

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**IAN C TEIG**  
Claimant

**APPEAL NO. 10A-UI-03415-H2T**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**HILLCREST FAMILY SERVICES**  
Employer

**Original Claim: 02-07-10  
Claimant: Respondent (2-R)**

Iowa Code § 96.5(2)a – Discharge/Misconduct  
Iowa Code § 96.5(1) – Voluntary Leaving  
Iowa Code § 96.4(3) – Able and Available  
Iowa Code § 96.3(7) - Recovery of Benefit Overpayment

**STATEMENT OF THE CASE:**

The employer filed a timely appeal from the February 25, 2010, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on April 15, 2010. The claimant did participate and was represented. The employer did participate through Shannon Hagensten, Recruitment and Retention Specialist; Kim Nelson, Program Manager; and (representative) Julie Heiderscheit, Vice President of Human Development. Employer's Exhibits One through Seven were entered and received into the record. Claimant's Exhibits One through Five were entered and received into the record.

**ISSUES:**

Was the claimant discharged due to job-related misconduct or did he voluntarily quit his employment?

Is claimant able to and available for work?

Has the claimant been overpaid any unemployment insurance benefits?

**FINDINGS OF FACT:**

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed as a visiting counselor, full-time, beginning September 10, 2007, through February 8, 2010, when he was changed from full-time to on-call status. The claimant remains an employee of the employer.

As a visiting counselor, the claimant was required to complete paperwork after visiting each of his clients. Additionally, he was required to complete quarterly reports. The employer cannot get paid from either insurance companies or the federal government for the work the claimant completed until the paperwork is completed. Additional federal regulations require that the counselor who actually provided the service be the one to complete the paperwork. The

claimant has considerable history of falling behind in his paperwork. In 2008 and 2009, he was on extended leave under the employer FMLA policy. The employer has always been satisfied with the claimant's counseling work and considered him a good and valuable employee.

In December of 2009, the claimant experienced a reoccurrence of his depression symptoms. He did not work much, if at all, in December 2009 and January 2010. According to the employer, he has at least 160 hours of paperwork he needs to complete on counseling sessions with clients and quarterly or other reports needed for the employer to bill the payers for the client visits. The claimant was unable to work on February 3, 4, and 5 due to adjustments to his medication. Since that time, he has been released to return to work with no work restrictions. In February 2010, when the employer learned how behind the claimant was in getting his paperwork completed, they told him that he could not perform anymore client visits but that he was to come to the office and complete the paperwork so that they could get paid for the work he had performed. The claimant was and is capable of performing the paperwork. The claimant was informed that his job status would be changed to on-call and he could essentially set his own hours to come in and work on the paperwork. The employer did not want the claimant making any more client visits, because they did not want any additional work performed for which they could not be paid. The employer's movement of the claimant to on-call status due to his failure to complete his paper work and his subsequent refusal to finish his assigned work was reasonable under the circumstances. The employer did not discharge the claimant, and reiterated at hearing that work is available for him. At hearing the claimant made it clear he was able to complete the paperwork, but has chosen not to. The claimant is refusing to perform suitable work, as it is the same paperwork he has previously completed, for the same rate of pay. The claimant does not want to work until his unemployment case was resolved and because his feelings were hurt that the employer stopped him from visiting clients. Neither is a good cause reason for refusing essentially full-time work at his regular job duties. The claimant job status has been changed to "on-call" while he gets his paperwork caught up. The employer acted reasonably in making the change, because they have a right to expect the claimant to complete the paperwork necessary for them to get paid for his work. The employer also has the right to assign the job duties to the claimant. The employer merely wanted him to stop visiting clients and get his paper work caught up. In light of the claimant's history of falling behind on his paperwork, the employer's actions are reasonable.

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

For the reasons that follow, the administrative law judge concludes the claimant was not discharged from employment.

Iowa Code § 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.

871 IAC 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.

Iowa Code § 96.5-1 provides:

An individual shall be disqualified for benefits:

1. Voluntary quitting. If the individual has left work voluntarily without good cause attributable to the individual's employer, if so found by the department.

The employer has at least 160 hours of full-time work available for the claimant at his regular rate of pay performing his regular job duties. The claimant has indicated he has not quit. The administrative law judge concludes that the claimant has not been discharged, nor has he voluntarily quit, he is still employed. The employer has acted reasonably in changing the claimant's classification to "on call" in order to insure that the claimant completes the required paperwork for them to get paid for the work he has performed.

For the reasons that follow, the administrative law judge concludes that the claimant is not able to work and available for work effective February 8, 2010.

Iowa Code § 96.4-3 provides:

An unemployed individual shall be eligible to receive benefits with respect to any week only if the department finds that:

3. The individual is able to work, is available for work, and is earnestly and actively seeking work. This subsection is waived if the individual is deemed partially unemployed, while employed at the individual's regular job, as defined in section 96.19, subsection 38, paragraph "b", unnumbered paragraph 1, or temporarily unemployed as defined in section 96.19, subsection 38, paragraph "c". The work search requirements of this subsection and the disqualification requirement for failure to apply for, or to accept suitable work of section 96.5, subsection 3 are waived if the individual is not disqualified for benefits under section 96.5, subsection 1, paragraph "h".

871 IAC 24.23(16) provides:

Availability disqualifications. The following are reasons for a claimant being disqualified for being unavailable for work.

(16) Where availability for work is unduly limited because a claimant is not willing to work during the hours in which suitable work for the claimant is available.

The claimant is refusing to perform his regular job duties, at his regular job location, and at his regular rate of pay, based on the employer's change of his employment status to on call. The employer has established their actions were reasonable under the totality of the circumstances. The claimant is not able to and available for work, because he simply chooses not to perform the suitable work that is available for him. Accordingly, benefits are denied effective February 8, 2010.

If the claimant returns to work, after completing all of the paperwork he has left to do, and the employer does not offer him full-time hours as during his base period, he can reopen his claim for benefits.

Iowa Code § 96.3-7, 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) 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. 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. The employer shall not be charged with the benefits.

(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.

Because the claimant's separation was disqualifying, benefits were paid to which the claimant 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. The employer will not be charged for benefits whether or not the overpayment is recovered. Iowa Code § 96.3(7). In this case, the claimant has received benefits but was not eligible for those benefits. The matter of determining whether the overpayment should be recovered under Iowa Code § 96.3(7)b is remanded to the Agency.

**DECISION:**

The February 25, 2010, reference 01, decision is reversed. The claimant is still an employee, but he is not able to and available for work effective February 8, 2010. The claimant has been overpaid unemployment insurance benefits in the amount of \$2,959.00.

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Teresa K. Hillary  
Administrative Law Judge

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Decision Dated and Mailed

tkh/kjw