

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

**Claimant**

**APPEAL 17A-UI-09936-JC-T**

**Employer**

**ADMINISTRATIVE LAW JUDGE  
PUBLIC DECISION**

**OC: 08/27/17  
Claimant: Respondent (2)**

Iowa Code § 235B.6(2)(d)(4) - Dependent Adult Abuse – access to confidential information  
Iowa Code § 235B.8 - Dependent Adult Abuse – re-dissemination of confidential information  
Iowa Code § 96.5(2)a – Discharge for Misconduct  
Iowa Code § 96.5(1) – Voluntary Quitting  
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:**

The employer/appellant filed an appeal from the September 21, 2017 (reference 01) unemployment insurance decision that allowed benefits based upon claimant's separation from employment. The parties were properly notified of the hearing and a telephone hearing was held on October 26, 2017. The claimant participated personally and was represented by an attorney. The employer was represented by non-attorney representative. A human resources representative, program manager, and public services superintendent attended the hearing for the employer. Employer Exhibits 1 through 51, and 55 through 60, were admitted. The administrative law judge took administrative notice of the claimant's unemployment insurance benefits records as well as the fact-finding documents.

**ISSUES:**

Shall the hearing record and decision be publicly disclosed?  
Was the claimant discharged for disqualifying job-related misconduct?  
Has the claimant been overpaid any unemployment insurance benefits, and if so, can the repayment of those benefits to the agency be waived?  
Can any 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 a resident treatment worker. This employer assists clients with disabilities with their daily living tasks in a residential facility. Claimant was employed from 2000 until August 24, 2017. Claimant last physically worked on the job January 27, 2017 when the final incident occurred with a client. Claimant was placed on paid administrative leave pending investigation (Employer Exhibit 1). Claimant was discharged from employment on August 24, 2017 (Employer Exhibit 2).

Claimant's job duties involved providing direct care and supervision for clients. Claimant was provided yearly training which addressed de-escalation tactics, abuse and neglect with dependent adult population and being a mandatory reporter (Employer Exhibit 8, 26-28). Claimant also received a behavioral support plan detailing appropriate interactions and de-escalation tactics to implement for each client served, based upon the client's physical, mental and intellectual capacities.

This employer has a written policy in place that states, "Employees shall not mistreat, abuse, coerce, neglect or exploit employees, visitors, or clients, whether verbally, physically, sexually or financially. When physical contact is a part of an employee's duties, each contact will be performed in a professional manner." (Employer Exhibit 7). Physical abuse under the employer's policy is defined as "[a]n act that causes, or may have caused injury to an individual. Physical abuse includes but is not limited to: hitting, slapping, pushing, pinching, throwing objects directed at the individual or otherwise striking an individual" or "unauthorized use of restrictive interventions including restraint, seclusion, aversive conditioning, time out or punishment (Employer Exhibit 9). Physical restraint is to be limited to situations of imminent danger or harm, such as a client walking into traffic.

Claimant received a copy of the employer's policies during hire (Employer Exhibit 4). Claimant had no prior warnings but in 2006, was discharged for similar conduct for which he was discharged in 2017 (Employer testimony). Upon grieving his discharge through his collective bargaining unit, he was reinstated. Claimant was aware that violating the employer's policy regarding abuse was grounds for dismissal (Claimant testimony).

On January 27, 2017, the claimant was supervising a client in his bedroom. The client's behavioral support plan directed the client to not leave the employer's residential premises without being clothed. The client had a history of wanting to take other clients' clothing. The claimant stated he was to not allow the client out of his room without being clothed. At the time of the incident, the client was wearing pants, but no shirt or shoes. The client attempted to exit his room, and the claimant was seated in a rolling, office-like chair at that time, attempted to block the client physically with his body and/or chair. As a result of the claimant's conduct, his leg struck the client in the groin area (Employer Exhibit 29, 31-34). The client stumbled to the floor after the claimant made contact. The claimant stated he was trying to block the client from leaving because he was not dressed. Unbeknownst to the claimant, the incident was witnessed by a superintendent, who was standing in the doorway (Employer Exhibit 29). Upon striking the client, the claimant sat back in his chair (Employer Exhibit 29).

As a result of the incident, the claimant was immediately placed on paid administrative leave, pending investigation (Employer Exhibit 1). The claimant wrote a statement on January 27, 2017, and was interviewed as well (Employer Exhibit 35-41). The superintendent was interviewed and wrote a statement as well (Employer Exhibit 29, 31-34). The claimant was interviewed a second time and provided a second written statement on January 31, 2017 (Employer Exhibit 42-51). The claimant acknowledged he made physical contact with the client (Employer Exhibit 35-36) and his conduct was not consistent with training he had received (Employer Exhibit 36). A careful review of the claimant's two statements and two interviews reflects inconsistencies in the claimant's account of the event. He was subsequently discharged (Employer Exhibit 2).

