

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

ANGELA R ELLIOTT
Claimant

APPEAL NO. 09O-UI-01240-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

MERCY HOSPITAL
Employer

OC: 11/02/08 R: 02
Claimant: Respondent (2-R)

Iowa Code Section 96.5(2)(a) – Discharge for Misconduct

STATEMENT OF THE CASE:

The matter was before the administrative law judge upon remand by the Employment Appeal Board. The Board directed that a new hearing be held to allow the claimant to participate. The employer had filed a timely appeal from the December 15, 2008, reference 01 decision that allowed benefits. The matter had proceeded to a hearing before Administrative Law Judge Terrence Nice on January 6, 2009 in Appeal Number 08A-UI-11880-NT. The employer participated. The claimant did not. Judge Nice entered a decision January 6, 2009, which decision disqualified the claimant for benefits, relieved the employer of liability for benefits, and remanded the issue of overpayment of benefits to the Claims Division. The claimant appealed to the Employment Appeal Board and asserted lack of proper notice.

Based on the Employment Appeal Board remand, a new telephone hearing was scheduled for February 12, 2009. Notice was mailed to the parties on January 30, 2009. On February 2, the claimant provided a telephone at which she could be reached for the hearing. However, the claimant did not make herself available for the hearing. The employer was available for the hearing through Christine Brown, Human Resources Coordinator, and Pam Nelson, Director of Nursing. Based on the claimant's second failure to make herself available for the rescheduled hearing, the administrative law judge concludes that further hearing is not necessary since the employer already presented its evidence during the January 6, 2009 hearing. The administrative law judge hereby adopts the findings of fact, reasoning and conclusions of law, and decision contained in Administrative Law Judge Terrence Nice's January 6, 2009 decision in Appeal Number 08A-UI-11880-NT.

As of the entry of this decision at 4:15 p.m. on February 12, 2009, the claimant has made no attempt to contact the Appeals Section to indicate she is available for the hearing or to resolve any problems regarding her participation in the hearing.

ISSUES:

Whether the claimant was discharged for misconduct in connection with the employment that disqualifies her for unemployment insurance benefits.

Whether the claimant has been overpaid benefits.

FINDINGS OF FACT:

The claimant worked for this employer from April 18, 2006 until October 22, 2008 when she was discharged from employment. Ms. Elliott was employed as a part-time certified nursing assistant and was paid by the hour. Her immediate supervisor was Pamela Nelson.

The claimant was discharged when it was determined that Ms. Elliott had failed to provide specific required care to a resident in violation of hospital policy. Ms. Elliott had been specifically instructed to check the resident for bowel movements at specified times but failed to do so. Although the claimant had been reminded to do so by a trainee, the claimant did not follow the work directive resulting in a complaint to management from both the trainee and the resident's family. Because the claimant had been previously warned for similar conduct, a decision was made to terminate the claimant from employment.

REASONING AND CONCLUSIONS OF LAW:

The weight of the evidence in the January 6, 2009, hearing record establishes that the claimant failed to provide necessary and specifically directed care to a resident. The evidence also establishes that although the claimant had been reminded it was necessary to check the resident for bowel movements, she continued to neglect to do so and a subsequent examination of the resident disclosed that the resident had not been checked for a substantial period of time and that the claimant's failure had caused some deterioration in the resident's physical condition. Because the claimant had been previously warned for similar conduct, she was discharged from employment.

The administrative law judge concludes based upon the evidence in the record that the employer has sustained its burden of proof in establishing that the claimant's conduct showed a willful disregard for the employer's interests and standards of behavior that an employer has a right to expect of its employees under the provisions of the Iowa Employment Security Act.

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.

For the above-stated reasons, the administrative law judge concludes the claimant was discharged for misconduct and unemployment insurance benefits are withheld.

Iowa Code section 96.3-7, 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) 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. 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. The employer shall not be charged with the benefits.

(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.

Based on the Employment Appeal Board remand, a new telephone hearing was scheduled for February 12, 2009 at 11:00 a.m. Notice was mailed to the parties on January 30, 2009. On February 2, the claimant provided a telephone at which she could be reached for the hearing. However, the claimant was unavailable for the hearing. At the scheduled time of the hearing, the administrative law judge made contact with the claimant at the number she had provided. The claimant indicated that she was in a class and lacked her hearing materials. The claimant had not contacted the Appeals Section to request that the hearing be rescheduled. When the administrative law judge indicated that the hearing would go forward, Ms. Elliott indicated that she was ready to proceed. The administrative law judge put the claimant on hold, while the he

contacted the employer for the hearing. At that time, Ms. Elliott terminated the call. Thereafter, the administrative law judge made three attempts to secure the claimant for the hearing. On the first additional attempt, the phone did not ring at all. On the second and third attempt, the phone rang once and then went silent. The administrative law judge last attempted to contact Ms. Elliott at 11:15 a.m. The employer was available for the hearing through Christine Brown, Human Resources Coordinator, and Pam Nelson, Director of Nursing. As of the entry of this decision at 4:15 p.m. on February 12, 2009, the claimant has made no attempt to contact the Appeals Section to indicate she is available for hearing or to resolve any problems with her participation in the hearing.

DECISION:

In accordance with the Administrative Law Judge Terrence Nice's January 6, 2009 decision in Appeal Number 08A-UI-11880-NT, the representative's decision dated December 15, 2008, reference 01, is reversed. The claimant was discharged for misconduct. Unemployment insurance benefits are withheld until the claimant has worked in and been paid wages for insured work equal to ten times the claimant's weekly benefit amount, provided that she is otherwise eligible. The administrative law judge remands to the Claims Division the issue of whether the claimant has been overpaid, the amount of the overpayment and whether the claimant will have to repay those benefits.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/pjs