

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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

**MIDASIA DIAZ**  
Claimant

**APPEAL NO: 18A-UI-09365-JE-T**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**IOWA HOME CARE LLC**  
Employer

**OC: 08/12/18**  
**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 August 31, 2018, reference 02, 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 September 26, 2018. The claimant participated in the hearing. Denny Kigin, Home Health Aide Supervisor, participated in the hearing on behalf of the employer. Employer's Exhibits 1 through 3 were admitted into evidence.

**ISSUE:**

The issue is whether the employer discharged the claimant for work-connected misconduct.

**FINDINGS OF FACT:**

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed as a full-time home health aide for Iowa Home Care from January 5, 2015 to August 15, 2018. She was discharged for violating the employer's code of ethics and a potential HIPPA violation.

On August 13, 2018, a client notified the employer of a conflict he had with the claimant that occurred Saturday, August 11 and Sunday, August 12, 2018. The client is a quadriplegic and the claimant is only supposed to provide cares for him such as bathing, toileting, dressing and things of that nature. The claimant offered to help the client with an art project and the client gave the claimant \$20.00 August 9, 2018, to purchase paint supplies. The claimant left the paint supplies at the client's apartment August 10, 2018, as they planned to paint August 11, 2018, and set a time to meet at the client's apartment. The claimant did not contact the client August 12, 2018, until after the time designated to meet and the client texted the claimant not to "worry about it" and he would see her at her next scheduled shift Tuesday, August 14, 2018 (Employer's Exhibit 1). The claimant responded by text message "demanding" the painting supplies for which she had chipped in approximately \$15.00. The client left his activity and went home. He told the claimant she could pick up the supplies between 6:30 p.m. and 7:00 p.m. when his night aide was scheduled to arrive and the claimant agreed to be there. The claimant did not arrive within that window of time and did not respond to the client's text messages. The client then asked the claimant to just come to his apartment on her regularly scheduled shift

August 14, 2018. The claimant responded angrily and stated she had no money to buy her own paint supplies and she needed to paint because she was going through a bad break-up. The client felt the claimant was acting in a “hostile and manipulative manner” (Employer’s Exhibit 1).

On Sunday, August 12, 2018, the claimant repeatedly texted the client demanding the art supplies. The client asked her to stop texting him and “threatening to come over” to his apartment and stated he would be notifying the employer about this interaction (Employer’s Exhibit 1). The claimant called another client who lived in the same building as the client the claimant was trying to get the supplies from and asked her to contact the client and ask if she could pick up the paint supplies. The claimant also contacted the client’s brother to see if he would intercede and get the paint supplies. The claimant texted the client and said she would no longer provide services to the client and again stated she was coming over to the client’s apartment to get the supplies. The client later told the employer he was scared about the security, privacy and safety of himself and his guests (Employer’s Exhibit 1). The client contacted the police to inform them of the situation and an officer arrived to assess the situation. The officer tried to call the claimant from the client’s phone but did not receive an answer. He then suggested the client notify the claimant the police had been called and if she came over to his apartment they would be called again immediately and the client did so. The claimant responded that she was coming over to the client’s apartment anyway. The client asked her to wait until he had someone who could help him set the painting supplies outside his door but the claimant came over and brought a friend. They knocked on the client’s door and would not leave without the painting supplies. The client called the police again and they came over and took the claimant’s information and the client gave the officer the painting supplies the claimant wanted and the claimant and her friend left the premises.

The claimant texted Home Health Aide Supervisor Denny Kigin August 12, 2018, to let her know there was an issue over the weekend. Ms. Kigin also received a call and an email from the client detailing the events that occurred between himself and the claimant (Employer’s Exhibit 1). Ms. Kigin asked to meet with the claimant August 13, 2018, at 3:00 p.m. but the claimant declined because it was her day off and Ms. Kigin informed her she could not work until they discussed the matter. On August 15, 2018, Ms. Kigin and another manager met with the claimant. The employer stated the claimant violated its professional commitment which states in pertinent part, “I will not engage in any activity that could or would be considered fraud or abuse in home care” (Employer’s Exhibit 2). The employer’s code of ethics prohibits, “Acceptance of gifts or tips. Bringing other persons to the client’s home (property)...Acceptance of money or goods for personal gain. Breach of the client’s privacy and confidentiality of information and records...Participating in any activities or behaviors that blur the professional boundaries...Any communication with employees and/or patients that does not serve in the best interest of the (the employer)” (Employer’s Exhibit 2). The claimant signed those documents at the time of hire January 5, 2015 and again after retraining of employees May 30, 2018 (Employer’s Exhibits 2 and 3). After reviewing those documents and the events that took place between the claimant and the client the employer terminated the claimant’s employment August 15, 2018.

The claimant has claimed and received unemployment insurance benefits in the amount of \$1,635.00 for the five weeks ending September 22, 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 disqualifying job misconduct.

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 violated the employer's policy prohibiting, "Participating in any activities or behaviors that blur the professional boundaries" and "any communication with employees and/or patients that does not serve in the best interest of the (the employer)." The claimant stated she thought she and the client were friends rather than client and caregiver and her actions "blurred the professional boundaries" of their relationship. Additionally, she mixed her money with the client's money in violation of the employer's policy prohibiting accepting cash, etc. from a client.

While the claimant wanted the painting supplies from the client, that did not give her the right to harass, threaten and abuse the client. Of the two parties involved, the claimant was the professional care giver and as such she had a responsibility to act like a professional. She may not have wanted to wait until Tuesday to get the painting supplies but as an adult and a

professional, the correct action on the part of the claimant would have been to wait until Tuesday. Instead the claimant continuously called and texted the client about the painting supplies over a period of two days to the point he called the police about her conduct.

Under these circumstances, the administrative law judge concludes the claimant's conduct demonstrated a willful disregard of the standards of behavior the employer has the right to expect of employees and shows an intentional and substantial disregard of the employer's interests and the employee's duties and obligations to the employer. The employer has met its burden of proving disqualifying job misconduct. *Cosper v. IDJS*, 321 N.W.2d 6 (Iowa 1982). Therefore, benefits are 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 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.

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.

The employer did not participate in the fact-finding interview. Consequently, the claimant's overpayment of benefits must be waived and her overpayment of benefits in the amount of \$1,635.00 for the five weeks ending September 22, 2018, shall be charged to the employer's account.

**DECISION:**

The August 31, 2018, reference 02, 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 personally participate in the fact-finding interview within the meaning of the law. Therefore, the claimant's overpayment of benefits in the amount of \$1,635.00 for the five weeks ending September 22, 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/rvs