

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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

**MELISSA A LAROSA**  
Claimant

**APPEAL NO: 18A-UI-05295-JE-T**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**CENTRAL AVENUE HEALTHCARE INC**  
Employer

**OC: 04/08/18**  
**Claimant: Respondent (2)**

Section 96.5-2-a – Discharge/Misconduct  
Section 96.3-7 – Recovery of Benefit Overpayment

**STATEMENT OF THE CASE:**

The employer filed a timely appeal from the April 27, 2018, reference 03, decision that allowed benefits to the claimant. After due notice was issued, a hearing was held by telephone conference call before Administrative Law Judge Julie Elder on May 25, 2018. The claimant participated in the hearing. Jessie Johnson, Business Office Manager, participated in the hearing on behalf of the employer.

**ISSUE:**

Whether the employer discharged the claimant for work-connected misconduct, as defined by Iowa law.

**FINDINGS OF FACT:**

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant worked as a full-time CNA for Central Avenue Healthcare from December 19, 2016 to April 2, 2018. She was discharged for failing to maintain acceptable standards of respect for residents and staff, failure to carry out general and specific instructions promptly or to perform her job responsibilities, and failure to cooperate with other employees and staff.

On March 29, 2018, Business Office Manager Jessie Johnson was passing dinner plates in the dining room when a resident told her she needed to use the restroom. Because Ms. Johnson is not a nurse or an aide she cannot assist a resident in using the restroom so she pushed the resident over to the window and told the claimant the resident needed to use the restroom. The claimant hesitated and then said she just got the resident out of the restroom and Ms. Johnson told her she still needed to assist the resident. The claimant sighed and rolled her eyes as she turned back toward the kitchen. Ms. Johnson called the claimant's name but the claimant did not answer and was visibly irritated. Ms. Johnson then said she would take care of the resident and started pushing the wheelchair away. The claimant turned around and reached for the wheelchair and Ms. Johnson told her no. The resident in question and another resident and her daughter as well as dietary staff observed the interaction. Fifteen minutes prior to this incident,

the resident told Ms. Johnson in the hall she felt no one would help her. Ms. Johnson was so upset by the situation, she did not return to the dining room even though she was the department head for the evening meal.

On May 31, 2017, the claimant received a written warning after commenting to a resident, "Look how big you are. You don't need another snack." The claimant refused to sign the warning. On September 19, 2017, a resident requested chocolate milk and the claimant stated, "Supper is in 45 minutes. You can wait. All you do is drink chocolate milk. You can wait." She told the resident she could wait several times before a nurse provided the resident with the chocolate milk and educated the claimant about the facility being the resident's home. The claimant received a verbal interaction for that incident. During the claimant's annual review March 2, 2018, the DON noted the claimant often rolled her eyes, sighed, and made inappropriate comments when her pager went off.

After reviewing the March 29, 2018, incident and the previous situations involving the claimant, the employer terminated the claimant's employment April 2, 2018.

The claimant has claimed and received unemployment insurance benefits in the amount of \$1,788.00 for the six weeks ending May 19, 2018.

The employer did not participate in the fact-finding interview.

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

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

Iowa Code section 96.5(2)a provides:

An individual shall be disqualified for benefits, regardless of the source of the individual's wage credits:

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.

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).

The employer has the burden of proving disqualifying misconduct. *Cosper v. Iowa Department of Job Service*, 321 N.W.2d 6 (Iowa 1982). A claimant is not qualified to receive unemployment insurance benefits if an employer has discharged him for reasons constituting work-connected misconduct. Iowa Code section 96.5-2-a. Misconduct that disqualifies an individual from receiving unemployment insurance benefits occurs when there are deliberate acts or omissions that constitute a material breach of the worker's duties and obligations to the employer. See 871 IAC 24.32(1).

The claimant showed a pattern of disrespecting residents. The facility is the residents' home and if a resident wants a snack, chocolate milk or to use the restroom, it is the claimant's responsibility to help the resident with those situations. It is not her job to judge what a resident eats or drinks or to comment on their size. The residents are dependent on staff, some for nearly their every need, and as a CAN, the claimant had a duty to assist residents and to do so without making the resident feel like a burden. Instead the employer has demonstrated that the claimant failed to maintain acceptable standards of respect and failed to carry out specific instructions promptly, as directed by Ms. Johnson. Under these circumstances, the administrative law judge finds the employer has met its burden of proving disqualifying job misconduct as that term is defined by Iowa law. Therefore, benefits must be denied.

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.

The unemployment insurance law requires benefits be recovered from a claimant who receives benefits and is later denied benefits even if the claimant acted in good faith and was not at fault. However, a claimant will not have to repay an overpayment when an initial decision to award benefits on an employment separation issue is reversed on appeal if two conditions are met: (1) the claimant did not receive the benefits due to fraud or willful misrepresentation, and (2) the employer failed to participate in the initial proceeding that awarded benefits. In addition, if a claimant is not required to repay an overpayment because the employer failed to participate in the initial proceeding, the employer's account will be charged for the overpaid benefits. Iowa Code section 96.3(7)a, b.

The claimant received benefits but has been denied benefits as a result of this decision. The claimant, therefore, was overpaid benefits.

Because the claimant did not receive benefits due to fraud or willful misrepresentation and employer failed to participate in the finding interview, the claimant is not required to repay the overpayment and the employer remains subject to charge for the overpaid benefits.

The employer did not participate in the fact-finding interview. Consequently, the claimant's overpayment of benefits is waived and her overpayment, in the amount of \$1,788.00 for the six weeks ending May 19, 2018, is charged to the employer's account.

**DECISION:**

The April 27, 2018, reference 03, 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 received benefits but was not eligible for those benefits. The employer did not participate in the fact-finding interview within the meaning of the law. Therefore, the claimant's overpayment of benefits, in the amount of \$1,788.00 for the six weeks ending May 19, 2018, shall be charged to the employer's account.

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Julie Elder  
Administrative Law Judge

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Decision Dated and Mailed

je/scn