

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

**JOHNATHON L LUDEMANN**  
Claimant

**THE UNIVERSITY OF IOWA**  
Employer

**APPEAL 17A-UI-04865-JP-T**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**OC: 04/16/17  
Claimant: Respondent (1)**

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 May 5, 2017, (reference 02) unemployment insurance decision that allowed benefits. The parties were properly notified about the hearing. A telephone hearing was held on May 30, 2017. Claimant participated. Employer participated through benefits specialist Mary Eggenburg and nurse manager for the department of nursing Kelly Petrulevich. Employer Exhibit 1 was admitted into evidence with no objection. Official notice was taken of the administrative record, including claimant's benefit payment history, with no objection.

**ISSUES:**

Was the claimant discharged for disqualifying job-related misconduct?

Has the claimant been overpaid unemployment insurance benefits, and if so, can the repayment of those benefits to the agency be waived?

Can 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: Claimant was employed full-time as a staff nurse from October 10, 2016, and was separated from employment on April 11, 2017, when he was discharged.

On April 3, 2017, claimant was working his scheduled shift when he had a conversation with a patient about his conversation with the employer regarding his Facebook posts. Claimant told the patient that a coworker had shown his Facebook posts to the employer. Claimant told the patient "it takes a heartless human being to try to jeopardize his job by showing management his Facebook posts." A coworker overheard claimant's conversation with the patient. Later, claimant and the coworker discussed his conversation with the patient. On April 5, 2017, claimant reported the conversation to Ms. Petrulevich. Claimant told Ms. Petrulevich that he

had a conversation with a patient about how he felt he was being treated by his coworkers. Claimant knew it was inappropriate and Ms. Petrlevich told claimant he could not have these types of conversations with patients. The employer did not give claimant a written warning for this incident.

On April 7, 2017, after claimant took a patient from the recovery room, he mistakenly checked the box to release all orders for the patient. One of the orders claimant released was an order for an epidural allowing for a certain pain medication. However, this order should have only been used in the operating room and not on the unit the patient was taken too. This order was not a part of the post-operative care orders that should have been released. Claimant realized his mistake regarding the epidural order almost immediately and he immediately reported it to the charge nurse. The charge nurse told claimant this type of order is not given on the unit the patient was on. Claimant and the charge nurse worked together to get the order rescinded. The medication was not given to the patient. If the patient was given this medication, it could have had adverse outcomes for the patient. Claimant had also released orders for a future procedure for the patient, which included an antibiotic. The antibiotic was administered to the patient. Claimant was not aware that the antibiotic should not have been administered to the patient. The senior resident discovered the antibiotic being administered to the patient and questioned the charge nurse why the patient was being given the antibiotic that was not ordered for this patient by the current medical team. The charge nurse did an investigation and determined that the antibiotic was to be administered with a future procedure. The patient was not harmed by the antibiotic. When a patient is given increased antibiotics, there are potential side effects.

On April 8, 2017, claimant was placed on paid administrative leave, pending an investigation. On April 11, 2017, the employer interviewed claimant. Ms. Petrlevich reviewed with claimant about releasing orders. Claimant knew the epidural order was not correct so he brought it to the charge nurse's attention. Ms. Petrlevich reviewed the releasing of the orders that were not related to the patient's procedures. Claimant was not aware of this incident, but that the orders were messed up and he was trying to work with the physicians to get everything figured out. Claimant was not aware of how to identify what the purpose of the medication is for after the order is released. On April 11, 2017, the employer discharged claimant.

Claimant was discharged during his probationary period. Employees are on probation during their first nine months of employment. After an employee completes their probationary period, the employer follows a progressive disciplinary policy (three written warnings and then discharge). However, if an infraction occurs during an employee's probationary period, the employer does not have to follow the progressive disciplinary policy.

Prior to discharge, the employer had counseled claimant about his attendance and his work performance. Claimant also went through another two week orientation from March 2, 2017 through March 16, 2017. Claimant had no prior mistakes releasing orders and he had not been disciplined for incorrectly releasing orders. Claimant had no prior written warnings.

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

For the reasons that follow, the administrative law judge concludes claimant was discharged from employment for no disqualifying reason. Benefits are allowed.

It is the duty of an administrative law judge and 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, as the finder of

fact, 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. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996). 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 evidence you believe; whether a witness has made inconsistent statements; the witness's conduct, age, intelligence, memory and knowledge of the facts; and the witness's interest in the trial, their motive, candor, bias and prejudice. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996).

This administrative law judge assessed the credibility of the witnesses who testified during the hearing, considering the applicable factors listed above, and used my own common sense and experience. This administrative law judge reviewed the exhibit that was admitted into evidence. This administrative law judge finds claimant's version of events to be more credible than the employer's recollection of those events.

