

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

SARA E LENDECKER

Claimant

MERCY HEALTH SERVICES-IOWA CORP

Employer

APPEAL 24A-UI-01486-AR-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 12/24/23

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 February 6, 2024, the employer filed an appeal from the January 31, 2024, (reference 01) unemployment insurance decision that allowed benefits based on the determination that claimant was discharged from employment without a showing of disqualifying misconduct. The parties were properly notified about the hearing. A telephone hearing was held on February 28, 2024. Claimant, Sara E. Lendecker, participated. Employer, Mercy Health Services-Iowa Corp., participated through MHA Hearing Representative Jennifer Kim-Pierce, Director of Inpatient Nursing Wendy Prins, and Clinical Nurse Manager Alexis Knodell. Spanish-language interpretation services were provided by Maria, #14976, with CTS Language Link. Employer's Exhibits 1 through 4 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 began working for employer on September 12, 2022. Claimant last worked as a full-time nursing assistant. Claimant was separated from employment on November 13, 2023, when she was discharged.

In July 2023, Knodell, who was claimant's final supervisor, completed claimant's introductory performance review, which had not been completed to that date. During that review, claimant

and Knodell discussed claimant's ongoing issues communicating with her coworkers in a positive manner. Claimant and Knodell discussed claimant's struggles completing work in a timely manner because of her diagnosis of ADHD. They discussed strategies to help claimant, including setting alarms and making lists. When they followed up two weeks later, the strategies were helping claimant with timely completion of tasks. However, claimant continued to struggle with interpersonal communication at work.

Sometime thereafter, both claimant and Knodell went out on leave. When claimant returned from leave, sometime in September 2023, she was placed on work restrictions. Specifically, she was prohibited from providing patient care. The employer placed her in a light-duty position in which she was to work at the desk answering phones and answering patient call lights from the desk, without going to the patients' rooms. The employer indicated to her that she was not to go to patients' rooms at all.

On October 31, 2023, claimant was scheduled to work, but she did not report for work or call out as absent. The employer contacted claimant who stated she did not know she needed to work that day. She had lost the updated schedule, so she had relied on an out-of-date schedule that did not indicate she was scheduled on October 31, 2023.

On November 1, 2023, Prins gave claimant a disciplinary warning for attendance. Claimant had accrued 43 points during the year. The employer's attendance policy states that employees will be discharged for accruing 20 attendance points. Claimant had not been discharged because there had been turnover of her supervisors and the attendance tracking had been one of the things missed during that turnover. The November 1, 2023, disciplinary action was printed before claimant had the no call/no show on October 31, 2023, so it did not address the no call/no show. The disciplinary action stated that any future attendance problems, or any other corrective actions, could result in progressive discipline, up to and including discharge.

On November 3, 2023, Prins was called to the unit where claimant was stationed because there was a disagreement in a patient room. When she arrived, she found another CNA, Christine, crying. Christine reported that she had been trying to show claimant how to do something but claimant was not listening. Prins went to the patient's room and found claimant who was attempting to figure out how to keep sheets on the patient's bed. The patient was a difficult patient who only responded well to claimant. There was some discussion of taping sheets together and taping sheets to the mattress. Prins told claimant that taping anything would be inappropriate, and that taping things to the mattress would damage the mattress. Prins told the patient that the mattress was a specialty mattress, and the nursing staff would be working to make the patient comfortable.

Once out of the patient's room, Prins told claimant she had not handled the situation properly. Claimant had argued with Christine in front of the patient, which was inappropriate. Prins also told claimant that she should not be in patients' rooms because of her light-duty restrictions. She told claimant that if she continued to violate the light-duty restrictions, they could not have her continue working in the same capacity.

The following week, Knodell had returned from leave. She was made aware of the incident from November 3, 2023, and she was asked to follow up. During that process, on November 9, 2023, another incident occurred. Claimant was again in a patient room on November 9, 2023. This time, she was delivering a pillowcase to the patient. It was reported that claimant told the patient that they deserved better care than they were receiving and they should report her coworkers for poor care. Claimant was suspended pending an investigation into the incidents from November 3 and 9, 2023.

