

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

DOUGLAS W BILLINGSLEY
Claimant

HILLCREST FAMILY SERVICES
Employer

APPEAL 15A-UI-09301-JP-T
**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 07/19/15
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 August 10, 2015, (reference 01) unemployment insurance decision that allowed benefits. The parties were properly notified about the hearing. A telephone hearing was held on September 14, 2015. Claimant participated. Employer participated through director of the southeast mental centers Kristin Helm. The director of the human resources department Shannon Hagensten was present for the hearing on behalf of the employer. Employer Exhibit One was admitted into evidence with no objection. Claimant Exhibit A was admitted into evidence. Employer objected to the following portions of Claimant Exhibit A based on relevance: the corrective action notice on May 14, 2015, email on June 3, 2015, e-mail on April 20, 2015, best buy receipt, the Adult/Child Checklist and child checklist, and Staff Survey. The employer's objections were overruled. Claimant Exhibit B was admitted into evidence over the employer's objection for relevance.

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 an outpatient therapist from January 21, 2015, and was separated from employment on July 24, 2015, when he was discharged.

The employer has a policy that requires employees to abide by the National Association of Social Workers (NASW) code of ethics. Employer Exhibit One. Employees needed to avoid conflicts of interest to avoid any litigation for the employer from the clients and to avoid

negatively impacting the clients. Claimant was aware of this requirement. The employer also has a disciplinary policy that starts with a verbal warning, then a written corrective action, followed by possible termination. Claimant is a licensed social worker. Ms. Helm was claimant's direct supervisor.

On June 23, 2015, claimant had a meeting with Ms. Helm to discuss several of his cases. They discussed a case where claimant had a mother as a current client and the child of the mother was going to come to the employer for possible services. They discussed whether this would create a dual role representation and a conflict of interest if claimant provided services to the child. They reviewed the NASW code of ethics and its application to these situations. It was discussed that claimant would not proceed with seeing the child to avoid any conflicts of interest. Ms. Helm told claimant he was not to see the child and that a new therapist that was to start soon would see that child. Ms. Helm testified she warned claimant not to proceed with any more cases that add dual relationships. After this meeting, claimant met with the child and handled the child's intake. Claimant also met with the mother during the child's intake. Claimant testified the mother said she would no longer want any services if that would allow her child to see claimant. Claimant did not properly follow the code of ethics and document his termination of services for the mother. Claimant did not properly discharge the mother from services.

On July 13, 2015, claimant met again with Ms. Helm to review his cases and concerns about any conflicts of interest. Ms. Helm discovered on July 13, 2015, that after their June 23, 2015 meeting claimant met with the child on June 23, 2015 and another occasion. Claimant told Ms. Helm that that seeing the child was no longer a concern because mother discontinued her services. Ms. Helm reviewed the mother's file and it was not documented that mother discontinued services or had been referred to another therapist. Ms. Helm testified the code of ethics clearly states that when a relationship is terminated with a client, the client needs to be properly referred to another therapist and the termination needs to be properly documented. Ms. Helm expressed concerns about claimant seeing the child after their discussion. Ms. Helm testified claimant told her that he had forgotten about the conflict. Ms. Helm instructed claimant to review the code of ethics about the next steps they should take. Ms. Helm told claimant they would discuss the next steps at their next meeting. Claimant then saw the child for another session on July 21, 2015.

Claimant was terminated on July 24, 2015, for failure to follow instructions, conduct that was detrimental the agency, and conduct detrimental to the client. Ms. Helm testified that the code of ethics requires therapists to avoid a dual relationship whenever possible.

On May 18, 2015, claimant was given a written professional development plan. Employer Exhibit One. This was a part of claimant's probationary period. Ms. Helm testified this also acted as a corrective action (written warning). This plan outlined areas of concern the employer had with claimant's performance; "possible conflict of interest arising when [claimant is] providing individual services to couples." Employer Exhibit One. Claimant was given a plan of action in the professional development plan and his probation was extended for another sixty days. Employer Exhibit One. Claimant was told that further infractions may result in further discipline, including discharge. Employer Exhibit One. Ms. Helm testified she had several discussions with claimant about concerns with conflicts of interest. Ms. Helm testified that claimant had multiple clients that had a potential to result in dual relationships, thus creating a possible conflict of interest.

The administrative record reflects that claimant has received unemployment benefits in the amount of \$1710.00, since filing a claim with an effective date of July 19, 2015, for the eight

weeks ending September 12, 2015. 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 reviewed the exhibits submitted by both parties. This administrative law judge finds the employer's version of events to be more credible than claimant's recollection of those events.

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).

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). 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).

Workers in the medical or social work 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 a licensed social worker providing services to the employer's clients. Prior to June 23, 2015, claimant received a written professional development plan from the employer. Employer Exhibit One. This plan outlined the employer's concerns with claimant's performance as of May 18, 2015; specifically, the employer was concerned with claimant's "possible conflict of interest arising when [he provides] individual services to couples." Employer Exhibit One. As a result of this plan and the outlined concerns, claimant's probation was extended another sixty days and he was told that further violations may result in termination. Employer Exhibit One. Then on June 23, 2015, claimant met with Ms. Helm to discuss his cases and any possible conflicts of interest. One case in particular, claimant's current client (a mother) and a possible new client (the mother's son), was discussed. After discussing this situation, Ms. Helm, claimant's direct supervisor, had enough concerns about a possible dual relationship creating a conflict of interest, she told claimant not to see the child. Claimant agreed that this sounded like a good plan. Employer Exhibit One. However, claimant immediately ignored this directive by his direct supervisor and meet with the child on June 23, 2015. Claimant's argument that the mother agreed to terminate her services being provided by claimant is not persuasive. The mother did not agree to this until after claimant had already started meeting the child and conducting the child's intake. At this point, claimant was already establishing a relationship with the client (ignoring his direct supervisor's instructions) without having terminated his relationship with the mother. This caused a potential conflict of interest, put the employer at risk for litigation, and also put the mother and the child's interests at risk. Claimant then met with the child on one more occasion before his next meeting with Ms. Helm on July 13, 2015. After the July 13, 2015 meeting, claimant again met with the child. Claimant's other argument that he did not believe it was a conflict of interest to provide services to the child is also unpersuasive. Claimant testified the mother requested to terminate her relationship with claimant, yet claimant did not document this request, and did not follow any procedure to properly discharge the mother. Furthermore, even if it was not a conflict of interest, on June 23, 2015, claimant was given a clear directive from his direct supervisor to not see the child to avoid any possibility of a conflict of interest. Claimant not only ignored this directive, but he met with the child the same day as Ms. Helm gave him the directive.

The employer has presented substantial and credible evidence that claimant did not avoid a potential conflict of interest after having been told not to meet with the child and after having

been previously warned about avoiding possible conflicts of interest. Employer Exhibit One. This is disqualifying misconduct.

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.

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 § 96.8, subsection 5.

b. (1) 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 § 96.8, subsection 5. 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 § 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. The employer shall not be charged with the benefits.

(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 states pursuant to § 602.10101.

871 IAC 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 § 96.6, subsection 2, means submitting detailed factual information of the quantity and quality that if un rebutted 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 § 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 § 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 § 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 § 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 § 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 he 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 he received and the employer's account shall not be charged.

DECISION:

The August 10, 2015, (reference 01) unemployment insurance decision is reversed. The claimant was discharged from employment due to job-related misconduct. Benefits are withheld until such time as he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible.

The claimant has been overpaid unemployment insurance benefits in the amount of \$1710.00 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

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