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. 871-24.32(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).

Iowa Admin. Code r. 871-24.32(5) provides:

**Discharge for misconduct.**

(5) *Trial period.* A dismissal, because of being physically unable to do the work, being not capable of doing the work assigned, not meeting the employer's standards, or having been hired on a trial period of employment and not being able to do the work shall not be issues of misconduct.

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). 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). When based on carelessness, the carelessness must actually indicate a "wrongful intent" to be disqualifying in nature. *Id.* Negligence does not constitute misconduct unless recurrent in nature; a single act is not disqualifying unless indicative of a deliberate disregard of the employer's interests. *Henry v. Iowa Dep't of Job Serv.*, 391 N.W.2d 731 (Iowa Ct. App. 1986). 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).

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. A determination as to whether an employee's act is misconduct does not rest solely on the interpretation or application of the employer's policy or rule. A violation is not necessarily disqualifying misconduct even if the employer was fully within its rights to impose discipline up to or including discharge for the incident under its policy.

On April 3, 2017, claimant had an inappropriate conversation with a patient, which he self-reported to Ms. Petrulevich. Ms. Petrulevich told claimant he could not have these types of conversations with patients, but he was not given a written warning. Then on April 7, 2017, claimant credibly testified he mistakenly released all of the orders for a particular patient. Claimant's testimony that this action was an accident is bolstered by the evidence that claimant self-reported the mistake to the charge nurse immediately after he realized his mistake and he worked with the charge nurse to fix the mistake. Claimant also worked with the physicians to correct his mistake.

Claimant was discharged during his probationary period, but he did not have any prior written warnings and he did not have any prior counselings for incorrectly releasing orders. Discharge within a probationary period, without more, is not disqualifying. Failure in job performance due to inability or incapacity is not considered misconduct because the actions were not volitional. *Huntoon v. Iowa Dep't of Job Serv.*, 275 N.W.2d 445, 448 (Iowa 1979). "[T]he definition of misconduct requires more than a 'disregard' it requires a '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.'" *Greenwell v. E.A.B. and Professional Transportation, Inc.*, No. 15-0154 (Iowa Ct. App. filed March 23, 2016) (citing Iowa Admin. Code r. 871-24.32(1)(a)) (emphasis in original). "Reoccurring acts of negligence by an

employee would probably be described by most employers as in disregard of their interests.” *Id.* “The misconduct legal standard requires more than reoccurring acts of negligence in disregard of the employer’s interests.” *Id.* “[T]he acts [should constitute] an ‘intentional and substantial’ disregard of the employer’s interests[.]” *Id.* The employer failed to show that on April 7, 2017, claimant’s conduct was “an ‘intentional and substantial’ disregard of the employer’s interests[.]” *Id.* Claimant credibly testified that on April 7, 2017, he mistakenly released all of the patient’s orders. Although claimant had multiple counselings, including an extra orientation, regarding his job performance, the employer did not present any evidence that on April 7, 2017 claimant “demonstrated a wrongful intent on his part.” *Kelly v. Iowa Dep’t of Job Serv.*, 386 N.W.2d 552 (Iowa Ct. App. 1986). The employer has failed to meet its burden of proof in establishing disqualifying job misconduct. Benefits are allowed.

Furthermore, the conduct for which claimant was discharged was merely an isolated incident of poor judgment and inasmuch as employer had not previously warned claimant about the issue leading to the separation (incorrectly releasing a patient’s orders), it has not met the burden of proof to establish that claimant acted deliberately or with recurrent negligence in violation of company policy, procedure, or prior warning. An employee is entitled to fair warning that the employer will no longer tolerate certain performance and conduct. Without fair warning, an employee has no reasonable way of knowing that there are changes that need be made in order to preserve the employment. If an employer expects an employee to conform to certain expectations or face discharge, appropriate (preferably written), detailed, and reasonable notice should be given. Training or general notice to staff about a policy is not considered a disciplinary warning. A warning for improper fuel in a vehicle and leaving a container of urine in a vehicle is not similar to not properly securing a vehicle from movement and the employer’s simple accrual of a certain number of warnings counting towards discharge does not establish repeated negligence or deliberation and is not dispositive of the issue of misconduct for the purpose of determining eligibility for unemployment insurance benefits. Benefits are allowed.

As benefits are allowed, the issues of overpayment, repayment, and the chargeability of the employer’s account are moot.

#### **DECISION:**

The May 5, 2017, (reference 02) unemployment insurance decision is affirmed. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided claimant is otherwise eligible. Any benefits claimed and withheld on this basis shall be paid.

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Jeremy Peterson  
Administrative Law Judge

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Decision Dated and Mailed

jp/rvs