

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

68-0157 (9-06) - 3091078 - EI

**MISTY D WIESE**  
Claimant

**APPEAL NO: 18A-UI-09368-JC-T**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**RECOVER HEALTH SERVICES LLC**  
Employer

**OC: 08/05/18  
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 30, 2018, (reference 01) unemployment insurance decision that allowed benefits. The parties were properly notified about the hearing. A telephone hearing was held on September 26, 2018. The claimant did not respond to the notice of hearing to furnish a phone number with the Appeals Bureau and did not participate in the hearing. The employer participated through Maggie Linale, administrator

The administrative law judge took official notice of the administrative records including the fact-finding documents. Based on the evidence, the arguments presented, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

**ISSUES:**

Was the claimant discharged for disqualifying job-related misconduct?  
Did the claimant voluntarily quit the employment with good cause attributable to the employer?  
Has the claimant been overpaid any unemployment insurance benefits, and if so, can the repayment of those benefits to the agency be waived?  
Can any 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: The claimant was employed full-time as a home health aide and was separated from employment on August 8, 2018, when she was discharged.

The claimant's role included visiting the homes of the employer clients, to provide assistance with bathing and transport, as well as perform light housekeeping duties. Each client had a specified care plan, located in their home and on the employer's computer system. Each shift, the claimant would have the client sign off on her care plan sheet. The employer in turn would

rely upon the care plan sheet to both pay the claimant and bill insurance. When the claimant was hired, she received training on employer policies related to care plans and other matters. Prior to discharge, the claimant had received a warning in August 2017 for being "rough" with a client and rushing with them. She also received another warning for being observed sitting at a client's dining table on her cell phone, rather than provide care.

On July 31, 2018, the employer received a complaint that the claimant had requested to use a client's truck to move. This violated the employer's rules regarding boundaries. The claimant denied requesting the truck but was issued a verbal warning on August 2, 2018. The claimant then called the client in question and "bullied" them, asking who reported her to the employer.

On August 2, 2018, the employer received a complaint from a nurse who tours the client homes. The nurse reported the client, G.A., had raised concerns of the claimant not performing her care duties but having the client sign off as completing them. The client reported the claimant refusing to do certain housekeeping tasks and saying:

"I can't vacuum for you, because other people walk on this floor."

"I can't do the dishes because there are other people's dishes in the sink."

"I can't take out the trash because it contains other people's trash".

The claimant was interviewed by Ms. Linale on August 3, 2018, and suspended pending investigation. The claimant denied the conduct at the time, stating the client and her husband were lying. As part of her investigation, Ms. Linale then called multiple clients for the claimant. When G.A. was called, Ms. Linale was informed she was fearful of reporting the claimant. Client, S.E., reported the claimant had been acting "very differently" lately and told the client if she had a housekeeping service as they did, the house would not be so messy. Another client, A.B., reported the claimant refused to perform services such as cleaning the toilet. Ms. Linale also interviewed other home health care aides who shared clients with the claimant. In addition, she reviewed the claimant's care plan sheets reflecting she had signed off on completing duties.

Based upon Ms. Linale's investigation, she concluded that at least 25 times, the claimant had stated she had performed services (specifically changing linens and cleaning the bedroom for G.A.) but had not actually performed the tasks as represented. As a result of the claimant's falsification, the employer ultimately had to pay back insurance companies for services that had been billed but not performed. The claimant was subsequently discharged.

The administrative record reflects that claimant has received unemployment benefits in the amount of \$2358.00, since filing a claim with an effective date of August 5, 2018. The administrative record also establishes that the employer did not participate in the August 29, 2018 fact-finding interview or make a witness with direct knowledge available for rebuttal.

Cicely Sherrod, claims analyst for Thomas and Company, the employer's unemployment vendor, was called and a voicemail was provided for Ms. Sherrod. She did not respond. There is no evidence that the employer attempted to submit written participation in lieu of attending the fact-finding interview. Ms. Sherrod did not attend the hearing to explain why she did not respond to the call or voicemail for the fact-finding interview. The employer witness had no information available about Ms. Sherrod's participation.

