

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**KAYLA LOGAN**  
Claimant

**APPEAL NO: 18A-UI-09586-JC-T**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**THE UNIVERSITY OF IOWA**  
Employer

**OC: 08/26/18**  
**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 September 12, 2018, (reference 01) unemployment insurance decision that allowed benefits. The parties were properly notified about the hearing. A telephone hearing was held on October 3, 2018. The claimant participated personally. The employer participated through benefits specialist Mary Eggenburg. Dana Upton, nurse manager, also testified. Employer Exhibit 1 was admitted into evidence.

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?  
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 is a registered nurse (RN), was employed full-time as a staff nurse at the Children's Hospital, and was separated from employment on August 28, 2018, when she was discharged (Employer Exhibit 1).

When the claimant was hired, she was trained on employer rules and procedures, the employer's code of conduct, and confidentiality/HIPAA laws. The employer prohibits the sharing of patient information to employees who are not assigned to a patient. For example, the claimant was not supposed to talk about a pediatric patient to another nurse in another department, if that nurse was not also responsible for the patient's care. The employer also has

rules requiring professional communications/conduct, and prohibits falsification of documents (Upton testimony).

The claimant was discharged without prior warning following an investigation of the claimant's conduct during the period of August 1 through August 21, 2018. Following a report from another nurse, who worked in the operating room, the employer reviewed the claimant's use of the employer's Voalte messaging system. The Voalte system is a text messaging application, allowing employees and doctors to communicate directly. The application is loaded on to an employer cellphone, which is assigned to an employee during their shift. (The employee does not take it home.) A review of the claimant's Voalte usage revealed approximately 4,000 messages sent and received with the claimant over a three week period. The claimant worked approximately 36 hours each week. The employer categorized several of the messages to be unprofessional, inappropriate and in violation of HIPAA. Specifically, at the hearing, the employer cited to three messages, which referenced the claimant's actions and feelings while being in the restroom, one telling a co-worker to make her "damn baby stop alarming" and another in which she stated a patient's name and diagnosis to a nurse who was not assigned to him.

The complaint from the co-worker alleged she (the co-worker) was struggling to get her work done due to so many messages being sent from the claimant. As a result, the employer also reviewed the claimant's work and confirmed the claimant had falsified a medical document on August 21, 2018, in which she documented completing a physical assessment on a patient. Upon reviewing video footage, the employer concluded the claimant had not in fact completed the assessment, which should have included inspecting the patient physically, from head to toe, using her stethoscope to verify certain functions, and speak to the patient.

The claimant agreed she had exchanged messages frequently at work using Voalte that were both professional and personal. She opined that the number of messages was inflated based upon her "texting style" of sending short messages rather than lengthy sentences. She also stated other employees often sent messages of similar nature to her.

With respect to the physical assessment, the claimant offered conflicting statements, first acknowledging she knew the physical assessment had not been done on the patient, and then stating she had done a visual inspection of the patient and asked questions, which she believed to be sufficient based upon her orientation. The undisputed evidence is that a physical assessment cannot be completed solely on physically looking over a patient or speaking to them. Based upon the employer findings, she was discharged.

The administrative record reflects that claimant has received unemployment benefits in the amount of \$1,868.00, since filing a claim with an effective date of August 26, 2018. The administrative record also establishes that the employer did not participate in the September 11, 2018, fact-finding interview or make a witness with direct knowledge available for rebuttal. Ms. Eggenburg submitted documentation in lieu of attending, in advance of the interview. The documentation included a cover letter, the reason for discharge, and discharge letter (See fact-finding documents/administrative record). No applicable employer policies, investigative reports, copies of messages or witness statements were included.

#### **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). Administrative agencies are not bound by the technical rules of evidence. *IBP, Inc. v. Al-Gharib*, 604 N.W.2d 621, 630 (Iowa 2000). A decision may be based upon evidence that would ordinarily be deemed inadmissible under the rules of evidence, as long as the evidence is not immaterial or irrelevant. *Clark v. Iowa Dep't of Revenue*, 644 N.W.2d 310, 320 (Iowa 2002). Hearsay evidence is admissible at administrative hearings and may constitute substantial evidence. *Gaskey v. Iowa Dep't of Transp.*, 537 N.W.2d 695, 698 (Iowa 1995).

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.

In this case, the claimant, a registered nurse, was discharged based upon her conduct between August 1 through August 21, in which she participated in sending or receiving 4,000 text messages, and also falsified a document representing that she had performed a physical assessment on a patient when she had not. The credible evidence presented is that the claimant through her training with the employer and her education as a registered nurse would be aware of both the requirements to complete a physical assessment on a patient, and also the importance of confidentiality / HIPAA laws.

The claimant did not dispute that she participated in text messages, but suggested the number of messages were inflated due to her short style of text messaging. If the claimant worked 36 hours each week, and participated in 4,000 messages in three weeks, she received or sent approximately 37 messages an hour during her shifts. Recognizing that employees may exchange an occasional personal, non-work related message between each other that was not the case here. The claimant's frequent messaging obviously distracted her from her duties as a nurse with pediatric patients, but also as reported by her co-worker, disrupted others employees from completing their job duties, based upon the frequent interruptions. The frequency of the messages alone is concerning, but also were the contents of the messages. The employer supplied a small sampling of messages at the hearing which were blatantly unprofessional, discussing personal activities in the restroom and referring to a "damn baby".

In addition, besides frequently text messaging her peers through the Voalte system, the credible evidence presented is that the claimant during this same period, also falsified her documentation of a patient, indicating she had completed a physical assessment of a patient on August 21, 2018, when she in fact had not. The administrative law judge did not find the claimant's testimony that she thought a look over and talking to the patient was an appropriate assessment to be credible. A physical assessment by name, would suggest the patient's physical body is actually checked by a trained professional. The administrative law judge is

persuaded that based upon the claimant's training as a registered nurse and through employment that she knew a physical assessment was incomplete if done verbally only.

Honesty is a reasonable, commonly accepted duty owed to the employer. Further, it cannot be ignored that the purpose of the claimant's assessment and documentation was directly related to the pediatric patient's care. Her failure to complete the assessment and misrepresentation could have had caused significant harm to the patient. Based on the evidence presented, 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 next issue is whether the claimant must repay the benefits she received.**

Iowa Code § 96.3(7)a-b 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 § 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 § 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 states pursuant to § 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 claimant has been overpaid benefits in the amount of \$1,868.00. 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 it did participate in the fact-finding interview. Iowa Code § 96.3(7), Iowa Admin. Code r. 871-24.10.

In this case, the employer elected in advance to participate in writing. The rules emphasize that 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.

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. 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. See Iowa Admin. Code r. 871-24.10. The employer in this case provided a short summary and termination letter only. The employer did not furnish any of the policies or code of conduct provision for which the claimant was discharged, or any other details. Accordingly, the administrative law judge concludes the employer failed to satisfactorily participate in the fact-finding interview. Therefore the claimant is not required to repay the benefits she received and the employers' account cannot be relieved of charges.

**DECISION:**

The September 12, 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 \$1,868.00 but does not have to repay the benefits. The employer's account is not relieved of 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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