluded that her relationship with Stewart-Sandusky was toxic after some months of friction between the two. Claimant generally felt uncomfortable in the office. Additionally, she had been bringing concerns to Stewart-Sandusky regarding some paychecks that had not cleared. Stewart-Sandusky responded to these concerns in an adversarial manner or ignored them. Claimant's attorney sent Stewart-Sandusky an email about one such paycheck issue on February 20, 2023. Claimant also emailed Stewart-Sandusky about additional paycheck issues on March 15, 2023, and March 24, 2023.

The administrative record indicates that claimant filed a claim for unemployment benefits with an effective date of March 26, 2023, and a reopen date of April 16, 2023. Her weekly benefit amount is \$551.00. She filed claims for benefits between April 16, 2023, and May 20, 2023. She received unemployment insurance benefits in the gross amount of \$2,755.00. The employer did not participate in the fact-finding interview due to no fault of its own. Stewart-Sandusky provided a valid phone number and was ready for the call at the appointed time, but never received the call. The fact finder called later the same day and left a message, but Stewart-Sandusky did not receive any message at any of the office phone numbers. Stewart-Sandusky followed up with Iowa Workforce Development in a timely manner to try to correct the issue, but she was never able to speak with the fact finder.

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.

The decision in this case rests, at least in part, on the credibility of the witnesses. 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, 394–95 (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, reviewing the exhibits submitted by the parties, considering the applicable factors listed above, and using her own common sense and experience, the administrative law judge finds the claimant's version of events to be more credible than the employer's recollection of those events. While there is no question that claimant was issued two PIPs for various ongoing issues, the administrative law judge is persuaded by the claimant's testimony regarding the timeline of the PIPs in relation to complaints made to Stewart-Sandusky. It is notable that these disciplinary actions were each issued within days of complaints made about paychecks failing to clear, and such a proximity in time calls into question the motivation behind the issuance of these PIPs, and ultimately, their validity.

The administrative law judge also found credible claimant's assertions that she attempted to meet the expectations laid out in the PIPs but was ultimately unable to. Failure in job performance due to inability or incapacity is not considered misconduct because the actions were not volitional. *Huntoon v. Iowa Dep't of Job Serv.*, 275 N.W.2d 445, 448 (Iowa 1979). Mere incapacity or incompetence is not disqualifying. Iowa Admin. Code r. 871—24.32(1)(a); *Eaton v. Iowa Dep't of Job Serv.*, 376 N.W.2d 915, 917 (Iowa App. 1985); *Newman v. Iowa Dep't of Job Serv.*, 351 N.W.2d 806 (Iowa 1984); *Richers v. Iowa Dep't of Job Serv.*, 479 N.W.2d 308 (Iowa 1991); *Kelly v. Iowa Dep't of Job Serv.*, 386 N.W.2d 552 (Iowa App. 1986). Where an individual is discharged due to a failure in job performance, proof of that individual's ability to do the job is required to justify disqualification, rather than accepting the employer's subjective view. To do so is to impermissibly shift the burden of proof to the claimant. *Kelly*, 386 N.W.2d 552. Since the employer agreed that claimant had never had a sustained period of time during which she performed her job duties to employer's satisfaction and inasmuch as she did attempt to perform the job to the best of her ability but was unable to meet its expectations, no intentional misconduct has been established, as is the employer's burden of proof. *Cosper*, 321 N.W.2d 6.

Finally, the administrative law judge notes that a warning for poor calendar maintenance is not similar to claimant's failure to participate in the Map Day. The administrative law judge concludes that the reason claimant was ultimately discharged is sufficiently dissimilar from the things for which she had been warned that the employer has not established repeated negligence or deliberation and is not dispositive of the issue of misconduct for the purpose of determining eligibility for unemployment insurance benefits. None of the reasons for claimant's discharge, even when taken together, constitute disqualifying misconduct. The separation is not disqualifying.

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

DECISION:

The June 15, 2023, (reference 02) unemployment insurance decision is AFFIRMED. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided the claimant is otherwise eligible. The issues of overpayment, repayment, and participation are moot.



Alexis D. Rowe
Administrative Law Judge

07/31/23
Decision Dated and Mailed

AR/jkb

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 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.