

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

ANGELA L MILLER
Claimant

S T L CARE COMPANY
Employer

APPEAL 16A-UI-04209-JP
**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 03/13/16
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 March 29, 2016, (reference 01) unemployment insurance decision that allowed benefits. The parties were properly notified about the hearing. An in-person hearing was held on June 22, 2016, at 4444 1st Avenue Northeast, Lindale Mall, Cedar Rapids, Iowa. Claimant did not participate. Employer participated through facility administrator, Andrew Wagg, and assistant director of nursing, Jaycie Bock. Employer Exhibit One was admitted into evidence with no objection. Official notice was taken of the administrative record of claimant's benefit payment records.

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 restorative care nurse from April 26, 2001, and was separated from employment on March 14, 2016, when she was discharged.

The employer does long term care and short term rehab. The residents rely on claimant for their basic needs. All employees receive an employee handbook. The handbook discusses insubordination that calls for immediate termination.

On March 10, 2016, claimant was working her scheduled shift. Claimant's job duties for March 10, 2016 had been changed from restorative nurse to floor nurse. The change was made because of personnel issues, which was not an uncommon occurrence. Claimant's

normal duties include being on the floor. Claimant was working at the same time as Ms. Bock. Claimant came off the elevator and in a loud and angry voice stated to Ms. Bock, "Why didn't anyone tell me I was on the floor today?" Employer Exhibit One. Ms. Bock explained to claimant that her assignment was changed late in the evening and the employer did not feel it was necessary to contact claimant. Employer Exhibit One. Claimant then asked Ms. Bock in an angry tone if she would try to replace her on the schedule from 2:00 p.m. to 6:00 p.m. on the floor; a shift claimant had previously volunteered for. Employer Exhibit One. Ms. Bock stated she would try to replace claimant. Employer Exhibit One. Approximately five minutes later, one of claimant's subordinates asked claimant a question and claimant rudely responded, "I don't know, you guys would know better than me." Employer Exhibit One. Claimant was responsible for giving her subordinates guidance. Claimant then worked the assignment she had been reassigned too. At around 2:30 p.m., claimant again approached Ms. Bock in a public area and loudly and angrily asked her, "Did you even try to replace me at 2?" Employer Exhibit One. Claimant then stated, "another nurse looked at your book and told me I'm on the floor tomorrow. Is that true? Aren't you here tomorrow?" Employer Exhibit One. Ms. Bock responded that she had tried to replace her and that she was working tomorrow. Employer Exhibit One. Ms. Bock also listed the other nurses on the floor and that there was still an open shift to be filled. Employer Exhibit One. Claimant then loudly stated, "Well if you don't need me in restorative, I'll just work my other job!" Employer Exhibit One. Ms. Bock stated she would let claimant know. Employer Exhibit One.

Ms. Bock felt claimant's conduct was rude and disrespectful and it occurred in front patients, family members of the patients, and other staff. Ms. Bock also supervises the other staff. Ms. Bock was claimant's direct supervisor. Claimant's conduct was not necessary. Claimant could have approached Ms. Bock in a private manner if she did not like her assignment.

Ms. Bock made a complaint to the employer. Mr. Wagg interviewed claimant. Claimant denied being rude, demanding, and uncooperative. Employer Exhibit One. Claimant stated, "well I guess I won't talk to her at all then." Employer Exhibit One. Claimant's demeanor during the interview was argumentative. Claimant was asked if she had another job that Mr. Wagg was unaware of. Claimant stated yes, she was working for a staffing agency. Mr. Wagg asked claimant if she had an issue working the floor. Claimant responded she did not like to and wanted to know in advance. Claimant stated if she was going to work the floor, she would rather work her other job.

On March 14, 2016, Mr. Wagg and Alexis Benion met with claimant. During the meeting, the employer reviewed the incident and as a result of the prior complaints and warnings, the employer decided to discharge claimant.

Claimant was given a written warning on January 20, 2016. Employer Exhibit One. The warning was a result of multiple complaints of claimant being rude to staff on January 19, 2016. Employer Exhibit One. In one specific incident, one of claimant's subordinate felt "beyond little" and unappreciated because of claimant's conduct. Employer Exhibit One. Prior to giving the warning, the employer investigated the incident. Employer Exhibit One. Claimant was warned that her job was in jeopardy and further incidents of rudeness may result in discharge. Employer Exhibit One.

Claimant was given a performance evaluation review on December 3, 2015. Employer Exhibit One. Claimant was instructed that the employer would like to see her "work on her customer service skills with her co-workers. More friendly, positive [and] motivating." Employer Exhibit One.

The administrative record reflects that claimant has received unemployment benefits in the amount of \$463.00, since filing a claim with an effective date of March 13, 2016, for the one week(s) ending March 19, 2016. 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.

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). 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).

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 and the resident's reliance on them for their basic needs. Claimant had been warned about her conduct with coworkers on January 20, 2016. Employer Exhibit One. Claimant was warned that further incidents could result in discharge. Employer Exhibit One. Claimant was also given a written performance evaluation that stated she needed to improve her internal customer service. Employer Exhibit One.

On March 10, 2016, despite claimant's prior warning and performance evaluation, she was rude and disrespectful to her direct supervisor, Ms. Bock, on two separate occasions. Claimant was rude and disrespectful in a public area, which could have been observed by staff, residents, or family members of residents. Claimant was upset that her assignment had changed without her getting advanced notice. Claimant's assignment was changed to something that was still part of her normal job duties. Furthermore, changing of assignments was not uncommon at the employer.

The employer has presented substantial and credible evidence that claimant was rude and disrespectful to her direct supervisor in a public area after having been warned. This is disqualifying misconduct.

Iowa Code § 96.3-7, 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) 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. 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. 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 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 March 29, 2016, (reference 01) unemployment insurance decision is reversed. Claimant was discharged from employment due to job-related misconduct. Benefits are withheld until such time as she 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 \$463.00 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/pjs