

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

JENNIFER K ESMAY
Claimant

APPEAL 22A-UI-07111-DH-T

**ADMINISTRATIVE LAW JUDGE
AMENDED DECISION**

CLAIR FAMILY DENTAL CORPORATION
Employer

**OC: 03/06/22
Claimant: Respondent (2)**

Iowa Code § 96.5(1) - Voluntary Quit
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
Iowa Admin. Code r. 871-24.32(1)a - Discharge for Misconduct
Iowa Admin. Code r. 871-24.1(113)c - Discharge for Violation of Rules

STATEMENT OF THE CASE:

The employer/appellant, Clair Family Dental Corporation, appealed the March 18, 2022, (reference 01) unemployment insurance decision that allowed benefits based upon finding the record for the 07/12/21, dismissal from work showed no misconduct. Notices of hearing were mailed to the parties' last known addresses of record for a telephone hearing scheduled for May 2, 2022. The claimant, Jennifer Esmay, personally participated. The employer participated through Dr. Isaac Clair, owner and McKenzie Lawrence, office manager. Judicial notice was taken of the administrative record, including DBRO and KFFD. Department's Exhibit D-1 and Employer's Exhibits R-1, R-2, R-3, and R-4 were admitted.

On May 16, 2022, a decision was mailed to the above-named parties; however, additional weeks of benefits were paid out to claimant since authoring that decision that were not addressed in the decision. This amended decision does not alter the denial of benefits but amends the amount of the overpayment.

ISSUES:

Was the separation a layoff, discharge for misconduct or a voluntary quit without good cause?
Was the claimant overpaid benefits?
Should claimant repay benefits and/or charge employer due to employer participation in fact finding?

FINDINGS OF FACT:

Having heard the testimony and reviewed the evidence in the record, the undersigned finds:

Claimant's first day of work was September 16, 2019, and her last day worked was July 12, 2021. She was separated from employment for misconduct on July 12, 2021. She was a fulltime front desk receptionist with a set schedule.

On July 7, 2021, Employer had a patient who paid in cash for toothpaste. The patient submitted a twenty-dollar bill, receiving two dollars in change and the toothpaste. The transaction happened toward the end of the day, and claimant was the only one working the front desk. An audit report (R-2) shows that claimant's personal login information was used to cancel the cash transaction and remove the toothpaste purchase from the patient bill. The twenty dollars cash disappeared from the cash till. Claimant admits she cancelled the cash transaction and removed the toothpaste from the bill, as she claims she was going to account for the cash on the next days deposits that she worked. The next three times she worked, she never accounted for the \$18 cash toothpaste transaction. The third time she worked, July 12, 2021, Dr. Clair was back in the office, had an audit run and confronted claimant. Claimant admitted to cancelling the cash transaction and deleting the transaction from the patient's bill. Claimant had no good or reasonable explanation as to why the transaction would be deleted from the bill if they were still going to account for the money transaction, nor a good reason for not accounting for the transaction on the next three times she worked, nor an explanation (other than stating she did not take the money) as to why the cash draw was \$20 short.

Employer has an employee handbook. Claimant was provided with access to a copy of a hard copy that is in the office when she started. The handbook had a policy regarding honesty, which in part prohibits theft from the employer. Claimant acknowledges she has access to the policy, and it likely had a policy on dishonesty, but doesn't remember exactly what it is. Claimant had a warning regarding her attendance, and therefore was aware her job was in jeopardy if there were issues. Claimant was discharged for stealing the \$20.

Records show claimant has received \$2,779.00 in benefits on this claim. Her weekly benefit amount is \$397.00. Employer thought they did not submit any written response nor documents for fact finding but did participate in a phone call. The record reflects no participation in the phone call but having sent information in for fact finding. Per the definitions in Iowa Admin. Code r. 871-24.10(1), employer did participate in fact finding.

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:

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. 871-24.1(113)c provides:

(113) Separations. All terminations of employment, generally classifiable as layoffs, quits, discharges, or other separations.

c. *Discharge*. A discharge is a termination of employment initiated by the employer for such reasons as incompetence, violation of rules, dishonesty, laziness, absenteeism, insubordination, failure to pass probationary period.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. *Huntoon v. Iowa Department of Job Service*, 275 N.W.2d 445, 448 (Iowa 1979).

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). 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. Iowa Dep't of Job Serv.*, 364 N.W.2d 262 (Iowa Ct. App. 1984). 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). 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). 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).

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 focus of the administrative code definition of misconduct is on deliberate, intentional or culpable acts by the employee. *Id.*

Altering a patient's billing account to remove a procedure (sale of toothpaste) and removing the cash transaction, with the \$20 bill in question going missing and being the only front desk employee violated the dishonesty policy. Taking the money, 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 claimant deliberately disregarded the employer's interest by her conduct and knowingly violated company policy, by committing an act of theft against the employer. Claimant had a warning for an unrelated offense but engaged in disqualifying misconduct even without a previous warning.

The employer has presented substantial and credible evidence of the theft. This behavior was contrary to the best interests of the employer and is disqualifying misconduct. Claimant was aware of the policy, having received access to the handbook. Claimant violated workplace rules.

The next issue is whether claimant has been overpaid benefits. Iowa Code § 96.3(7)a-b, 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)(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 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, any benefits paid on the claim would be benefits 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. Claimant received \$2,779.00 of benefits on this claim. The employer did participate in the fact-finding interview.

The law also states that an employer is to be charged if “the employer failed to respond timely or adequately to the department’s request for information relating to the payment of benefits. . .” Iowa Code § 96.3(7)(b)(1)(a). Here, the employer did respond adequately.

Claimant has been overpaid \$2,779.00 in benefits that has to be repaid and with employer participating in fact finding is not charged.

DECISION:

The March 18, 2022, (reference 01) unemployment insurance decision is **REVERSED**. Claimant was discharged for misconduct on July 12, 2021. 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 \$2,779.00 in unemployment insurance benefits that are to be repaid. Employer adequately participated in fact finding, and therefore shall not be charged.



Darrin T. Hamilton
Administrative Law Judge

May 18, 2022
Decision Dated and Mailed

dh/scn