

**IN THE IOWA ADMINISTRATIVE HEARINGS DIVISION
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

BETHENE ZAHNER
Claimant

CROTHALL HEALTHCARE INC
Employer

APPEAL 24A-UI-01896-PT-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

**OC: 01/21/24
Claimant: Respondent (2)**

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Code § 96.3(7) – Overpayment of Benefits
Iowa Admin. Code r. 871-24.10 – Employer Participation in Fact-finding Interview

STATEMENT OF THE CASE:

The employer, Crothall Healthcare Inc., filed an appeal from a decision of a representative dated February 8, 2024, (reference 01) that held the claimant eligible for unemployment insurance benefits after a separation from employment. After due notice, a telephone hearing was held on March 8, 2024. The claimant, Bethene Zahner, participated personally. The employer participated through Unit Director of Environmental Services Doug Rogers and Resident Regional Director of Operations Angela Scherer. The administrative law judge took official notice of the administrative record.

ISSUES:

Whether the claimant was discharged for disqualifying, job-related misconduct.
Whether the claimant has been overpaid any unemployment insurance benefits, and if so, whether the repayment of those benefits to the agency can be waived?
Whether any charges to the employer's account can be waived?

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds: The claimant began working as a full-time operations manager for Crothall Healthcare Inc. on January 1, 2015. The claimant was separated from employment on January 23, 2024, when she was discharged.

As an operations manager, the claimant was responsible for managing the employer's custodial department, wherein she supervised approximately 15 employees. The claimant typically worked from 6:30 a.m. to 3:30 p.m. Monday through Friday. The employer has a written employee manual that contains a fair treatment policy. The fair treatment policy requires employees to behave professionally and to treat others with respect. The claimant received a copy of the employee manual and was familiar with the employer's work rules and policies.

On December 4, 2023, the claimant's supervisor, the Director of Environmental Services, was notified that a waiting room was dirty and needed to be vacuumed. The director found the

claimant and asked her to vacuum the waiting room. As the claimant was walking away, she flipped the director the middle finger. When the claimant returned from vacuuming the waiting room she asked the director who had requested for the room to be vacuumed. After learning who made the request, the claimant stated, "I figured, since you're always kissing his ass." On December 14, 2023, the employer issued the claimant a final written warning due to profane and inappropriate conduct. The disciplinary notice warned the claimant that further violations of the employer's fair treatment policy would result in discipline up to and including termination of employment.

At approximately 7:45 a.m. on January 10, 2024, the director noticed an alert indicating that two hospital rooms needed to be cleaned immediately. The director tried radioing the custodial employee responsible for cleaning that part of the facility, but he received no response. About an hour later, the claimant arrived in the office. The director asked the claimant why her staff had not yet cleaned the rooms, and the claimant explained that the employee responsible for the rooms was on her fifteen minute break. The claimant told the director that she would make sure the employee cleaned the rooms when she was done with her break. At 9:15 a.m. the director noticed that the rooms had not been cleaned, so he called the claimant to his office. When the claimant arrived, the director asked her again why the rooms were not clean. The claimant responded, "Why? Did someone call down to complain?" The director responded, "No." The claimant then angrily left his office. The director felt the claimant's conduct was disrespectful, so he reported the interaction to the employer's human resources department.

The next day, January 11, 2024, a manager from the nursing department met with the claimant to discuss the protocol for disposing of IV bags that are left in patients rooms after patients are discharged. Specifically, the manager told the claimant that the custodial staff were not to throw the bags away. Rather, they should give the IV bags to a member of the nursing staff so that they could be disposed of properly. The manager's instruction upset the claimant and she said something to the effect of, "We don't have time to stand around the nurse's station while the nurses ignore us. I'm going to tell my staff to continue throwing them out." After a short back-and-forth, the claimant said, "I need to go, we can discuss this later," and then walked away.

