

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

AMBER N ESSARY
Claimant

IA DEPT OF HUMAN SVCS
Employer

APPEAL 23A-UI-07504-AR-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

**OC: 07/09/23
Claimant: Respondent (2)**

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:

On August 1, 2023, the employer filed an appeal from the July 26, 2023, (reference 01) unemployment insurance decision that allowed benefits based upon the determination that claimant was discharged without a showing of disqualifying misconduct. The parties were properly notified of the hearing. A telephone hearing was held on August 21, 2023. The claimant, Amber N. Essary, participated. The employer, Iowa Department of Human Services, participated through its hearing representative, Jennifer Rice, with witnesses Jana Rhoads and Dori Tew. Sone Xaykofo observed on behalf of the employer but did not testify. Claimant's Exhibit A was admitted over a foundation objection by the employer. Employer's Exhibits 1 through 7 were admitted. The administrative law judge took official notice of the administrative record.

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 an administrative assistant I from April 14, 2000, until this employment ended on July 10, 2023, when she was discharged.

The employer deals with information considered confidential under Iowa Code related to child abuse information. Both the employer's work rules and Iowa Code prohibit the dissemination of child abuse information to unauthorized parties. The employer's work rules also prohibit accessing this information without authorization or a legitimate, work-related reason to do so. The work rules are contained in the employee handbook, which is intermittently updated. Each time it is updated, employees are expected to review the work rules and sign indicating they have done so. Claimant had acknowledged her receipt and review of the work rules. She was

familiar with the employer's rules regarding unauthorized or unnecessary access of confidential information. The employer's procedures dictate that, if an employee becomes aware of an acquaintance or family member being the subject of an investigation by or assistance from the employer, the employee should notify their supervisor and a lock should be placed so that the employee cannot access information from the acquaintance or family member's file.

In late April 2023, claimant had taken a child into her home who was friends with her own child. She had done so because the guest child's home life was problematic. Claimant knew that the employer was involved in the guest child's life because a child protective worker had come to claimant's home to speak with the guest child. Claimant also knew that the guest child had, at some point, had difficulty communicating their parents' phone number to the child protective worker via phone. At some point, claimant did contact the child protective worker but did not receive a response. Claimant was not named as an interested party in the guest child's case with the employer.

On April 28, 2023, while at work, claimant accessed the guest child's case file information in the employer's computer system twice. She again accessed the information on May 1, 2023. Claimant's justification for this was that she was attempting to make sure that the phone number in the case file had been input correctly. Claimant's access of the information in the computer system was verified with the employer's information technology department on May 2, 2023.

After an interaction with the guest child's parents, claimant became concerned that the child protective worker might cause her to be in legal trouble because of the information she had accessed about the case or because of her other conduct with respect to the case, including allowing the guest child to stay in her home. Claimant spoke first to another team member, and then to a supervisor, but not the child protective worker's supervisor, to inquire about whether the child protective worker could cause claimant to be charged criminally. The supervisor she asked was not authorized to have information about the case.

Rhoads was made aware of claimant's actions and confronted claimant about the issue. Claimant admitted having accessed the information in the guest child's case file. She also admitted that she knew she was not authorized to access that information. She stated that she was looking to see if there were other cases associated with the guest child because she wanted to know if the child was being honest. Rhoads told claimant that she could not engage in that type of conduct. Claimant was informed that the incident would be under investigation as of May 12, 2023.

The employer interviewed a number of people, including the assigned child protective worker, their supervisor, the team member and supervisor that claimant approached for information about whether the worker could cause her legal trouble, and claimant. After discussion among the supervisors and with HR, the employer discharged claimant on July 10, 2023, for improperly accessing and disseminating confidential information. The discharge did not occur until July 10, 2023, because of the investigation and because of relevant parties' absences from work during the intervening period.

Claimant had received one prior warning for conduct similar in nature to the conduct for which she was discharged. On April 20, 2021, claimant received a written reprimand for sending an email with confidential information to a number of different employer bureaus seeking information and assistance for an individual with whom claimant was familiar. The email contained confidential information that should not have been sent to some of the recipients. It also contained directives from claimant that were outside of the scope of her role. Claimant received a warning for this conduct and was reminded of the employer's strict confidentiality

requirements. The warning also informed claimant that future similar conduct could result in discipline up to and including discharge.

The administrative record indicates that claimant filed a claim for unemployment benefits with an effective date of July 9, 2023, and a reopen date of July 16, 2023. She filed for and received unemployment insurance benefits for four weeks between July 16, 2023, and August 19, 2023. She has received unemployment insurance benefits in the gross amount of \$2,416.00. The employer substantially participated in the fact-finding interview when it provided information regarding the discharge in writing, in lieu of attendance at the interview itself.

