

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

SUEANN ODAM
Claimant

APPEAL NO: 12A-UI-09655-BT

**ADMINISTRATIVE LAW JUDGE
DECISION**

WESLEYLIFE
Employer

OC: 07/08/12
Claimant: Respondent (2/R)

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

STATEMENT OF THE CASE:

Wesleylife (employer) appealed an unemployment insurance decision dated August 3, 2012, reference 04, which held that SueAnn Odum (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 September 4, 2012. The claimant participated in the hearing. The employer participated through Bruce Kane, food and beverage director; Jordain Skarphol, hospitality director; and Beth Crocker, employer representative. Employer Exhibits One and Two and Claimant's Exhibit A 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 having considered all of the evidence in the record, finds that: The claimant was employed as a full-time server in a retirement facility called Edgewater from January 9, 2012 through July 13, 2012, when she was fired for repeated policy violations. She signed an acknowledgement of the team handbook on January 16, 2012, and this includes the standards of conduct contained within the team member conduct and appearance procedure. Team members are required to treat all residents, clients, visitors and co-workers in a professional and courteous manner. In addition to the general performance requirements, the handbook provides a list of conduct that will result in disciplinary action, up to and including termination. Using profanity or abusive language is prohibited and violation of this policy could result in termination.

The claimant signed a job description for wait staff on February 27, 2012 which provides the following as its mission statement: "Guided by Christian compassion, we support the independence, health and well-being of older adults wherever they call home." Wait staff are required to maintain effective communication to aid and ensure good relationships with all staff and residents. Additionally, work must be performed in a professional manner

The employer issued the claimant several coaching statements regarding her demeanor and hospitality behaviors. One employer witness testified that her negative behavior had been ongoing since May 2012. She received a written warning on July 6, 2012 for being late for work six times in the previous 14 days. The claimant was discharged after she acted inappropriately and unprofessionally on July 13, 2012 in the Bistro, a casual dining restaurant. She came to work in a negative mood and was not hospitable to the residents or the employees. She was slamming the door, slamming glasses, and not being a team player. They were out of wine, so the claimant went upstairs to get some. After the claimant returned from going upstairs, someone asked her where she had gone and she said, "I had to go upstairs to get some wine so people would stop bitching." This comment was said in front of residents, guests, and co-workers. Hospitality Director Jordain Skarphol heard the comment and told her it was unacceptable and the claimant responded with, "Excuse me."

The claimant filed a claim for unemployment insurance benefits effective July 8, 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 § 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 for repeated inappropriate behavior after repeated warnings and the final incident was her use of profanity in front of residents and co-workers. There is maybe a higher expectation of professionalism in the work place, since this is the residents' home. The claimant was aware of her responsibilities, was capable of performing her duties, and had been warned of the consequences of her actions. An employer has the right to expect decency and civility from its employees and an employee's use of profanity or offensive language in a confrontational, disrespectful, or name-calling context may be recognized as misconduct disqualifying the employee from receipt of unemployment insurance benefits. *Henecke v. Iowa Department of Job Service*, 533 N.W.2d 573 (Iowa App. 1995). 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 August 3, 2012, reference 04, 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/kjw