

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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**TRACEY L FUCALORO**  
Claimant

**APPEAL NO. 14A-UI-09289-SWT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**JEFFREY A HAGAN DDS PLC**  
Employer

**OC: 07/27/14**  
**Claimant: Respondent (2)**

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Section 96.5-2-a – Discharge  
Section 96.3-7 – Overpayment of Benefits

**STATEMENT OF THE CASE:**

The employer appealed an unemployment insurance decision dated August 28, 2014, reference 01, that concluded the claimant's discharge was not for work-connected misconduct. A telephone hearing was held on September 23, 2014. The parties were properly notified about the hearing. The claimant failed to participate in the hearing. Jeffrey Hagan participated in the hearing on behalf of the employer with a witness, Tracy Ford. Exhibits One and Two were admitted into evidence at the hearing.

**ISSUE:**

Was the claimant discharged for work-connected misconduct?  
Was the claimant overpaid unemployment insurance benefits, which must be repaid?  
Is the employer subject to charge for benefits paid?

**FINDINGS OF FACT:**

The claimant worked full time for the employer as a dental assistant from September 5, 2000, to July 17, 2014. The claimant was informed and understood that under the employer's work rules, regular attendance was required and employees were required to notify the employer if they were not able to work as scheduled. She had received repeated warnings about her excessive unexcused absenteeism.

On July 2, 2013, the claimant failed to report to work and failed to notify the employer that she would not be at work. After being contacted by the employer, she reported to work an hour late in a disheveled condition. The owner, Jeffrey Hagan, later determined she was hung over after times where she fell asleep while she was in the room with dental patients. She was sent home. On July 8, 2013, she received a written warning for her lateness, substantial work quality, and unfitness for duty on July 2. The claimant continued to report late for work. She was counseled on November 18 about her poor work performance, competence, and mental issues that was the result of personal issues.

The claimant was on vacation after July 17, 2014. Her first day back was to be July 28. She did not report to work and did not notify the employer about her absence, which was due to her binge drinking and abusing drugs. Employees tried calling the claimant, but she did not answer. Out of concern, the claimant's sister was called. She went to the claimant's house and found that she had been drinking and taking pills and was unfit for work. Hagan called the claimant that evening and found her sluggish and out of it. He did not think she would be able to competently work the next day so he told her to come in to talk at the end of the day on July 29.

When the claimant came in on July 29, Hagan discharged her for her failure to report to work or call in and her poor performance that were the result of her personal issues, which included substance abuse. The claimant did not tell Hagan that her absence on July 28 was due to legitimate physical illness or she had seen a doctor regarding any illness.

The claimant filed for and received a total of \$1,504 in unemployment insurance benefits for the weeks between July 27 and August 23, 2014.

Both the claimant and the employer actively participated the fact-finding interview on August 27, 2014.

#### **REASONING AND CONCLUSIONS OF LAW:**

The first issue in this case is whether the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law.

The unemployment insurance law disqualifies claimants discharged for work-connected misconduct. Iowa Code § 96.5-2-a. The rules define misconduct as (1) deliberate acts or omissions by a worker that materially breach the duties and obligations arising out of the contract of employment, (2) deliberate violations or disregard of standards of behavior that the employer has the right to expect of employees, or (3) carelessness or negligence of such degree of recurrence as to manifest equal culpability, wrongful intent or evil design. 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 misconduct within the meaning of the statute. 871 IAC 24.32(1).

The claimant's conduct on July 28, 2014, was a willful and material breach of the duties and obligations to the employer and a substantial disregard of the standards of behavior the employer had the right to expect of the claimant. She had been warned about similar conduct in the past. The evidence does not establish the claimant was suffering from a legitimate illness on July 28 or that her failure to notify the employer was for legitimate cause. Work-connected misconduct as defined by the unemployment insurance law has been established in this case.

The unemployment insurance law generally requires benefits be recovered from a claimant who receives benefits and is later denied benefits even if the claimant acted in good faith and was not at fault. But a claimant is not required to repay an overpayment when an initial decision to award benefits on an employment-separation issue is reversed on appeal if two conditions are met: (1) the claimant did not receive the benefits due to fraud or willful misrepresentation, and (2) the employer failed to participate in the initial proceeding that awarded benefits. In addition, if a claimant is not required to repay an overpayment because the employer failed to participate in the initial proceeding, the employer's account will be charged for the overpaid benefits. Iowa Code § 96.3-7-a, -b.

The claimant received benefits but has been denied benefits as a result of this decision. The claimant, therefore, was overpaid \$1,504 in benefits.

Because the employer participated in the fact-finding interview, the claimant is required to repay the overpayment and the employer's account will not be charged for benefits.

**DECISION:**

The unemployment insurance decision dated August 28, 2014, reference 01, is reversed. The claimant is disqualified from receiving unemployment insurance benefits until she has been paid wages for insured work equal to ten times her weekly benefit amount, provided she is otherwise eligible. The claimant was overpaid \$1,504 in benefits, which she is required to repay.

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Steven A. Wise  
Administrative Law Judge

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Decision Dated and Mailed

saw/pjs