

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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**LINDSEY L VAUGHN**  
Claimant

**APPEAL 22A-UI-03688-SN-T**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**BEACON OF HOPE HOSPICE INC**  
Employer

**OC: 01/02/22  
Claimant: Respondent (2)**

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Iowa Code § 96.5(2)a – Discharge for Misconduct  
Iowa Admin. Code r. 871-24.32(1)a – Discharge for Misconduct  
Iowa Code § 96.3(7) – Recovery of Benefit Overpayment  
Iowa Admin. Code r. 871-24.10 – Recovery of Benefit Overpayment

**STATEMENT OF THE CASE:**

The employer, Beacon of Hope Hospice Inc., filed an appeal from the January 27, 2022, (reference 01) unemployment insurance decision that granted benefits based upon the conclusion she was discharged, but not for willful work-related misconduct. The parties were properly notified of the hearing. A telephone hearing was held on March 11, 2022. The claimant participated. The employer participated through Executive Vice President of Human Resources Jennifer Romano. Exhibits 1, 2, and 3 were received into the record.

**ISSUE:**

Whether the claimant's separation from employment is disqualifying?

Whether the claimant has been overpaid benefits?

Whether the claimant is excused from repaying those benefits due to the employer's non-participation at factfinding?

**FINDINGS OF FACT:**

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed as an on-call registered nurse from June 22, 2020, until this employment ended on January 5, 2022, when she was discharged. The claimant's immediate supervisor was Branch Administrator Adele Malcolm. Ms. Malcolm is the administrator for both the Galesburg and Davenport service areas.

The job description does not state the service area the employer expected the claimant to provide service. The job description does say the claimant must perform "other duties assigned by management." It also states the claimant, "may be requested to work weekends, holidays and occasional overtime." Finally, the job description states the claimant, "Must have the ability to deal with abrupt schedule changes." The employer provided a copy of the claimant's job

description. (Exhibit 3) The claimant acknowledged receipt of her job description on February 12, 2021. The claimant acknowledged she had covered for other nurses in the Galesburg service area, but she said she was given a few days' notice in the past.

On June 22, 2021, the claimant received a call for service from out of the Galesburg service area. The triage nurse called the on-call nurse primarily responsible for that night. She did not answer her phone. The claimant refused to take the call because she was the only on-call nurse assigned to the Davenport area that night. The claimant had not slept for most of that preceding weekend. The claimant then hung up on the triage nurse.

On July 4, 2021, the claimant was called to a patient's house for a visit. At the visit, the claimant exclaimed, "I'm not sure what the nurse was thinking and why she would tell them not take Lasix."

On July 6, 2021, the claimant dispatched to a patient's death at an assisted living facility in Geneseo, Illinois. This assisted living facility is approximately 30 minutes by vehicle from the claimant's residence. The claimant did not go to the site. Instead, the claimant performed all of her functions via telephone.

On July 7, 2021, the claimant received a verbal warning regarding the incidents occurring on June 22, 2021, July 4, 2021, and July 6, 2021. The verbal warning notes that any "future violations will result in further disciplinary action up to and including termination." The employer provided a copy of the verbal warning. (Exhibit 2)

At 9:30 p.m. on January 4, 2022, the triage nurse, Angela Fountain, received a call from one of its client's families that the client was no longer breathing. The nurse on-call for the Galesburg area reported she had a vehicular accident on the way to the client due to the winter road conditions. She added she was stuck in a ditch. Ms. Fountain attempted to call the other nurse assigned to the Galesburg area. This nurse did not pick up her phone. Ms. Fountain then called the claimant, who was eating dinner not far from her home. Ms. Fountain explained to the claimant that she had called both nurses assigned to the Galesburg area, but neither was available to take the call. The triage nurse expected the claimant to return home, get in uniform and depart to the call. The City of Galesburg is about an hour by vehicle from the claimant's residence. Neither party could recall the exact location of the client's residence, but both parties acknowledged it was about an hour from Galesburg by vehicle. The claimant refused to take the call because it was not in the Davenport service area.

On January 5, 2022, Branch Administrator Adele Malcolm informed the claimant of her termination. Ms. Malcolm told the claimant to pack up her things. There was not a discussion about Ms. Malcolm's decision to discharge her.

The following section describes the findings of facts necessary to resolve the overpayment issue:

The claimant claimed benefits from the week ending January 8, 2022 through the week ending January 22, 2022. She received \$1,142.00 total in benefits after her separation from the employer.