Later that day, the director called the claimant to his office. When the claimant arrived at his office, he told her that he had received two complaints that the custodial staff had not been clearing the emergency department over the weekends. The director told the claimant that if she could not find an employee to clean the emergency department over the weekends, then someone from management may need to come in and clean. The claimant responded something to the effect of, "you should come in and clean it since you make more money than me." The claimant then got up and left the director's office.

After the claimant left, the director reported both conversations to the employer's human resources department. The employer investigated the incidents by questioning the employees who witnessed the claimant's interactions on January 10 and 11, 2024. On January 23, 2024, the employer called the claimant into a meeting and informed the claimant that her employment was being terminated effective immediately due to disrespectful and insubordinate conduct in violation of the employer's fair treatment policy.

The claimant's administrative records indicate the claimant filed an original claim for unemployment insurance benefits effective January 21, 2024. Since filing her initial claim, the claimant has filed weekly claims for six weeks between January 21, 2024 and March 2, 2024, and has received total benefits of \$3,275.00. 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 for disqualifying, job related misconduct. Benefits are denied.

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:

d. For the purposes of this subsection, "misconduct" means a deliberate act or omission by an employee that constitutes a material breach of the duties and obligations arising out of the employee's contract of employment. Misconduct is 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. Misconduct by an individual includes but is not limited to all of the following:

...

(2) Knowing violation of a reasonable and uniformly enforced rule of an employer.

The employer has the burden of proof in establishing disqualifying job misconduct. *Cosper v. Iowa Dep't of Job Serv.*, 321 N.W.2d 6 (Iowa 1982).

Iowa Admin. Code r. 871-24.32(4) provides:

(4) *Report required.* The claimant's statement and employer's statement must give detailed facts as to the specific reason for the claimant's discharge. Allegations of misconduct or dishonesty without additional evidence shall not be sufficient to result in disqualification. If the employer is unwilling to furnish available evidence to corroborate the allegation, misconduct cannot be established. In cases where a suspension or disciplinary layoff exists, the claimant is considered as discharged, and the issue of misconduct shall be resolved.

Iowa Admin. Code r. 871-24.32(8) provides:

(8) *Past acts of misconduct.* While past acts and warnings can be used to determine the magnitude of a current act of misconduct, a discharge for misconduct cannot be based on such past act or acts. The termination of employment must be based on a current act.

The issue is not whether the employer made a correct decision in separating the claimant, but whether the claimant is entitled to unemployment insurance benefits. *Infante v. Iowa Dep't of Job Serv.*, 364 N.W.2d 262 (Iowa Ct. 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. Iowa Dep't of Job Serv.*, 425 N.W.2d 679 (Iowa

Ct. 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 Dep’t of Job Serv.*, 351 N.W.2d 806 (Iowa Ct. App. 1984).

The gravity of the incident, number of policy violations and prior warnings are factors considered when analyzing misconduct. The lack of a current warning may detract from a finding of an intentional policy violation. Disqualification for a single misconduct incident must be a deliberate violation or disregard of standards of behavior which the employer has a right to expect. *Diggs v. Emp’t Appeal Bd.*, 478 N.W.2d 432 (Iowa Ct. App. 1991).

Insubordination does not equal misconduct if it is reasonable under the circumstances. The question of whether the refusal to perform a specific task constitutes misconduct must be determined by evaluating both the reasonableness of the employer’s request in light of all circumstances and the employee’s reason for noncompliance. *Endicott v. Iowa Dep’t of Job Serv.* 367 N.W.2d 300 (Iowa Ct. App. 1985). An employee’s failure to perform a specific task may not constitute misconduct if such failure is in good faith or for good cause. *Woods v. Iowa Dep’t of Job Serv.*, 327 N.W.2d 768, 771 (Iowa 1982). Generally, continued refusal to follow reasonable instructions constitutes misconduct. *Gilliam v. Atlantic Bottling Co.*, 453 N.W.2d 230 (Iowa Ct. App. 1990). The Iowa Court of Appeals found substantial evidence of misconduct in testimony that the claimant worked slower than he was capable of working and would temporarily and briefly improve following oral reprimands. *Sellers v. Emp’t Appeal Bd.*, 531 N.W.2d 645 (Iowa Ct. App. 1995).

