

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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**DAWN D DOZARK**  
Claimant

**APPEAL 21A-UI-25556-CS-T**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**CHOICE EMPLOYMENT SERVICES LLC**  
Employer

**OC: 05/02/21  
Claimant: Respondent (2)**

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Iowa Code §96.5(2)a-Discharge/Misconduct  
Iowa Code §96.5(1)- Voluntary Quit  
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 November 18, 2021, the employer/appellant filed an appeal from the November 12, 2021, (reference 03) unemployment insurance decision that allowed benefits based on claimant being dismissed on October 11, 2021. However, there was no evidence of willful or deliberate misconduct. The parties were properly notified about the hearing. A telephone hearing was held on January 18, 2022. Claimant participated in the hearing. Employer participated through Chief Operations Officer, Patrick Dahlquist. Administrative notice was taken of claimant's unemployment insurance benefits records.

**ISSUES:**

Was the separation a layoff, discharge for misconduct, or voluntary quit without good cause?

Should claimant repay benefits?

Should the employer be charged due to employer participation in fact finding?

Is the claimant overpaid benefits?

**FINDINGS OF FACT:**

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant began working for employer on June 1, 2021. Claimant last worked as a full-time job coach. Claimant's job requires her to assist clients with disabilities so they can have a job. Claimant's job requires her to be near the client so she can verbally coach the client while they work.

On October 2, 2021, claimant was with a client while the client worked at a convenience store. Prior to the client leaving the store for the day, claimant went to her car and left the client in the store. Claimant is required to stay with the client during their shift and after their shift until their transportation has arrived to take the client. It was determined that claimant was not near and could not see the client at all times when she was sitting in her car.

The employer has a written policy that requires claimant to be able to physically see the consumer at all times. Claimant was aware of the policy and signed an acknowledgement of the employee handbook that contained the policy on June 1, 2021.

Employer also received complaints from a convenient store employee that claimant was spending a majority of her time on the computer instead of assisting the client while they worked.

Claimant received a prior warning on August 23, 2021, for leaving a client while they were working. In that instance the employer found claimant sitting in her car smoking while the client was inside Wal-Mart working. Claimant was warned that she could be terminated if she left a client while they were working.

On October 11, 2021, the employer terminated claimant due to her leaving the client in the store while she went and sat in her car.

Claimant originally filed for benefits with an effective date of May 2, 2021. Claimant's weekly benefit amount is \$605.00. Claimant resumed filing for benefits the week ending October 16, 2021, and continued filing each week until week ending January 8, 2022. Since October 16, 2021, claimant has received \$5,783.00 in state unemployment benefits.

Claimant was present when the Iowa Workforce Development representative attempted to call the employer to participate. The employer did not participate in a fact-finding interview.

#### **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 §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 Department of Job Service*, 275 N.W.2d 445, 448 (Iowa 1979). Iowa Admin. Code r. 871-24.32(4) provides:

(4) Report required. The claimant's statement and employer's statement must give detailed facts as to the specific reason for the claimant's discharge. Allegations of misconduct or dishonesty without additional evidence shall not be sufficient to result in disqualification. If the employer is unwilling to furnish available evidence to corroborate the allegation, misconduct cannot be established. In cases where a suspension or disciplinary layoff exists, the claimant is considered as discharged, and the issue of misconduct shall be resolved.

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.

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).

In this case, the parties agree that claimant left the client in the convenience store. Claimant testified that she left the client so she could work on paperwork in her vehicle. However, leaving the client is in violation of the company's policy, even if it was to fill out paperwork. The employer is entitled to establish reasonable work rules and expect employees to abide by them. Leaving the client unattended puts the client at risk of being injured and the company at risk of being liable. The employer has presented substantial and credible evidence that claimant was warned about leaving the client unattended. Despite these warnings, claimant continued to engage in similar behavior. This is disqualifying misconduct.

Because claimant's separation was disqualifying, benefits were paid to her which she was not entitled. The administrative law judge finds claimant has been overpaid regular state unemployment benefits in the amount of \$5,783.00 for thirteen weeks ending January 8, 2022. Claimant is not required to repay the regular state unemployment benefits because the employer did not participate in the fact-finding interview due to no fault of her own.

Iowa Code section 96.3(7)a-b, as amended in 2008, provides, in pertinent part: :

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.

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.

Claimant has been overpaid REGULAR UI benefits in the amount of \$5,783.00 as she was not eligible to receive REGULAR UI benefits from October 16, 2021 through January 8, 2022. However, since the employer did not participate in the fact-finding interview, claimant is not required to repay these benefits and the employer's account shall be charged.

**DECISION:**

The November 12, 2021, (reference 03) 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.

Claimant has been overpaid unemployed insurance benefits in the amount of \$5,783.00, but she is not obligated to repay those benefits since the employer did not participate in the fact-finding interview. The employer's account shall be charged.



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Carly Smith  
Administrative Law Judge  
Unemployment Insurance Appeals Bureau

February 9, 2022  
Decision Dated and Mailed

cs/scn

**NOTE TO CLAIMANT:**

- This decision determines you are not eligible for regular unemployment insurance benefits under state law. If you disagree with this decision you may file an appeal to the Employment Appeal Board by following the instructions on the first page of this decision.