#### **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.

Iowa Code section 96.5(2)a provides:

An individual shall be disqualified for benefits, regardless of the source of the individual's wage credits:

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:

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).

In an at-will employment environment, an employer may discharge an employee for any number of reasons or no reason at all if it is not contrary to public policy, but if it fails to meet its burden of proof to establish job related misconduct as the reason for the separation, it incurs potential liability for unemployment insurance benefits related to that separation. The employer has the burden of proof in establishing disqualifying job misconduct. *Cosper v. Iowa Department of Job Service*, 321 N.W.2d 6 (Iowa 1982). The issue is not whether the employer made a correct decision in separating claimant, but whether the claimant is entitled to unemployment insurance benefits. *Infante v. IDJS*, 364 N.W.2d 262 (Iowa App. 1984). What constitutes misconduct justifying termination of an employee and what misconduct warrants denial of unemployment insurance benefits are two separate decisions. *Pierce v. IDJS*, 425 N.W.2d 679 (Iowa App. 1988). Misconduct serious enough to warrant discharge is not necessarily serious enough to warrant a denial of job insurance benefits. Such misconduct must be "substantial." *Newman v. Iowa Department of Job Service*, 351 N.W.2d 806 (Iowa App. 1984). The focus is on deliberate, intentional, or culpable acts by the employee. See *Gimbel v. Employment Appeal Board*, 489 N.W.2d 36, 39 (Iowa Ct. App. 1992).

It is the duty of the administrative law judge as 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 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. *Id.* 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 believable evidence; whether a witness has made inconsistent statements; the witness's appearance, conduct, age, intelligence, memory and knowledge of the facts; and the witness's interest in the trial, their motive, candor, bias and prejudice. *Id.* Assessing the credibility of the witnesses and reliability of the evidence in conjunction with the applicable burden of proof, as shown in the factual conclusions reached in the above-noted findings of fact, the administrative law judge concludes that the employer has satisfied its burden to establish by a preponderance of the evidence that the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law.

Honesty is a reasonable, commonly accepted duty owed to the employer. Reporting time on one's timecard when one is not working is theft from the employer. Theft from an employer is generally disqualifying misconduct. *Ringland Johnson, Inc. v. Hunecke*, 585 N.W.2d 269, 272 (Iowa 1998). In *Ringland*, the Court found a single attempted theft to be misconduct as a matter of law.

In this case, the employer presented credible, undisputed evidence that the claimant repeatedly refused to perform job duties related to housekeeping tasks but documented she had completed them. In turn, this resulted in client complaints, and the claimant being paid for work not performed. Ms. Linale's investigation of the claimant's conduct based upon complaints was thorough, and included interviewing the claimant, multiple clients, other co-workers, and auditing time cards, and led to the conclusion that the claimant misrepresented performing tasks she did not complete. Based on the evidence presented, the claimant deliberately disregarded the employer's interest and knowingly violated company policy and reasonable expectations of truthfulness. The administrative law judge is persuaded the claimant knew or should have known her conduct was contrary to the best interests of the employer. Therefore, based on the evidence presented, the claimant was discharged for misconduct, even without prior warning. Benefits are denied.

The claimant received benefits but has been denied benefits as a result of this decision. The claimant, therefore, was overpaid benefits in the amount of \$2358.00. The unemployment insurance law 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. However, a claimant will not have 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 section 96.3(7)a, b.

The employer failed to participate in the fact-finding interview and did not provide evidence that it was due to Agency or Postal Service error. Therefore, the employer cannot be relieved of charges. Because the claimant did not receive benefits due to fraud or willful misrepresentation

and the employer failed to participate in the fact-finding interview, the claimant is not required to repay the overpayment, and the employer remains subject to charge for the overpaid benefits.

**DECISION:**

The August 30, 2018, (reference 01) decision is reversed. The 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. The claimant has been overpaid benefits in the amount of \$2358.00 but does not have to repay the benefits. The employer's account cannot be relieved of associated charges because it failed to satisfactorily participate in the fact-finding interview.

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Jennifer L. Beckman  
Administrative Law Judge

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Decision Dated and Mailed

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