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) and (d) provide:

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 disqualification shall continue 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.

...

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 even 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:

(1) Material falsification of the individual's employment application.

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

(3) Intentional damage of an employer's property.

(4) Consumption of alcohol, illegal or nonprescribed prescription drugs, or an impairing substance in a manner not directed by the manufacturer, or a combination of such substances, on the employer's premises in violation of the employer's employment policies.

- (5) Reporting to work under the influence of alcohol, illegal or nonprescribed prescription drugs, or an impairing substance in an off-label manner, or a combination of such substances, on the employer's premises in violation of the employer's employment policies, unless the individual is compelled to work by the employer outside of scheduled or on-call working hours.
- (6) Conduct that substantially and unjustifiably endangers the personal safety of coworkers or the general public.
- (7) Incarceration for an act for which one could reasonably expect to be incarcerated that results in missing work.
- (8) Incarceration as a result of a misdemeanor or felony conviction by a court of competent jurisdiction.
- (9) Excessive unexcused tardiness or absenteeism.
- (10) Falsification of any work-related report, task, or job that could expose the employer or coworkers to legal liability or sanction for violation of health or safety laws.
- (11) Failure to maintain any license, registration, or certification that is reasonably required by the employer or by law, or that is a functional requirement to perform the individual's regular job duties, unless the failure is not within the control of the individual.
- (12) Conduct that is libelous or slanderous toward an employer or an employee of the employer if such conduct is not protected under state or federal law.
- (13) Theft of an employer or coworker's funds or property.
- (14) Intentional misrepresentation of time worked or work carried out that results in the individual receiving unearned wages or unearned benefits.

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).

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. 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). The focus is on deliberate, intentional, or culpable acts by the employee.

First, the administrative law judge considers whether claimant was discharged for a current act of misconduct.

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.

A lapse of 11 days from the final act until discharge when claimant was notified on the fourth day that his conduct was grounds for dismissal did not make the final act a “past act.” Where an employer gives seven days’ notice to the employee that it will consider discharging him, the date of that notice is used to measure whether the act complained of is current. *Greene v. Emp’t Appeal Bd.*, 426 N.W.2d 659 (Iowa Ct. App. 1988). An unpublished decision held informally that two calendar weeks or up to ten work days from the final incident to the discharge may be considered a current act. *Milligan v. Emp’t Appeal Bd.*, No. 10-2098 (Iowa Ct. App. June 15, 2011).

Conduct asserted to be disqualifying misconduct must be current. *West v. Emp’t Appeal Bd.*, 489 N.W.2d 731 (Iowa 1992); *Greene*, 426 N.W.2d 659. Whether the act is current is measured by the time elapsing between the employer’s awareness of the misconduct and the employer’s notice to the employee that the conduct provides grounds for dismissal. *Greene*, 426 N.W.2d at 662.

Though two months elapsed between the act and the ultimate discharge, the claimant was notified that the conduct was inappropriate and that it was under investigation at least as of May 12, 2023. Accordingly, because claimant was notified that the conduct was being investigated for disciplinary reasons at least as of May 12, 2023, the act is a current act.

The employer has carried its burden of establishing that claimant engaged in disqualifying misconduct when she accessed information that she did not have authorization or work-related reason to access. She admitted that she knew that under the work rules, this conduct was prohibited; she engaged in the conduct regardless. Claimant then disclosed additional information to persons without authorization to have the information in an attempt to determine whether she would be in trouble for having accessed the information or based on any of her other conduct with respect to the case. Claimant did this despite a prior warning that explicitly warned her that she must carefully adhere to the employer’s confidentiality expectations because of the sensitive nature of the employer’s work. Claimant asserts that similar conduct occurs frequently at the employer and those employees are not discharged. However, there is no indication that the employer knew about these other employees engaging in similar conduct, and claimant did not make the employer aware of any of these other employees until the time at which she was discharged. The claimant disregarded a known work rule forbidding the conduct in which she engaged. This constitutes disqualifying 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. Iowa Code section 96.3(7)a-b 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, 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 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), Iowa Admin. Code r. 871—24.10. In this case, the claimant has received benefits but was not eligible for those benefits. Since the employer did participate 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 July 26, 2023, (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 has been overpaid unemployment insurance benefits in the amount of \$2,416.00 and is obligated to repay the agency those benefits. The employer did participate in the fact-finding interview and its account shall not be charged.



Alexis D. Rowe
Administrative Law Judge

08/23/23
Decision Dated and Mailed

AR/jkb

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:

**Employment Appeal Board
4th Floor – Lucas Building
Des Moines, Iowa 50319
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:

**Employment Appeal Board
4th Floor – Lucas Building
Des Moines, Iowa 50319
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.