

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

ALONDRA MAJIN CRUZ
Claimant

APPEAL 23R-UI-01597-SN-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

DEVELOPMENTAL WELLNESS LLC
Employer

**OC: 10/23/22
Claimant: Respondent (1)**

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Admin. Code r. 871-24.32(1)a – Discharge for Misconduct
Iowa Code § 96.3(7) – Recovery of Benefit Overpayment
Iowa Admin. Code r. 871-24.10 – Recovery of Benefit Overpayment

STATEMENT OF THE CASE:

The employer, Developmental Wellness LLC, filed an appeal from the November 21, 2022, (reference 02) unemployment insurance decision that denied benefits effective October 25, 2022 based upon the conclusion she was discharged, but misconduct was not shown. The parties were properly notified of the hearing. A telephone hearing scheduled for December 27, 2022 at 8:00 a.m.

Prior to that hearing date, a new notice of hearing was sent to the parties informing them of a hearing scheduled for January 3, 2023 at 2:00 p.m. The employer participated through the employer's owner, Kyle Dahl. Administrative Law Judge Justin Dunn issued an appellate decision, 22A-UI-19326-JD-T, on the merits in the employer's favor. The claimant appealed this decision to the Employment Appeal Board ("EAB"). The EAB sent the matter back to be determined by an administrative law judge in a subsequent hearing. The EAB reasoned the claimant did not receive the notice of hearing for the January 3, 2023 hearing and so due process required a new hearing.¹

A hearing was scheduled for March 3, 2023 at 10:00 a.m. On March 1, 2023, at 10:09 a.m., attorney-at-law, Kay Osvig informed the Appeals Bureau of her appearance by email. On March 2, 2023 at 1:15 p.m., Kyle Dahl informed the Appeals Bureau that her attorney would be appearing on her behalf. On March 2, 2023 at 2:47 p.m., Administrative Law Judge Sean Nelson sent an email back to the parties regarding the proposed exhibits for the hearing. He also said a new record would be developed and that the parties should plan accordingly. The same day as the hearing, Ms. Osvig emailed a sworn affidavit written by Ms. Dahl to the Appeals Bureau and the claimant. The claimant participated personally. The employer participated through Ms. Osvig. It provided no witness testimony. Exhibits 1, 2, 3, 4, A, B, C, and D were received into the record. Official notice was taken of the agency records. The sworn affidavit was not admitted into evidence because it did not comply with Iowa Admin. Code 871-26.13 (stating that "exhibits must be sent before the hearing date.") The administrative law judge

¹ The administrative allowed Ms. Osvig to make a record regarding this issue on cross examination, but he acknowledges this was in error. The administrative law judge did not have jurisdiction to entertain whether the EAB's remand order should be vacated. Such an argument should have been made in an appeal to the EAB remand.

denied Ms. Osvig's request to take official notice of written materials submitted at factfinding because the claimant was unaware of their contents and to do so would be to violate principles of due process.

ISSUES:

Was the claimant discharged for disqualifying job-related misconduct?

Whether the claimant has been overpaid benefits? Whether the claimant is excused from repayment of benefits due to the employer's non-participation?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds:

The claimant worked for the employer as a full-time behavioral technician from April 4, 2022, until she separated from employment on October 25, 2022. The claimant's immediate supervisor was Chief Clinical Officer Kyle Dahl. The employer is a facility that addresses the needs of children with autism.

The employer provided its entire employee manual and the claimant's acknowledgement of the employee manual. (Exhibit 1)

The claimant typically worked with another behavioral technician, Savanna (last name unknown). The claimant describes her relationship with Savanna as generally good. The claimant provided copies of text messages she exchanged with Savanna from May 5, 2022 through October 17, 2022. (Exhibit A) The claimant occasionally worked with Sarah King. The claimant provided two text messages exchanged with Ms. King in August and October 2022 to show the relationship at least appeared to be cordial. (Exhibit C)

The employer provided notes generated by Ms. Dahl when she observed the claimant performing job duties on June 24, 2022, July 22, 2022, August 29, 2022, October 20, 2022, and October 24, 2022. The claimant acknowledged that Ms. Dahl could have generated these notes while observing the claimant in the performance of her duties. The claimant had not seen these notes during the time of her employment. In the notes, Ms. Dahl describes many unsatisfactory things about the claimant's performance. (Exhibit 2)