The administrative record reflects that claimant has received unemployment benefits in the amount of \$3,122.00, since filing a claim with an effective date of August 27, 2017. The administrative record also establishes that the employer did participate in the fact-finding interview or make a witness with direct knowledge available for rebuttal.

## REASONING AND CONCLUSIONS OF LAW:

The first issue to be addressed in this case is the effect of the confidentiality requirements of Iowa Code § 235B.6(2)(d)(4) and Iowa Code § 235B.8. Iowa Code § 235B.8 prohibits the re-dissemination of dependent adult abuse information. Iowa Code § 235B.8 must be followed despite conflicting provisions of the Iowa Open Records Act (Iowa Code chapter 22), the Iowa Administrative Procedure Act (APA) (Iowa Code chapter 17A), and Iowa Employment Security Law (Iowa Code chapter 96). Iowa Code § 22.2(1) provides: "Every person shall have the right to examine and copy a public record and to publish or otherwise disseminate a public record or the information contained in a public record."

The appeal documents, exhibits, decision, and audio recording in an unemployment insurance case would meet the definition of "public record" under Iowa Code § 22.1-3. Iowa Code § 17A.12(7) provides that contested case hearings "shall be open to the public." Under Iowa Code § 96.6(3), unemployment insurance appeals hearings are to be conducted pursuant to the provisions of chapter 17A. The unemployment insurance rules provide that copies of all presiding officer decisions shall be kept on file for public inspection at the administrative office of the department of workforce development. Iowa Admin. Code r. 871-26.17(3).

In this case, it would defeat the purpose of Iowa Code § 235B.8 of restricting re-dissemination to permit the confidential information to be disclosed to the general public. Therefore, the public decision in this case is issued without identifying information. A decision with identifying information will be issued to the parties; but that decision, the audio record, and any documents in the administrative file shall be sealed and not publicly disclosed.

For the reasons that follow, the administrative law judge concludes the claimant was discharged for job-related misconduct.

Iowa Code § 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 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).

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.

The employer has the burden of proof in establishing disqualifying job related 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 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 of the administrative code definition of misconduct is on deliberate, intentional or culpable acts by the employee. *Id.*

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, 394-395 (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, considering the applicable factors listed above, and using her own common sense and experience, the Administrative Law Judge concludes that the employer has satisfied its burden to establish by a preponderance of the evidence that the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law.

While the employer testimony relied on hearsay statements, administrative agencies are not bound by the technical rules of evidence. *IBP, Inc. v. Al-Gharib*, 604 N.W.2d 621, 630 (Iowa 2000). A decision may be based upon evidence that would ordinarily be deemed inadmissible under the rules of evidence, as long as the evidence is not immaterial or irrelevant. *Clark v. Iowa Dep't of Revenue*, 644 N.W.2d 310, 320 (Iowa 2002). Hearsay evidence is admissible at administrative hearings and may constitute substantial evidence. *Gaskey v. Iowa Dep't of Transp.*, 537 N.W.2d 695, 698 (Iowa 1995). Based on the hearsay evidence presented, compared with the testimony of the claimant, the administrative law judge finds the employer's evidence to be more credible than the claimant.

Claimant's job duties included following the necessary and required policies and guidelines that were in place for each client's health and safety purposes. Claimant was aware of these policies. An employer has a right to expect that an employee will not jeopardize the safety of others, especially where the claimant's job duties require them to keep the clients they are supervising safe. There was no emergency situation which warranted the claimant attempting to use physical force or restrain the client on January 27, 2017, by way of his leg or his body (in or out of a chair). As a result of the claimant's conduct, a client was struck physically and unnecessarily. There is substantial evidence in the record to support the conclusion that claimant deliberately violated these rightful expectations in this case, and engaged in physical contact, abuse of a client. Claimant's actions constitute an intentional and substantial disregard of the employer's interest. Accordingly, the employer has proven claimant committed job related misconduct. Benefits are denied.

Iowa Code § 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 § 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 § 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 states pursuant to § 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 he was not entitled. The claimant has been overpaid benefits in the amount of \$3,122.00. 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 it 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. The employer satisfactorily participated in the scheduled fact-finding interview. Since the employer did participate in the fact-finding interview, the claimant is obligated to repay the benefits he received and the employer's account shall not be charged.

**DECISION:**

The September 21, 2017 (reference 01) initial decision is reversed. The claimant was discharged from employment due to job-related misconduct. Benefits are withheld until such time as he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible. The claimant has been overpaid benefits in the amount of \$3,122.00 and is obligated to repay the benefits. The employer's account is relieved of charges associated with the claim.

---

Jennifer L. Beckman  
Administrative Law Judge

---

Decision Dated and Mailed

jlb/rvs