

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

DEE J SCHMITZ

Claimant

NEW HOPE VILLAGE INC

Employer

APPEAL 17A-UI-03896-JP-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 07/03/16

Claimant: Respondent (2-R)

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:

The employer filed an appeal from the April 3, 2017, (reference 02) unemployment insurance decision that allowed benefits. The parties were properly notified about the hearing. A telephone hearing was held on May 2, 2017. Claimant did not participate. Employer participated through director of human resources Sonya Sterns and community living director Tasha Hinners. Community living supervisor Amanda Ure attended the hearing on behalf of the employer, but she did not testify. Official notice was taken of the administrative record, including claimant's benefit history, claimant's wage history, and fact-finding documents, with no objection. Employer exhibit one was admitted into evidence with no objection.

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 part-time as a client support staff starting October 20, 2011, and was suspended from March 7, 2017 to March 15, 2017.

The employer has a written policy that requires its employees to provide written documentation for any services provided to the employer's clients. The employer gets paid for services that an employee provides to its clients. If there is no documentation, the employer is unable to bill for the services the employee provides, but the employee still gets paid. Claimant was aware of the policy and the reason for the policy. The employer also has a written progressive disciplinary policy. Claimant was aware of the disciplinary policy.

The final incident that led to claimant's suspension occurred on February 24, 2017. Employer Exhibit One. On February 24, 2017, claimant worked with four clients, but she only documented her services for two of the four clients. Employer Exhibit One. The employer discovered claimant's failure to document during a routine audit. The employer suspended claimant on March 7, 2017 pending investigation. Claimant was suspended from March 7, 2017 through March 15, 2017. On March 15, 2017, the employer gave claimant a final written warning and warned her that her job was in jeopardy. Employer Exhibit One. The employer gave claimant some tips to try to remember to document on each client. Claimant was then allowed to return to work and her next scheduled work day was March 25, 2017.

On March 25, 2017, claimant called in sick and did not work. Claimant was next scheduled to work on April 1, 2017. Claimant returned to work on April 1, 2017. On April 4, 2017, claimant submitted her resignation effective April 15, 2017. Claimant did not give a reason why she was quitting. The employer accepted claimant's resignation. Claimant last worked for the employer on April 9, 2017. April 9, 2017, was the last scheduled work day for claimant. The employer allowed claimant to work through her remaining work schedule.

Since April 2016, claimant has had multiple prior warnings for failing to document her services for clients. On February 6, 2017, claimant was given a written counseling report, suspended for two days, and warned her job was in jeopardy for failing to document her services. Employer Exhibit One. Claimant failed to document her services for two clients on January 21, 2017 and failed to document her services for one client on January 11, 2017. Employer Exhibit One. The employer gave claimant's tips to help with documenting each client.

On December 5, 2016, claimant was given a written counseling report and suspended for one day for failing to document services she provided for clients. Employer Exhibit One. On November 26, 2016, claimant failed to document services she provided for her clients. Employer Exhibit One. On November 25, 2016, claimant had failed to adequately document the services she provided her clients. Employer Exhibit One.

On October 5, 2016, the employer gave claimant a written improvement plan for failing to document her services. Employer Exhibit One. Claimant failed to provide any documentation for clients she provided services for on September 26, 27, and 30, 2016. Employer Exhibit One.

On May 18, 2016, the employer gave claimant a written counseling for failing to document her services. Employer Exhibit One. On April 2, 2016, and May 2, 4, and 15, 2016, claimant failed to document services she provided for her clients. Employer Exhibit One

The administrative record reflects that claimant has not received unemployment benefits since filing a claim with an effective date of July 3, 2016. The administrative record also reflects that claimant has not received unemployment benefits since filing an additional claim with an effective date of March 12, 2017. The administrative record also establishes that the employer did participate in the fact-finding interview. The administrative record reflects that this employer is the only employer in claimant's base period when she filed a claim for benefits with an effective date of July 3, 2016.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes claimant was suspended from employment for 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.

Iowa Admin. Code r. 871-24.32(9) provides:

(9) Suspension or disciplinary layoff. Whenever a claim is filed and the reason for the claimant's unemployment is the result of a disciplinary layoff or suspension imposed by the employer, the claimant is considered as discharged, and the issue of misconduct must be resolved. Alleged misconduct or dishonesty without corroboration is not sufficient to result in disqualification. This rule is intended to implement Iowa Code

section 96.5 and Supreme Court of Iowa decision, *Sheryl A. Cospers vs. Iowa Department of Job Service and Blue Cross of Iowa*.

The employer has the burden of proving disqualifying job misconduct. *Cospers v. Iowa Dep't of Job Serv.*, 321 N.W.2d 6 (Iowa 1982). 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). Generally, continued refusal to follow reasonable instructions constitutes misconduct. *Gilliam v. Atlantic Bottling Co.*, 453 N.W.2d 230 (Iowa Ct. App. 1990).

The employer is entitled to establish reasonable work rules and expect employees to abide by them. The employer's written policy requiring claimant to document the services she provides the employer's clients is reasonable. The employer has presented substantial and credible evidence that claimant failed to properly document the services she provided two clients on February 24, 2017 after having been warned on multiple occasions. On March 7, 2017, after the employer discovered this incident, the employer suspended claimant pending its investigation. Claimant remained suspended until March 15, 2017, when her suspension was lifted and she was given a final written warning for failing to properly document her services.

Since the employer had warned claimant multiple times about her failure to document the services she provides the employer's clients, her continued failure to document her services was misconduct sufficient to deny benefits for the period of the disciplinary suspension. Benefits are denied.

Iowa Code § 96.3(7)a-b, as amended in 2008, 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 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 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, claimant has not received benefits since she filed a claim with an effective date of July 3, 2016. Claimant has also not received any benefits since she filed an additional claim with an effective date of March 12, 2017.

DECISION:

The April 3, 2017, (reference 02) unemployment insurance decision is reversed. Claimant was suspended from employment for misconduct. Benefits are denied. Benefits are withheld until such time as claimant works in and has been paid wages equal to ten times her weekly benefit amount, provided she is otherwise eligible. There is no overpayment because benefits have not been paid on this claim.

REMAND: The separation issue delineated in the findings of fact is remanded to the Benefits Bureau of Iowa Workforce Development for a fact-finding interview and unemployment insurance decision on claimant’s separation from this employer in April 2017.

Jeremy Peterson
Administrative Law Judge

Decision Dated and Mailed

jp/rvs