

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

KATHLYN M SMITH
Claimant

DSM HEALTHCARE MANAGEMENT
Employer

APPEAL 17A-UI-05733-JP-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

**OC: 12/11/16
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:

The employer filed an appeal from the May 26, 2017, (reference 02) unemployment insurance decision that allowed benefits. The parties were properly notified about the hearing. A telephone hearing was held on June 16, 2017. Claimant participated. Employer participated through administrator Brodey Hanson. Official notice was taken of the administrative record, including claimant's benefit payment history, with no objection.

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 registered nurse from February 7, 2017, and was separated from employment on May 4, 2017, when she was discharged.

The employer has a progressive disciplinary policy. The policy provides that the employer may skip steps depending on the severity of the incident. Claimant was aware of the policy.

The final incident that led to discharge occurred on April 29, 2017. On April 29, 2017, at the beginning of claimant's shift, an audit was performed on the medication cart that was going to be assigned to claimant. Every medication cart is assigned to a nurse. At shift change, the outgoing nurse and the incoming nurse audit the medication cart together to verify all of the medication is accounted for and then cart is passed with keys to the incoming nurse. The medication cart is a locked cart and the only person that has access to the cart is the person

with the keys. Claimant (the incoming nurse) performed the audit with the outgoing nurse and the audit revealed there was no missing medication. Claimant signed off that all medication was present.

During claimant's shift on April 29, 2017, she gave four separate doses of liquid morphine to the same patient. Claimant did not leave her medication cart unlocked during her shift. Claimant did leave the keys to her medication cart with another nurse when she went on break and when she returned from break the keys were in the same location. Claimant did not do an audit on the medication cart before or after her break. Claimant documented that she gave the correct dosage of the morphine to the patient. Claimant did not spill any of the morphine during her shift. Claimant did not give any morphine from the patient's vial to any other person.

At the end of claimant's shift on April 29, 2017, she and the incoming nurse performed an audit on her medication cart. The audit discovered that three milliliters of liquid morphine were missing from the patient's vial. The morphine was prescribed only for one patient and is considered a controlled substance. Claimant and incoming nurse reported the missing medication to the assistant director of nursing. The assistant director of nursing reported it to the director of nursing. The director of nursing reported it to the Mr. Hanson and he ordered an investigation. The employer then conducted an investigation. The employer suspended claimant pending the outcome of the investigation. During the investigation, the employer interviewed claimant three times. Each time claimant was interviewed, she told the employer essentially the same thing. All the staff that worked were interviewed by the employer and they did not dispense the morphine. A couple of the staff told the employer that in the past, but not on April 29, 2017, they had observed claimant's cart unlocked or her keys lying around. On May 1, 2017, claimant took a drug test, which came back negative for drugs.

During the investigation, the facility and a physician determined that the patient must have been overmedicated on April 29, 2017, because every other scenario was ruled out. The patient was monitored for forty-eight hours and there was no change in the patient's behavior. Over medication of a controlled substance, including morphine, could result in serious injury or death. On May 4, 2017, the employer discharged claimant.

On April 27, 2017, the employer gave claimant a written warning. Claimant was warned that her job was in jeopardy. The written warning was for: failure to document her nurse's notes on April 24 and 25, 2017; claimant failed to properly conduct medication audits on her medication cart on April 24 and 25, 2017; and on April 26, 2017 claimant failed to notify the family and the physician about her concerns. On April 10, 2017, the employer gave claimant a verbal warning. The verbal warning was for: failure to properly wash her hands; failure to watch residents to ensure their medication was swallowed; claimant left her medication cart unlocked, out of sight, and out of reach; claimant had multiple documentation errors; and claimant did not follow the proper medication dispensing procedures.

Claimant has been a registered nurse for thirty-eight years. In claimant's thirty-eight years of nursing, she has worked with liquid morphine. Claimant had provided liquid medication from her medication cart prior to April 29, 2017. Claimant had done audits on the liquid medication before with no medication missing. Claimant testified it is important to make sure the medication cart audit is accurate to ensure accuracy in dispensing medication. Claimant testified it is important to ensure the proper dosage in the dispensing of medication to avoid potential harm to the patient, including serious injury or death.

The administrative record reflects that claimant has received unemployment benefits in the amount of \$2,320.00, since filing a claim with an effective date of December 11, 2016, for the

five weeks ending June 10, 2017. The administrative record also establishes that the employer did participate in the fact-finding interview.

REASONING AND CONCLUSIONS OF LAW:

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

It is the duty of an administrative law judge and 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, as the finder of fact, 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. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996). 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 evidence you believe; whether a witness has made inconsistent statements; the witness's conduct, age, intelligence, memory and knowledge of the facts; and the witness's interest in the trial, their motive, candor, bias and prejudice. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996).

This administrative law judge assessed the credibility of the witnesses who testified during the hearing, considering the applicable factors listed above, and used my own common sense and experience. This administrative law judge finds the employer's version of events to be more credible than claimant's recollection of those events.

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).

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). 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). 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). Generally, continued refusal to follow reasonable instructions constitutes misconduct. *Gilliam v. Atlantic Bottling Co.*, 453 N.W.2d 230 (Iowa Ct. App. 1990).

Workers in the medical or dependent care profession, reasonably have a higher standard of care required in the performance of their job duties. That duty is evident by special licensing requirements. Claimant was aware of the importance of maintaining an accurate audit of her medication cart and dispensing the proper dosage to patients. On April 29, 2017, at the end of claimant's shift, there was three milliliters missing from a patient's morphine vial on claimant's medication cart. The employer has presented substantial and credible evidence that claimant failed to properly monitor and dispense a patient's morphine on April 29, 2017 after having been warned. Claimant's conduct was contrary to the best interests of the employer and the safety of its patients. This is disqualifying misconduct. Benefits are denied.

Iowa Code section 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 she 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. 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 she received and the employer's account shall not be charged.

DECISION:

The May 26, 2017, (reference 02) unemployment insurance decision is reversed. Claimant was discharged from employment due to job-related misconduct. Benefits are withheld until such time as claimant has worked in and been paid wages for insured work equal to ten times her weekly benefit amount, provided she is otherwise eligible.

Claimant has been overpaid unemployment insurance benefits in the amount of \$2,320.00 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.

Jeremy Peterson
Administrative Law Judge

Decision Dated and Mailed

jp/rvs