On November 13, 2023, Knodell and an HR representative called claimant to conduct the investigatory interview. They explained that claimant was suspended because of the comments she made in the patient room, and for having an argument with a coworker in a patient's room. Claimant denied having made the comments about poor patient care on November 9, 2023. When asked why she was in the patient's room when she was not supposed to be, she responded that she knew the patient personally and was not providing patient care, so she thought she could simply enter the room. She did not know that violated the expectations regarding light-duty restrictions.

The employer determined that, because of its concerns regarding claimant's competency in the position, her interpersonal communication struggles, and her recent disciplinary action, discharge was the best course of action. Knodell and VP of HR Julie Anfensen informed claimant of the discharge decision by phone on November 13, 2023.

The administrative record indicates that claimant filed a claim for unemployment insurance benefits with an effective date of December 14, 2023, and a reopen date of January 14, 2024. Her weekly benefit amount is \$516.00. She filed weekly continuing claims for benefits between January 14, 2024, and February 3, 2024. She has received a total benefit payment in the amount of \$1,548.00. The employer did not participate in the fact-finding interview, but through no fault of its own. The notice of claim was not received by the employer's third-party handler of unemployment claims. The phone number the fact finder called did not go to the third-party claims handler. The fact finder sent a request for additional information with a deadline of January 26, 2024, to respond by telephone. Rochelle McKinney, a representative with the third-party claims handler, placed a call and left a voicemail with details regarding the separation on January 26, 2024, at 3:08 p.m.

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.

The decision in this case rests, at least in part, on the credibility of the witnesses. It is the duty of the administrative law judge as 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, 394–95 (Iowa 2007). The administrative law judge 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. *Id.* 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 believable evidence; whether a witness has made inconsistent statements; the witness's appearance, conduct, age, intelligence, memory and knowledge of the facts; and the witness's interest in the trial, their motive, candor, bias and prejudice. *Id.*

After assessing the credibility of the witnesses who testified during the hearing, reviewing the exhibits submitted by the parties, considering the applicable factors listed above, and using her own common sense and experience, the administrative law judge finds the employer's version of events to be more credible than the claimant's recollection of those events. Claimant denied any fault in any of the interactions recounted during the appeal hearing. Each time a problematic interaction was discussed, claimant attributed the fault to a coworker, and accepted no blame for her part in the interaction. This substantially undermined her assertions that, in each case, someone else was the cause of the issue.

The administrative law judge concludes that claimant had been warned about her struggles interacting with her coworkers. She had also been warned not to go into patient rooms to avoid violating her light-duty restrictions, and she had been told that doing so would jeopardize her employment. Indeed, prior to her discharge, she had been told that any future corrective action could result in her termination from employment. Despite these prior warnings, claimant entered a patient room on November 9, 2024, and undermined her coworkers when she encouraged the patient to report them for poor quality of care. Even if the other conduct is disregarded, the conduct of entering the patient room, despite explicit instructions not to and at least one prior warning indicating that doing so would jeopardize her employment, constitutes disqualifying misconduct.

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. Since the employer did not participate in the fact-finding interview the claimant is not obligated to repay to the agency the benefits she received. However, the employer did not participate in the fact-finding interview through no fault of its own. Accordingly, its account shall not be charged. The overpayment shall be absorbed by the fund.

DECISION:

The January 31, 2024, (reference 01) unemployment insurance decision is REVERSED. The claimant was discharged from employment on November 13, 2023, 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 \$1,548.00. Because the employer did not participate in the fact-finding interview, claimant is not obligated to repay the benefits she received. The employer did not participate in the fact-finding interview through no fault of its own, and its account shall not be charged. The overpayment shall be absorbed by the fund.



Alexis D. Rowe
Administrative Law Judge

March 5, 2024
Decision Dated and Mailed

ar/scn

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:

**Iowa Employment Appeal Board
6200 Park Avenue Suite 100
Des Moines, Iowa 50321
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:

**Iowa Employment Appeal Board
6200 Park Avenue Suite 100
Des Moines, Iowa 50321
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.