IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

LESLIE W CAREY Claimant **MID-STEP SERVICES INC** Employer	**APPEAL 19A-UI-10121-AW-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 12/01/19** **Claimant: Respondent (2)**

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:

Employer filed an appeal from the December 17, 2019 (reference 01) unemployment insurance decision that allowed benefits. The parties were properly notified of the hearing. A telephone hearing was held on January 16, 2020, at 11:00a.m. Claimant did not participate. Employer participated through Melissa Klein, Human Resources Coordinator. Employer's witnesses included, Laura Bos, ICF Administrator, and Karen Scroggin, Director of ICFMR Services. Employer's Exhibits 1 – 18 were admitted. Official notice was taken of the administrative record.

ISSUES:

Whether claimant was discharged for disqualifying job-related misconduct.
Whether claimant was overpaid benefits.
Whether claimant should repay those benefits and/or whether employer should be charged based upon its 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 as a full-time residential living assistant from December 23, 2001 until his employment with Mid-Step Services, Inc. ended on December 2, 2019. (Bos Testimony) Claimant worked four days per week from 6:00 a.m. until 4:00 p.m. (Bos Testimony) Claimant's direct supervisor was Amanda Fitzgerald, Residential Supervisor. (Bos Testimony) Employer provides services to individuals with intellectual disabilities. (Bos Testimony) Claimant's job duties included providing care and supervision for employer's residents. (Bos Testimony)

On November 25, 2019, claimant was supervising a resident with a puree diet restriction. (Bos Testimony) The restriction was put in place by the resident's doctor and dietician due to claimant's severe risk of choking. (Bos Testimony) Claimant was aware of the restriction because it was outlined in the resident's care plan and claimant worked with resident for approximately three years while the puree diet restriction was in place. (Bos Testimony) On

November 25, 2019, the resident obtained a peanut butter and jelly sandwich and ate it while under claimant's supervision. (Bos Testimony) Claimant noticed something in the resident's mouth, at which point claimant should have reported it to employer and performed the Heimlich maneuver, per his training. (Bos Testimony) Claimant did not report it or perform the Heimlich maneuver. (Bos Testimony) Claimant escorted the resident to her room and placed her on the toilet in the bathroom. (Bos Testimony) The resident turned blue and became unresponsive, at which time claimant should have begun CPR, per his training. (Bos Testimony) Claimant did not begin CPR. (Bos Testimony) Claimant called for help. (Bos Testimony) When another employee responded, the resident was found face down on the floor with claimant standing by. (Bos Testimony) Other employees performed CPR; the resident was transported to the hospital where she was pronounced dead. (Bos Testimony)

Employer interviewed claimant regarding the incident on November 25, 2019 and suspended claimant on November 26, 2019 pending an investigation. (Bos Testimony) Employer investigated by taking statements from all employees present. (Bos Testimony) On December 2, 2019, employer discharged claimant for gross misconduct in violating employer's safety policy resulting in the death of a resident. (Bos Testimony) Claimant had a prior warning on November 21, 2019 for a safety related issue. (Bos Testimony; Exhibit 5)

The administrative record reflects that claimant filed for and has received unemployment insurance benefits in the gross amount of $2,411.00 for benefit weeks ending December 7, 2019 through January 11, 2020. Employer was unable to participate in the fact-finding interview, because it did not receive a telephone call from the fact-finder. (Scroggins Testimony) Employer was waiting for a call to participate in the interview. (Scroggins Testimony)

REASONING AND CONCLUSIONS OF LAW:

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

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 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.

Iowa Admin. Code r. 871-24.32(1)(a) provides:

> 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 of misconduct has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. *Reigelsberger v. Emp't Appeal Bd.*, 500 N.W.2d 64, 66 (Iowa 1993); *accord Lee v. Emp't Appeal Bd.*, 616 N.W.2d 661, 665 (Iowa 2000). 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).

Claimant failed to properly supervise the resident which allowed her to eat a sandwich in violation of her puree diet restriction outlined in her care plan. Claimant failed to respond properly to the resident choking by notifying employer and performing the Heimlich. Claimant failed to respond properly to the resident becoming unresponsive by performing CPR. Claimant had a prior warning for a safety-related issue. Claimant's actions on November 25, 2019 were a willful and wanton disregard of employer's interest and a deliberate violation of the standards of behavior employer had a right to expect of claimant. Claimant was discharged for disqualifying job-related misconduct. Benefits are denied.

The next issues to be determined are whether claimant has been overpaid benefits, whether the claimant must repay those benefits, and whether the employer's account will be charged. For the reasons that follow, the administrative law judge concludes the claimant was overpaid, claimant must repay those benefits and employer's account will not be charged.

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 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.

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 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.

Claimant was overpaid benefits. The benefits were not received due to any fraud or willful misrepresentation by claimant. Additionally, employer did not participate in the fact-finding interview. Thus, claimant is not obligated to repay to the agency the benefits she received.

The law also states that an employer is to be charged if "the employer failed to respond timely or adequately to the department's request for information relating to the payment of benefits. . ." Iowa Code § 96.3(7)(b)(1)(a). Here, employer did not receive a call to participate in the fact-finding interview. Benefits were not paid because employer failed to respond timely or adequately to IWD's request for information relating to the payment of benefits. Instead, benefits were paid because employer did not receive a call to participate in the fact-finding interview. Therefore, employer cannot be charged. Because neither party is to be charged, the overpayment is absorbed by the fund.

DECISION:

The December 17, 2019 (reference 01) unemployment insurance decision is reversed. Claimant was discharged for disqualifying, job-related misconduct. Benefits are denied until claimant has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible. Claimant has been overpaid unemployment insurance benefits in the amount of $2,411.00 and is not obligated to repay those benefits to the agency. Employer did not participate in the fact-finding interview through no fault of its own; employer's account shall not be charged. The overpayment must be charged to the fund.

_____

Adrienne C. Williamson
Administrative Law Judge
Unemployment Insurance Appeals Bureau
Iowa Workforce Development
1000 East Grand Avenue
Des Moines, Iowa 50319-0209
Fax (515)478-3528

_____

Decision Dated and Mailed

acw/scn