Every employer is entitled to expect civility and decency from its employees, and an employee’s “use of profanity or offensive language in a confrontational, disrespectful, or name-calling context may be recognized as misconduct.” *Henecke v. Iowa Dep’t of Job Serv.*, 533 N.W.2d 573, 576 (Iowa App. 1995). However, the use of profanity or offensive language is not automatically disqualifying for unemployment insurance benefits purposes. The “question of whether the use of improper language in the workplace is misconduct is nearly always a fact question... [and] must be considered with other relevant factors...” *Myers v. Employment Appeal Board*, 462 N.W.2d 734, 738 (Iowa App. 1990). An Employment Appeal Board decision set forth six aggravating factors to be considered when examining an employee’s use of improper language: “(1) cursing in front of customers, vendors, or other third parties; (2) undermining a supervisor’s authority; (3) threats of violence; (4) threats of future misbehavior or insubordination; (5) repeated incidents of vulgarity; and (6) discriminatory context.” Emp. App. Bd. Hrg. No. 16B-UI-08787, at *3 (Emp. App. Bd. pub. Oct. 21, 2016) (citing cases). The Employment Appeal Board also suggests that the general work environment is a relevant consideration in analyzing profanity. *Id.*

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.*

The findings of fact show how I have resolved the disputed factual issues in this case. I assessed the credibility of the witnesses who testified during the hearing, considering the applicable factors listed above, and using my own common sense and experience. I find the employer's testimony concerning the investigation, the claimant's awareness of the work rules, and the interactions that took place between the claimant and the director to be more thorough and consistent with other believable evidence. For this reason, the administrative law judge has given greater weight to the employer's version of events than to the claimant's version of events.

In this case, the employer has presented substantial and credible evidence that on January 10 and 11, 2024, the claimant disregarded a reasonable instruction from her supervisor, refused to comply with the employer's rules for disposing of IV bags, and then became antagonistic toward her supervisor stating, "you should clean [the emergency department] because you make more money than me." The claimant engaged in this conduct despite having received a final written warning for similar misconduct less than one month prior. The claimant's actions were a deliberate violation of company policy and of the standards of behavior the employer had a right to expect from her. As such, the claimant was discharged for a current act of disqualifying, job-related misconduct. Benefits are denied.

The next issues to be determined are whether claimant has been overpaid benefits, whether the claimant must repay those benefits, and whether the employer's account will be charged. For the reasons that follow, the administrative law judge concludes:

Iowa Code section 96.3(7)a, b, as amended in 2008, provides:

Payment – determination – duration – child support intercept.

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 section 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 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.

(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 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 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.

The unemployment insurance law provides that benefits must be recovered from a claimant who receives benefits and is later determined to be ineligible for those 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).

Because the claimant's separation was disqualifying, benefits were paid to which the claimant was not entitled. The administrative law judge concludes that the claimant has been overpaid unemployment insurance benefits in the amount of \$3,275.00. There is no evidence that the claimant received these benefits due to fraud or willful misrepresentation. Because the employer participated 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 February 8, 2024, (reference 01) unemployment insurance decision is reversed. The claimant was discharged for substantial job-related misconduct. Unemployment insurance benefits funded by the State of Iowa are denied until the claimant has worked in and been paid wages for insured work equal to ten times her weekly benefit amount after the January 23, 2024, separation date, and provided she is otherwise eligible.

The claimant has been overpaid regular unemployment insurance benefits in the gross amount of \$3,275.00 and is obligated to repay the agency those benefits. The employer did participate in fact-finding. The employer's account shall not be charged.



