

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

RENEE KIMBROUGH
Claimant

APPEAL NO: 12A-UI-12305-BT

**ADMINISTRATIVE LAW JUDGE
DECISION**

FIVE STAR QUALITY CARE INC
Employer

OC: 09/16/12
Claimant: Respondent (2/R)

Iowa Code § 96.5(2)(a) - Discharge for Misconduct
Iowa Code § 96.3-7 - Overpayment

STATEMENT OF THE CASE:

Five Star Quality Care, Inc. (employer) appealed an unemployment insurance decision dated October 5, 2012, reference 01, which held that Renee Kimbrough (claimant) was eligible for unemployment insurance benefits. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on November 8, 2012. The claimant participated in the hearing. The employer participated through Danielle Beik, Director of Nurses. Employer's Exhibits One through Three were admitted into evidence. Based on the evidence, the arguments of the parties, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUE:

The issue is whether the claimant was discharged for misconduct sufficient to warrant a denial of unemployment benefits.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds that: The claimant was employed as a full-time certified nursing assistant (CNA) from June 27, 2012 through September 17, 2012 when she was discharged for insubordination and abuse of a resident. On September 11, 2012, she raised her voice towards the Assistant Director of Nurses (ADON) and blocked the ADON from exiting the nurse's station. The claimant was upset because she wanted to return home to her disabled teenage son and the employer asked her to find a replacement so she could leave. The confrontation occurred less than an hour after she initially made the request.

The claimant did leave the facility and at 6:07 p.m., a co-employee reported that a resident was alleging the claimant refused to help him. The male resident was only recently admitted to the facility for physical therapy, occupational therapy and strength training in order to regain strength and the ability to return to his home. He had a left hip fracture in addition to several other medical "conditions. The resident was in a lot of pain and needed his knee repositioned so put on his call light and explained what he needed to the CNA who came into his room. The

CNA said, "You got yourself into it. Get yourself out of it." She then turned around and left his room.

The resident called a friend of his named Diana and complained of pain from being "scrunched up in bed." Diana called Luanne Beyer who works in medical records and Ms. Beyer immediately went to the resident's room and assisted the resident. Ms. Beyer asked the resident about the CNA who refused to assist him. The resident said, "She has black hair and is kind of big" but added, "I hate to be a rat." Ms. Beyer asked another CNA to help the resident and the matter was reported to the DON. The DON went to speak with the resident and he described the CNA to the DON. There were only two CNAs working on the hall and the other CNA wore glasses. The DON asked the resident whether the CNA wore glasses and he said no and added that the CNA with glasses was a good CNA.

The Administrator was notified of the complaint on September 12, 2012 and the claimant was suspended. She was discharged on September 17, 2012 after a thorough investigation was conducted and the employer confirmed the claimant neglected to provide care to a resident on September 11, 2012.

The claimant filed a claim for unemployment insurance benefits effective September 16, 2012 and has received benefits after the separation from employment.

REASONING AND CONCLUSIONS OF LAW:

The issue is whether the employer discharged the claimant for work-connected misconduct. A claimant is not qualified to receive unemployment insurance benefits if an employer has discharged the claimant for reasons constituting work-connected misconduct. Iowa Code § 96.5-2-a.

Iowa Code section 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.

871 IAC 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.

The employer has the burden to prove the discharged employee is disqualified for benefits due to work-related misconduct. *Sallis v. Employment Appeal Bd.*, 437 N.W.2d 895, 896 (Iowa 1989). The claimant was discharged on September 17, 2012 for insubordination and abuse of a resident by refusing to provide assistance. Her conduct shows a willful or wanton disregard of the standard of behavior the employer has the right to expect from an employee, as well as an intentional and substantial disregard of the employer's interests and of the employee's duties and obligations to the employer. Work-connected misconduct as defined by the unemployment insurance law has been established in this case and benefits are denied.

Iowa Code § 96.3(7) 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. The overpayment recovery law was updated in 2008. See Iowa Code § 96.3(7)(b). Under the revised law, a claimant will not be required to repay an overpayment of benefits if all of the following factors are met. First, the prior award of benefits must have been made in connection with a decision regarding the claimant's separation from a particular employment. Second, the claimant must not have engaged in fraud or willful misrepresentation to obtain the benefits or in connection with the Agency's initial decision to award benefits. Third, the employer must not have participated at the initial fact-finding proceeding that resulted in the initial decision to award benefits. If Workforce Development determines there has been an overpayment of benefits, the employer will not be charged for the benefits, regardless of whether the claimant is required to repay the benefits.

Because the claimant has been deemed ineligible for benefits, any benefits the claimant has received could constitute an overpayment. Accordingly, the administrative law judge will remand the matter to the Claims Division for determination of whether there has been an overpayment, the amount of the overpayment, and whether the claimant will have to repay the benefits.

DECISION:

The unemployment insurance decision dated October 5, 2012, reference 01, is reversed. The claimant is not eligible to receive unemployment insurance benefits because she was discharged from work for misconduct. Benefits are withheld until 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 matter is remanded to the Claims Section for investigation and determination of the overpayment issue.

Susan D. Ackerman
Administrative Law Judge

Decision Dated and Mailed

sda/pjs