IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

BRUCE E ENGER Claimant **MID-IOWA FAMILY THERAPY** Employer	**APPEAL 17A-UI-07796-JP-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 07/09/17** **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:

The employer filed an appeal from the July 28, 2017, (reference 01) unemployment insurance decision that allowed benefits. The parties were properly notified about the hearing. A telephone hearing was held on August 18, 2017. Claimant participated. Employer participated through human resources payroll director Abby Mertz and community care regional supervisor Katie Keith. Community care director Lisa Bellows attended the hearing on behalf of the employer. Christine Secrist registered for the hearing on behalf of the employer, but she did not attend the hearing. Employer Exhibit 1 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 full-time as a community care case manager from October 13, 2008, and was separated from employment on July 13, 2017, when he was discharged.

The employer has a contract to with the Department of Human Services (DHS) that it has to follow. Pursuant to the DHS contract the employer has to provide monthly service reports. Employees, including claimant, are required to provide to Ms. Keith their monthly service reports for their clients for approval by the 1st of each month, but no later than the 3rd of the month, so Ms. Keith can review them and give them to the clients personally. If the employer fails to comply with the rule, the employer may lose its contract with DHS and its funding. The employer also has an incident reporting policy. When an employee, including claimant, is

dealing with a suicidal client, the employee is required to notify their supervisor immediately. After the employee handles the situation, they are to fill out an incident report and submit it to their supervisor within twenty-four hours. The incident report is required for the employer's COA accreditation.

Since 2014, the employer has given claimant six performance improvement plans. Claimant was given his most recent performance improvement plan (PIP) on May 22, 2017. Employer Exhibit 1. Claimant was given the PIP for failing to provide Ms. Keith his monthly service reports in a timely manner, failing to close cases in a timely manner, and not responding to his supervisor's directives. Employer Exhibit 1. Claimant also had PIPs on January 17, 2014, July 1, 2014, March 11, 2015, and September 2, 2016 for the same issues as the May 24, 2017 PIP. Claimant would improve his performance for a month or two after he received a PIP, but then he would regress and he would be given another PIP. Claimant also received a PIP on December 14, 2015 for a different issue.

Claimant went on vacation from July 3, 2017 through July 7, 2017. Claimant's first day back was on July 10, 2017. On July 7, 2017, Ms. Keith sent claimant an e-mail because seventeen of claimant's monthly service reports were missing or needed corrected. These monthly service reports were due on July 1, 2017 and no later than July 3, 2017. Claimant should have completed his paperwork before he went on vacation. Ms. Keith was completely missing twelve of claimant's monthly service reports. Although claimant's numbers were high, they were high because he did not follow the employer's policies in closing cases. Claimant had only around fifteen active clients, which was approximately 30% of his open cases. Claimant's referrals were similar to the other case workers. Claimant never responded to Ms. Keith's July 7, 2017 e-mail. In her e-mail, Ms. Keith reminded claimant about the July 10, 2017 meeting because it was not on his calendar.

On July 10, 2017, claimant was to meet with Ms. Keith (claimant's direct supervisor) and Ms. Secrist for a supervision meeting at 10:30 a.m. The meeting was to go over the PIP he was given on May 24, 2017. The employer intended on suspending claimant for violating his PIP. Claimant did not attend the meeting and did not contact the employer to inform it he would not be attending. On July 9, 2017, a former client sent claimant a text message that the client was having suicidal thoughts, but claimant did not see the text message until July 10, 2017. After claimant saw the text message, he attempted to contact the client. Claimant did not contact the employer about the text message he received from the client. Claimant was initially unsuccessful in getting a hold of the client. Around 9:00 a.m. on July 10, 2017, claimant went to the client's residence. Claimant did not contact the employer before going to the client's residence. Once claimant got to the residence he stayed with the client until he was able to resolve the situation. Ms. Keith sent claimant a text message at 10:36 a.m. after he had not arrived for the meeting. Claimant did not respond to Ms. Keith text message. Ms. Keith attempted to call claimant at 10:49 a.m., but he did not answer. At 11:04 a.m., Ms. Keith called claimant again, but he did not answer; Ms. Keith left him a message. At 11:30 a.m., Ms. Keith sent another text message to claimant. Claimant responded to Ms. Keith's text message at 11:36 a.m. Claimant sent Ms. Keith a text message that he could not attend the meeting because he was dealing with a crisis. Claimant informed Ms. Keith by text message that he was handling a suicidal client. Ms. Keith responded to claimant by text message asking the name of the client. Claimant did not respond to Ms. Keith's text message. At 11:53 a.m. Ms. Keith sent claimant another text message asking if he was coming to the office. Claimant did not respond to this text message either. Claimant did not communicate with the employer on July 10, 2017 after his 11:36 a.m. text message. Around 2:00 p.m., claimant finished with the suicidal client. Claimant did not contact the employer after he finished with this client, instead he continued meeting with his other clients.

On July 11, 2017, Ms. Keith called claimant. Claimant told Ms. Keith he was with a client and he would call her back. Approximately an hour later, claimant called Ms. Keith back and they discussed claimant not coming to the meeting on July 10, 2017. Claimant told Ms. Keith the former client's name. Claimant told Ms. Keith he did not get home until 8:00 p.m. Claimant told Ms. Keith he did not have a chance to call the employer prior to the meeting to let it know he would not be at the meeting. Ms. Keith told claimant he needed to meet with Ms. Keith and Ms. Bellows on July 13, 2017 to discuss missing the meeting and his PIP.

