

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

<b>Claimant</b>	<b>APPEAL 17A-UI-01519-DB-T</b>
<b>Employer</b>	<b>ADMINISTRATIVE LAW JUDGE PUBLIC DECISION</b>
	<b>OC: 01/08/17 Claimant: Respondent (2)</b>

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, 2017 (reference 01) unemployment insurance decision that allowed benefits based upon claimant's separation from employment. The parties were properly notified of the hearing and a telephone hearing was held on April 11, 2017. The claimant participated personally and was represented by counsel. Two co-workers of the claimant participated as witnesses on behalf of the claimant. The employer was represented by a non-attorney representative and participated through the employer's Public Service Supervisor; Treatment Program Administrator; and Public Service Manager. Employer's Exhibits 1 - 9 were admitted. The administrative law judge 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?  
Did claimant voluntarily quit the employment with good cause attributable to employer?  
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: Claimant was employed full-time as a resident treatment worker. This employer runs a group home facility, which assist clients with disabilities with their daily living tasks. Claimant was employed from February of 2015 until January 3, 2017. Claimant was discharged from employment. Claimant's job duties involved providing direct care for clients and assisting clients with daily living tasks.

This employer has a written policy in place that states, “[n]o staff, volunteer, or contractor shall behave in an abusive or neglectful manner toward individuals.” See Exhibit 2. Physical abuse under the employer’s policy is defined as “[a]n act that causes, or may have caused injury to an individual. Physical abuse includes but is not limited to: hitting, slapping, pushing, pinching, throwing objects directed at the individual or otherwise striking an individual.” See Exhibit 2. Mental or psychological abuse under the employer’s policy includes “[a]ctions which result or may result in a negative impact on an individual’s sense of well being, safety, integrity, or self-esteem. Such abuse includes but is not limited to: [i]ntimidation; withholding attention; threat to physically harm; or taunting or harassment.” Exhibit 2. Neglect in the employer’s policy is defined as “[a]ctions or inactions that result in the failure to provide food, shelter, clothing, physical or mental health, supervisor, or any other care necessary to prevent imminent risk of or potential risk for harm or death.” Exhibit 2. Claimant received a copy of the employer’s policies listed in Exhibit 2. See Exhibit 4.

On October 10, 2016 claimant was placed on suspension pending the completion of an investigation. See Exhibit 8. Between October 10, 2016 and October 13, 2016 the employer became aware of four separate incidents involving claimant. The employer became aware of these incidents when an exit interview was conducted with a co-worker who was resigning from employment. After becoming aware of the incidents, the employer began an investigation. Employer conducted several interviews of the clients involved in the incidents as well as the claimant and other co-workers.

The first incident occurred on August 16, 2016. Claimant was in the game room with two clients and he encouraged one client to throw objects at another client. The client did throw objects at the other client and the two clients then engaged in a physical altercation. A third client witnessed the incident. All three clients reported that claimant was the person who encouraged the client to initially throw objects at the other client.

The second and third incidents each occurred on August 22, 2016. Claimant struck a client in the face causing a bruise to the client’s eye. This was confirmed by the client who was injured. Then, claimant and two other employees, conspired together to falsely report that the client was injured by another client in the home rather than by claimant. After employer’s review of the log entry notes from the home for that night, employer found it suspicious that log entries reported that no problematic issues in the home occurred between approximately 9:15 p.m. and 9:57 p.m. However, the incident report regarding the client’s injury was reported at 9:57 p.m. and stated that the injury occurred at 9:15 p.m. from one client to another client, even though the other log entries from that same period contained statements that the clients had no issues with their normal nightly routines.

The third incident on August 22, 2016 involved claimant accompanying the injured client to the medical room for treatment by a nurse. The nurse specifically recalled the claimant accompanying this injured client to the medical room for treatment. The client also reported that claimant accompanied him to the medical room. Claimant was assigned to supervise another client who required continuous one-on-one supervision that night. Claimant did not sign out this client to any other co-worker during the time he was required to be supervising this one-on-one client. Claimant left the client requiring continuous one-on-one supervision in order to accompany the injured client, who he was not assigned to supervise, to the medical room.

The fourth incident was reported by a client on September 26, 2016 and involved claimant taking personal belongings from a different client and either hiding the belongings or telling the client that his belongings had been stolen by other clients in the home. This particular client whose belongings were being taken has poor coping skills and the purpose of taking these belongings was to upset the client.

Claimant had received previous discipline during the course of employment. In June of 2016, claimant was disciplined for failing to report abusive conduct of a co-worker towards clients. See Exhibit 5. Claimant received a one-day suspension for this behavior. See Exhibit 5.

The administrative record reflects that claimant has received unemployment benefits in the amount of \$3,200.00 since filing a claim with an effective date of January 8, 2017, for eight weeks ending March 4, 2017. The administrative record also establishes that the employer did participate in the fact-finding interview.

### **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. 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.

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 the Treatment Program Administrator's testimony is more credible than claimant's testimony.

While the Treatment Program Administrator's testimony relied on hearsay statements, administrative agencies are not bound by the technical rules of evidence. *IBP, Inc. v. Al-Gharib*, 604 N.W.2d 621, 630 (Iowa 2000). A decision may be based upon evidence that would ordinarily be deemed inadmissible under the rules of evidence, as long as the evidence is not immaterial or irrelevant. *Clark v. Iowa Dep't of Revenue*, 644 N.W.2d 310, 320 (Iowa 2002). Hearsay evidence is admissible at administrative hearings and may constitute substantial evidence. *Gaskey v. Iowa Dep't of Transp.*, 537 N.W.2d 695, 698 (Iowa 1995). In considering whether specific hearsay testimony is "the kind of evidence on which reasonably prudent persons are accustomed to rely for the conduct of their serious affairs" there are five factors to be considered. *Schmitz v. Iowa Dep't of Human Servs.*, 461 N.W.2d 603, 607-08 (Iowa Ct. App. 1990)(citing Iowa Code § 17A.14(1)). Those factors include: (1) the nature of the hearsay, (2)

the availability of better evidence, (3) the cost of acquiring better information, (4) the need for precision, and (5) the administrative policy to be fulfilled. *Id.* at 608. The Treatment Program Administrator's testimony, which includes statements made by several witnesses who all confirm claimant's involvement in all four incidents, is persuasive.

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.* 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).

Claimant's job duties included following the necessary and required policies and guidelines that were in place for each client's health and safety purposes. Claimant was aware of these policies. An employer has a right to expect that an employee will not jeopardize the safety of others, especially where the claimant's job duties require them to keep the clients they are supervising safe. There is substantial evidence in the record to support the conclusion that claimant deliberately violated these rightful expectations in this case and engaged in physical, mental and psychological abuse of several clients. Claimant's actions constitute an intentional and substantial disregard of the employer's interest. Accordingly, the employer has proven claimant committed job related misconduct. Benefits are denied. Because benefits are denied, the issues of overpayment and chargeability must be addressed.

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, benefits were paid to which the claimant 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 those 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).

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 claimant received in connection with this employer's account, and this employer's account shall not be charged.

**DECISION:**

The February 1, 2017 (reference 01) unemployment insurance decision is reversed. Claimant was discharged from employment for job related misconduct. Benefits are withheld in regards to this employer until such time as claimant is deemed eligible. The claimant has been overpaid unemployment insurance benefits in the amount of \$3,200.00 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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