

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

VALERIE K. SHIVVERS
Claimant

APPEAL NO. 09A-UI-11523-VST

**ADMINISTRATIVE LAW JUDGE
DECISION**

PINNACLE HEALTH FACILITIES XVII
Employer

**Original Claim: 07/05/09
Claimant: Appellant (2)**

Section 96.5-2-a – Misconduct

STATEMENT OF THE CASE:

The claimant filed an appeal from a representative's decision dated August 3, 2009, reference 01, which held the claimant ineligible for unemployment insurance benefits. After due notice, a telephone conference hearing was scheduled for and held on August 25, 2009. The claimant participated. The employer participated by Julie Simons, director of nursing. The record consists of the testimony of Valerie Shivvers and the testimony of Julie Simons.

ISSUE:

Whether the claimant was discharged for misconduct.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony of the witnesses and having considered all of the evidence in the record, makes the following findings of fact:

The claimant worked as a certified nursing assistant at the employer's facility in Granger, Iowa. She was hired on October 12, 2007.

On or about June 15, 2009, the family of a resident reported a missing cell phone. An investigation was done by the employer and the matter was referred to the Granger Police Department and the Iowa Department of Inspections and Appeals. The police department provided a list of the numbers called on the missing cell phone and 75 percent to 80 percent of the calls were to the claimant or the claimant's boyfriend. The claimant told the employer that she had used a cell phone but she thought it was the cell phone of another employee, as that employee had given the phone to her and told her she could use it.

The employer terminated the claimant on June 24, 2009. Both the Granger Police Department and the Iowa Department of Inspections and Appeals have conducted investigations, but the results are not known.

REASONING AND CONCLUSIONS OF LAW:

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.

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 duty to the employer. The employer has the burden of proof to show misconduct.

The claimant was terminated when it was discovered that she had been using a cell phone belonging to a resident. The claimant admitted that she used a cell phone, but she said that she did not know the phone belonged to a resident. The phone had been given to her by another employee. That employee told the claimant that it was her phone and that the claimant could use it for a few days, as it was scheduled to be disconnected. Julie Simons testified that if the phone had belonged to another employee, the claimant's use would not be grounds for termination.

After carefully considering the evidence in the case, the administrative law judge concludes that the employer has not sustained its burden of proof on misconduct. At this time, there is only an allegation of theft and the claimant denies knowingly using a resident's cell phone. Benefits are allowed if the claimant is otherwise eligible.

DECISION:

The representative's decision dated August 3, 2009, reference 01, is reversed. Unemployment insurance benefits are allowed, provided the claimant is otherwise eligible.

Vicki L. Seeck
Administrative Law Judge

Decision Dated and Mailed

vls/kjw