On July 13, 2017, claimant met with Ms. Keith and Ms. Bellows. The employer informed claimant he was discharged.

The administrative record reflects that claimant has received unemployment benefits in the amount of $1,728.00, since filing a claim with an effective date of July 9, 2017, for the five weeks ending August 12, 2017. The administrative record also establishes that the employer did participate in the fact-finding interview.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes claimant was discharged from employment due to job-related misconduct. Benefits are denied.

It is the duty of an administrative law judge and 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, as the finder of fact, 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. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996). 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 evidence you believe; whether a witness has made inconsistent statements; the witness's conduct, age, intelligence, memory and knowledge of the facts; and the witness's interest in the trial, their motive, candor, bias and prejudice. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996).

This administrative law judge assessed the credibility of the witnesses who testified during the hearing, considering the applicable factors listed above, and used my own common sense and experience. This administrative law judge reviewed Employer Exhibit 1. This administrative law judge finds the employer's version of events to be more credible than claimant's recollection of those events.

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:
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> 2. Discharge for misconduct. If the department finds that the individual has been discharged for misconduct in connection with the individual's employment:
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> 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.
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> 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).

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). When based on carelessness, the carelessness must actually indicate a "wrongful intent" to be disqualifying in nature. *Id.* Negligence does not constitute misconduct unless recurrent in nature; a single act is not disqualifying unless indicative of a deliberate disregard of the employer's interests. *Henry v. Iowa Dep't of Job Serv.,* 391 N.W.2d 731 (Iowa Ct. App. 1986). Poor work performance is not misconduct in the absence of evidence of intent. *Miller v. Emp't Appeal Bd.*, 423 N.W.2d 211 (Iowa Ct. App. 1988). The Iowa Court of Appeals found substantial evidence of misconduct in testimony that the claimant worked slower than he was capable of working and would temporarily and briefly improve following oral reprimands. *Sellers v. Emp't Appeal Bd.*, 531 N.W.2d 645 (Iowa Ct. App. 1995). 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 rule requiring claimant to timely provide his supervisor his monthly service reports is reasonable. Claimant's argument that he properly submitted all of his monthly service reports prior to going on vacation is not persuasive. Ms. Keith credibly testified that on July 7, 2017, she was completely missing twelve of his monthly service reports and five others needed to be corrected. Ms. Keith's also credibly testified that when she sent claimant an e-mail on July 7, 2017 regarding his monthly service reports, she reminded him about the supervision meeting on July 10, 2017 because it was not on his calendar. Claimant also testified that the supervision meeting was not on his calendar.

On July 10, 2017, claimant failed to follow the employer's policy by immediately notify the employer about a suicidal client and he failed to complete the required incident report within twenty-four hours of the incident. The question of whether the refusal to perform a specific task constitutes misconduct must be determined by evaluating both the reasonableness of the employer's request in light of all circumstances and the employee's reason for noncompliance.

Endicott v. Iowa Dep't of Job Serv., 367 N.W.2d 300 (Iowa Ct. App. 1985). The employer's rule requiring employees to notify their supervisor immediately if they are dealing with a suicidal client and requiring them to file an incident report within twenty-four hours of the incident is reasonable. By notifying the employer, the employer can provide any resources they may need. On July 10, 2017, claimant had more than one opportunity to notify the employer about the suicidal client. Claimant could have notified the employer immediately after he saw the text message from the client. Claimant also could have notified the employer before he went to the client's residence. However, claimant failed to immediately notify the employer, either by phone call or text message, about the suicidal client, in violation of the employer's policy. Claimant only notified the employer after Ms. Keith repeatedly tried to contact him when he did not show up for his supervision meeting. Claimant then failed to contact/update the employer on July 10, 2017 regarding the missed meeting or the suicidal client after he finished with client around 2:00 p.m. Finally, claimant failed to complete an incident report regarding the suicidal client within twenty-four hours of the incident in violation of the employer's incident reporting policy.

The employer has presented substantial and credible evidence that claimant continually failed to timely provide his supervisor his monthly service reports after having been previously warned on multiple occasions. Claimant's repeated failure to accurately perform his job duties after having been warned is evidence of negligence or carelessness to such a degree of recurrence as to rise to the level of disqualifying job-related misconduct. See Iowa Admin. Code r. 871-24.32(1)a. Furthermore, the employer presented substantial and credible evidence that on July 10, 2017, claimant failed to immediately notify the employer about a suicidal client or file an incident report within twenty-four hours of the incident, in violation of the employer's policy. This is disqualifying misconduct. Benefits are denied.

Iowa Code section 96.3(7)a-b, as amended in 2008, provides:

> 7. Recovery of overpayment of benefits.
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> 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.
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> 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.
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> (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 he 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. In this case, the claimant has received benefits but was not eligible for those benefits. Since the employer did participate in the fact-finding interview the claimant is obligated to repay to the agency the benefits he received and the employer’s account shall not be charged.

DECISION:

The July 28, 2017, (reference 01) unemployment insurance decision is reversed. Claimant was discharged from employment due to job-related misconduct. Benefits are withheld until such time as claimant has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible.

Claimant has been overpaid unemployment insurance benefits in the amount of $1,728.00 and is obligated to repay the agency those benefits. The employer did participate in the fact-finding interview and its account shall not be charged.

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Jeremy Peterson
Administrative Law Judge

_____
Decision Dated and Mailed

jp/rvs