

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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**JAMES R FARMER**  
Claimant

**APPEAL 17A-UI-12522-H2T**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**THE UNIVERSITY OF IOWA**  
Employer

**OC: 11/12/17  
Claimant: Respondent (2)**

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Iowa Code § 96.5(2)a – Discharge/Misconduct  
Iowa Code § 96.3(7) - Recovery of Benefit Overpayment  
871 IAC 24.10 – Employer Participation in the fact-finding Interview

**STATEMENT OF THE CASE:**

The employer filed an appeal from the December 1, 2017, (reference 01) unemployment insurance decision that allowed benefits. The parties were properly notified about the hearing. A telephone hearing was held on December 28, 2017. Claimant participated personally. Present with the claimant, but not offering testimony or participating was Roger Halvorson, a Rehabilitation Associate. Employer participated through Mary Eggenburg, Benefits Specialist, and Joanne Higgins, Human Resources Manager.

**ISSUES:**

Was the claimant discharged due to job connected 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 custodian I beginning on August 24, 2010 through October 31, 2017, when he was discharged. The claimant was discharged for mistreating a coworker, Maria on October 20. The claimant was a very good custodian and very particular about how he performed his job duties. He expected the other custodians to perform their job duties to meet his very high standards. As the hospital operates twenty-four hours per day – seven days a week, there are many custodians working many different shifts. Often the different custodian work schedules overlaps. One custodian may begin a task that is eventually finished by another custodian. In the labor and delivery area, a room is not taken off the “to be cleaned” list until the room is cleaned.

The claimant worked third shift generally in the labor and delivery area of the hospital. He did not think Maria was a good custodian and sought to have her removed from the area prior to October 20. It was not up to the claimant to decide which custodian was assigned to work in which area. The other custodians were not expected to meet his expectations.

While working in another area of the university in April 2017, the claimant was written up and given a one-day suspension for yelling at a coworker. That discipline put him on notice that he was not allowed to yell at or mistreat other coworkers.

The claimant was also upset that Maria would sometimes use a custodian cart that he thought should be reserved for his use only. He had instructed Maria numerous times to go to her supervisor and get her own cart. Because Maria worked second shift and the claimant worked third shift, there was usually very little overlap for her to use the cart normally used by the claimant.

On one occasion in September or October Maria was using the cart claimant wanted to use when he arrived at work. Claimant took Maria's purse off the cart and "tossed it" across the hall. Her belongings spilled out. The claimant had no right to put his hands on Maria's personal belongings or to commandeer a cart she was using. He had no right to take the cart from her or to "toss" her belongings off of the cart.

The claimant had yelled at Maria and told her on at least one prior occasion that she was not good enough to be a custodian in the labor and delivery area.

On the evening of October 20, Maria and Laverta, one of the nursing assistants, were cleaning a room in the labor and delivery area. At about 11:30 the claimant came on duty, and since the room had not been completed it did not show as done in the computer system. The claimant believed the room was his to clean. When he got to the room, he discovered Maria and Laverta cleaning the room. The claimant became angry, ordered Maria out of the room, and told her she should not be a custodian in the labor and delivery area. The claimant then "bumped" Maria's cart at least three times with his own cart in his attempt to get her out of a room he thought was his area to clean. The claimant was yelling so loudly at Maria that Michelle, one of the nurse's staff, came over and intervened telling him he could not talk to or speak to Maria the way he was. The claimant had no right to decide where Maria should or should not clean. He complained to both his and Maria's supervisor. Neither of them agreed with his assessment of the situation, that is that Maria was not good enough of a custodian to be on the same floor he worked on.

As numerous employees complained about the incident the employer investigated. The employer determined that the claimant had yelled at and mistreated Maria. More importantly to the employer, the claimant showed no understanding or comprehension that what he had done was unacceptable. As the claimant had been previously disciplined for similar behavior (yelling at a coworker), he was discharged.

At no time prior to his discipline in April 2017 or his discharge in October 2017, did the claimant ask for any type of accommodation.

The claimant has received unemployment benefits after the separation on a claim with an effective date of November 12, 2017.

The employer did participate personally in the fact-finding interview through Ms. Eggenburg who provided essentially the same details to the fact-finder as were provided at the appeal hearing.

## 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 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).

Generally, continued refusal to follow reasonable instructions constitutes misconduct. *Gilliam v. Atlantic Bottling Company*, 453 N.W.2d 230 (Iowa App. 1990).

The claimant had no authority to decide where Maria worked or cleaned in the hospital. The claimant had been warned previously through a suspension that yelling at coworkers was unacceptable. Claimant simply wanted things done in a way that suited him, and that included having Maria removed from his area. When that did not occur, the claimant mistreated Maria. He yelled at her and berated her for doing her job. On at least one occasion he 'tossed' her purse across a hallway. Such conduct is a violation of the conduct an employer has a right to expect from their employees. The claimant's argument that his hearing loss made his conduct acceptable is not persuasive. The claimant had never requested any accommodation prior to his discharge. His being hard of hearing also does not explain why he needed to "toss" Maria's

purse and “bump” her cart. The claimant’s actions amount to sufficient misconduct to disqualify him from receipt of unemployment insurance benefits. Benefits are denied

Iowa Code section 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 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 the claimant 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). In this case, the claimant has received benefits but was not eligible for those benefits. Since the employer participated in the fact-finding interview

the claimant is obligated to repay the benefits he received to the agency and the employer's account shall not be charged.

**DECISION:**

The December 1, 2017, (reference 01) 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 unemployment insurance benefits in the amount of \$1,290.00 and he is obligated to repay the agency those benefits. The employer did participate in the fact-finding interview and their account shall not be charged.

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Teresa K. Hillary  
Administrative Law Judge

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Decision Dated and Mailed

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