A notice of fact-finding was sent to the parties on January 18, 2021, informing them of a fact-finding interview on January 24, 2021 at 10:50 a.m. The administrative record KFFD shows the employer did not leave a name or telephone number for someone who had firsthand information, if necessary for rebuttal. The claimant was called at 11:15 a.m. and participated

personally. The representative left a voicemail for the employer's third-party servicer at 11:25 a.m.

The representative took the following information from the State Information Data Exchange System ("SIDES"), "Refused to see [patient] for [Galesburg] while on call for [Davenport.] Not eligible for rehire. Payout ETO as resides in [Illinois]." The employer's third-party servicer provided a verbal warning issued to the claimant on July 6, 2021 and a copy of the claimant's job description to support its position. It did not provide a copy of the termination notice.

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

For the reasons that follow, the administrative law judge concludes claimant was discharged for disqualifying misconduct. The administrative law judge further concludes the claimant is excused from repaying the benefits she received due to the employer's inadequate participation.

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.

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.

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). 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). The focus is on deliberate, intentional, or culpable acts by the employee. *Id.* 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). The administrative law judge must analyze situations involving alleged insubordination by evaluating the reasonableness of the employer's request in light of the circumstances, along with the worker's reason for non-compliance. *See Endicott v. Iowa Dep't of Job Serv.*, 367 N.W.2d 300 (Iowa Ct. App. 1985).

The administrative law judge concludes the claimant's refusal to perform work on the night of January 4, 2022 was job related misconduct. The claimant contends that her refusal was reasonable because this assignment was for another service area. However, the claimant acknowledged that she had been asked to cover nurses in the Galesburg service area in the past.

The claimant contends she had always been given a couple of days' notice in the past before she had to cover these assignments. The nature of the claimant's relationship with the employer is one, in which she was on-call for the days she was working. Indeed, the claimant acknowledges that if a call for service had been requested for the Davenport service area, that she would have been required to take that call. The claimant's job description outlines the expectation that she could be asked to perform other duties by management and those duties could result in "abrupt changes to her schedule" including working overtime.

Furthermore, the employer took steps to contact other nurses prior to asking the claimant to service the area. The claimant acknowledged that Ms. Fountain explained these circumstances to the claimant on January 4, 2022. Finally, the claimant does not state circumstances that would threaten her health, safety, or morals. In this context, the administrative law judge finds the claimant's refusal to respond to the assignment as unreasonable and insubordinate. Benefits are denied.

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 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.

Because the claimant's separation was disqualifying, benefits were paid 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 adequately in the initial proceeding to award benefits. The benefits were not received due to any fraud or willful misrepresentation by claimant. Additionally, the employer did not participate adequately in the fact-finding interview. Thus, claimant is not obligated to repay to the agency the benefits she received.

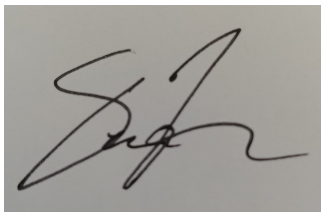
The law also states that an employer is to be charged if "the employer failed to respond timely or adequately to the department's request for information relating to the payment of benefits. . ." Iowa Code § 96.3(7)(b)(1)(a). In this case, the employer's third-party servicer provided minimal information through SIDES. It attached the past warning issued to the claimant and her job description. The termination notice was not attached to the SIDES response. Instead, the representative had the following information from the employer to evaluate a complex insubordination case, "Refused to see [patient] for [Galesburg] while on call for [Davenport.] Not eligible for rehire. Payout ETO as resides in [Illinois]." While the employer stated the claimant's last day worked, it remained unclear from its submission when the final incident occurred. This means the employer did not comply with the minimal requirements of Iowa Admin. Code r. 871-24.10(1) to identify the dates and circumstances resulting in the claimant's discharge.

It's two-sentence description of the incident also undermines the central point the employer needed to show to meet its burden, that the request did not exceed the expectations of her

position. This means the employer did not comply with the minimal requirements of Iowa Admin. Code r. 871-24.10(1) to identify the policy violated. The employer did not participate adequately at factfinding. As a result, the employer will be responsible for absorbing benefits paid to the claimant.

**DECISION:**

The January 27, 2022, (reference 01) unemployment insurance 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 is not required to repay the \$1,142.00 in regular benefits she received because the Respondent did not participate adequately at factfinding.



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Sean M. Nelson  
Administrative Law Judge  
Unemployment Insurance Appeals Bureau  
1000 East Grand Avenue  
Des Moines, Iowa 50319-0209  
Fax (515) 725-9067

April 8, 2022  
Decision Dated and Mailed

smn/kmj