Patrick B. Thomas
Administrative Law Judge

March 21, 2024
Decision Dated and Mailed

PBTjkb/

APPEAL RIGHTS. If you disagree with the decision, you or any interested party may:

1. Appeal to the Employment Appeal Board within fifteen (15) days of the date under the judge's signature by submitting a written appeal via mail, fax, or online to:

**Iowa Employment Appeal Board
6200 Park Avenue Suite 100
Des Moines, Iowa 50321
Fax: (515)281-7191
Online: eab.iowa.gov**

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

AN APPEAL TO THE BOARD SHALL STATE CLEARLY:

- 1) The name, address, and social security number of the claimant.
- 2) A reference to the decision from which the appeal is taken.
- 3) That an appeal from such decision is being made and such appeal is signed.
- 4) The grounds upon which such appeal is based.

An Employment Appeal Board decision is final agency action. If a party disagrees with the Employment Appeal Board decision, they may then file a petition for judicial review in district court.

2. If no one files an appeal of the judge's decision with the Employment Appeal Board within fifteen (15) days, the decision becomes final agency action, and you have the option to file a petition for judicial review in District Court within thirty (30) days after the decision becomes final. Additional information on how to file a petition can be found at Iowa Code §17A.19, which is online at <https://www.legis.iowa.gov/docs/code/17A.19.pdf> or by contacting the District Court Clerk of Court <https://www.iowacourts.gov/iowa-courts/court-directory/>.

Note to Parties: YOU MAY REPRESENT yourself in the appeal or obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds.

Note to Claimant: It is important that you file your weekly claim as directed, while this appeal is pending, to protect your continuing right to benefits.

SERVICE INFORMATION:

A true and correct copy of this decision was mailed to each of the parties listed.

DERECHOS DE APELACIÓN. Si no está de acuerdo con la decisión, usted o cualquier parte interesada puede:

1. Apelar a la Junta de Apelaciones de Empleo dentro de los quince (15) días de la fecha bajo la firma del juez presentando una apelación por escrito por correo, fax o en línea a:

**Iowa Employment Appeal Board
6200 Park Avenue Suite 100
Des Moines, Iowa 50321
Fax: (515)281-7191
En línea: eab.iowa.gov**

El período de apelación se extenderá hasta el siguiente día hábil si el último día para apelar cae en fin de semana o día feriado legal.

UNA APELACIÓN A LA JUNTA DEBE ESTABLECER CLARAMENTE:

- 1) El nombre, dirección y número de seguro social del reclamante.
- 2) Una referencia a la decisión de la que se toma la apelación.
- 3) Que se interponga recurso de apelación contra tal decisión y se firme dicho recurso.
- 4) Los fundamentos en que se funda dicho recurso.

Una decisión de la Junta de Apelaciones de Empleo es una acción final de la agencia. Si una de las partes no está de acuerdo con la decisión de la Junta de Apelación de Empleo, puede presentar una petición de revisión judicial en el tribunal de distrito.

2. Si nadie presenta una apelación de la decisión del juez ante la Junta de Apelaciones Laborales dentro de los quince (15) días, la decisión se convierte en acción final de la agencia y usted tiene la opción de presentar una petición de revisión judicial en el Tribunal de Distrito dentro de los treinta (30) días después de que la decisión adquiriera firmeza. Puede encontrar información adicional sobre cómo presentar una petición en el Código de Iowa §17A.19, que se encuentra en línea en <https://www.legis.iowa.gov/docs/code/17A.19.pdf> o comunicándose con el Tribunal de Distrito Secretario del tribunal <https://www.iowacourts.gov/iowa-courts/court-directory/>.

Nota para las partes: USTED PUEDE REPRESENTARSE en la apelación u obtener un abogado u otra parte interesada para que lo haga, siempre que no haya gastos para Workforce Development. Si desea ser representado por un abogado, puede obtener los servicios de un abogado privado o uno cuyos servicios se paguen con fondos públicos.

Nota para el reclamante: es importante que presente su reclamo semanal según las instrucciones, mientras esta apelación está pendiente, para proteger su derecho continuo a los beneficios.

SERVICIO DE INFORMACIÓN:

Se envió por correo una copia fiel y correcta de esta decisión a cada una de las partes enumeradas.