On October 25, 2022, the claimant was informed she was being terminated by Ms. Dahl. The claimant was provided a piece of paper that said she violated specific policy provisions but that she was insubordinate. Ms. Dahl did not give her specific dates of alleged insubordination or other instances of misconduct. In its written statement, the employer characterizes the behavior that led to the claimant's separation as "fraudulent, unethical, and intentional." (Exhibit 4) The employer provided a copy of interview notes and answers generated regarding an investigation into the claimant's behavior. (Exhibit 3) The employer refused to provide the name of the one who submitted the complaint. The complaint alleges the claimant refused to follow instructions and take care for specific clients. It alleges the claimant is continually distracted. It states she laughed and used profanity in front of clients. The complainant continues to describe the claimant as intimidating. She claims the work environment was permeated from "uncomfortable and negative" communication. Attached to these are additional findings by Ms. Dahl, such as an allegation the claimant refuses to comply with direction and invites insubordination from colleagues. Not one specific date of misconduct was given regarding any of this litany of vague conclusory charges.

REASONING AND CONCLUSIONS OF LAW:

The administrative law judge concludes the employer has failed to meet its burden that the claimant was discharged due to disqualifying conduct. The overpayment issue need not be analyzed because the claimant is entitled to benefits.

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.

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 Code section 96.5(2)b, c and d provide:

An individual shall be disqualified for benefits, regardless of the source of the individual's wage credits:

2. Discharge for misconduct. If the department finds that the individual has been discharged for misconduct in connection with the individual's employment:

b. Provided further, if gross misconduct is established, the department shall cancel the individual's wage credits earned, prior to the date of discharge, from all employers.

c. Gross misconduct is deemed to have occurred after a claimant loses employment as a result of an act constituting an indictable offense in connection with the claimant's employment, provided the claimant is duly convicted thereof or has signed a statement admitting the commission of such an act. Determinations regarding a benefit claim may be redetermined within five years from the effective date of the claim. Any benefits paid to a claimant prior to a determination that the claimant has lost employment as a result of such act shall not be considered to have been accepted by the claimant in good faith.

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 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. 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 result 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 licenses, 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.

Iowa Admin. Code r.871-24.32(4) and (8) provide:

(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. [Emphasis added]

(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.

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 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, 394-395 (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.*

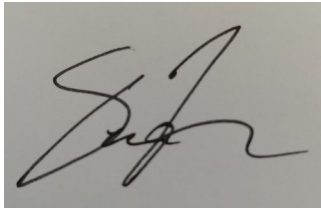
After assessing the credibility of the witnesses who testified during the hearing, reviewing the exhibits submitted by the parties, considering the applicable factors listed above, and using her own common sense and experience, the administrative law judge finds the claimant's version of events to be more credible than the employer's exhibits.

The employer has provided no final incident leading to the claimant's discharge. The employer's submissions do not provide a single date of misconduct. There are many conclusory allegations of various types leveled at the claimant. Not one of these varying families of misconduct is supported with a specific date of misconduct. This is fatal to the employer's appeal under Iowa Admin. Code r.871-24.32(4) (stating that, "Allegations of misconduct or dishonesty without additional evidence shall not be sufficient to result in disqualification.")

Some may argue that the claimant benefitted from the process in this matter. To those who make that observation, they are reminded that the employer was the appealing party in this matter and since it discharged the claimant, it also had the burden of proof. The employer refused to provide specific details regarding the specific nature of the reasons for the claimant's termination. A claimant is not expected to guess at smears leveled at her without the benefit of cross examination. Benefits are allowed, provided the claimant is otherwise eligible.

DECISION:

The November 21, 2022, (reference 02) unemployment insurance decision is AFFIRMED. The claimant was discharged due to non-disqualifying conduct. The representative's decision granting benefits shall stand in full effect. The overpayment issue is moot because the claimant is entitled to benefits.



Sean M. Nelson
Administrative Law Judge II
Iowa Department of Inspections & Appeals
Administrative Hearings Division – UI Appeals Bureau

March 6, 2023
Decision Dated and Mailed

smn/scn

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.