

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

KAREN M OTTO
Claimant

ABCM CORPORATION
Employer

APPEAL NO. 12A-UI-11374-VST

**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 08/26/12
Claimant: Respondent (2R)

Section 96.5-2-A – Discharge for Misconduct
Section 96.3-7 – Overpayment of Benefits

STATEMENT OF THE CASE:

The employer filed an appeal from a decision of a representative dated September 14, 2012, reference 01, which held that the claimant was eligible for unemployment insurance benefits. After due notice, a telephone conference hearing was scheduled for and held on October 16, 2012. The claimant did not respond to the hearing notice and did not participate. The employer was present by Christine Tomash-Meyer, the administrator, and Teresa LIntz, the director of nursing. The record consists of the testimony of Christine Tomash-Meyer and the testimony of Teresa Lintz.

ISSUES:

Whether the claimant was discharged for misconduct; and

Whether the claimant has been overpaid unemployment insurance benefits.

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 employer is a nursing facility located in Nevada, Iowa. The claimant was hired on September 11, 2009, as a full-time certified nursing assistant. The claimant's last day of work was August 4, 2012. She was terminated on August 9, 2012.

The incident that led to the claimant's termination occurred on July 17, 2012. The claimant yelled at a resident and forced the resident to sit in her wheelchair. The nurse in charge wrote up a disciplinary action and when it was presented to the claimant she used profanity with the nurse and said it was "fucking bullshit." She refused to sign the warning. She then left on vacation.

The administrator and the director of nursing tried repeatedly to contact the claimant while she was on vacation. They wanted a meeting to discuss the incident of July 17, 2012. The claimant

refused to return their calls. Unbeknownst to the administrator the claimant took a night shift on August 4, 2012. When she returned to work on August 9, 2012, she was terminated.

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.

871 IAC 24.32(8) provides:

(8) Past acts of misconduct. While past acts and warnings can be used to determine the magnitude of a current act of misconduct, a discharge for misconduct cannot be based on such past act or acts. The termination of employment must be based on a current act.

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. Profanity or other offensive language in a confrontational or disrespectful context may constitute misconduct, even in isolated situations or in situations in which the target of the statements is not present to hear them. See Myers v. EAB, 462 N.W.2d 734 (Iowa App. 1990). In Henecke v. IDJS, 533 N.W.2d 573 (Iowa App. 1995), the Iowa Court of Appeals stated that an employer has the right to expect decency and civility from its workers. The employer has the burden of proof to show misconduct.

The evidence in this case established that the claimant was terminated for disqualifying misconduct. She was insubordinate to the nurse in charge and used profanity that breached her duty of civility and geniality. She also was disrespectful to a resident by yelling at the resident and forcing her to sit in a wheelchair. The employer has a material interest in providing a safe and respectful place for its residents to live. The claimant breached her duty to the employer by engaging with the resident as she did.

The only issue is whether this is a current act of misconduct. There was a gap between the time of the incident on July 17, 2012, and the discharge on August 9, 2012. The administrative law judge concludes that it was the claimant who prevented the employer from discharging her until August 9, 2012, by deliberately ignoring multiple phone calls from the employer. The claimant was on vacation and did not respond to the request for a meeting. Under these circumstances, the administrative law judge concludes that the claimant was discharged for a current act of misconduct because the employer acted as soon as the claimant agreed to appear for a meeting.

The next issue is overpayment of benefits.

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.

The overpayment issue is remanded to the Claims Section for determination.

DECISION:

The decision of the representative dated September 14, 2012, reference 01, is reversed. Unemployment insurance benefits are allowed provided claimant is otherwise eligible. The overpayment issue is remanded to the Claims Section for determination.

Vicki L. Seeck
Administrative Law Judge

Decision Dated and Mailed

vls/css