

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

MICHELLE CONGER
Claimant

APPEAL NO: 08A-UI-11231-ET

**ADMINISTRATIVE LAW JUDGE
DECISION**

CARE INITIATIVES
Employer

OC: 10-05-08 R: 03
Claimant: Respondent (2-R)

Section 96.5-2-a – Discharge/Misconduct
Section 96.3-7 – Recovery of Benefit Overpayment

STATEMENT OF THE CASE:

The employer filed a timely appeal from the November 19, 2008, reference 01, decision that allowed benefits to the claimant. After due notice was issued, a hearing was held by telephone conference call before Administrative Law Judge Julie Elder on December 15, 2008. The claimant did not respond to the hearing notice and did not participate in the hearing or request a postponement of the hearing as required by the hearing notice. Kyle Merry, Administrator and Kevin Rafferty, Employer Representative, participated in the hearing on behalf of the employer.

ISSUE:

The issue is whether the employer discharged the claimant for work-connected misconduct.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed as full-time CNA for Care Initiatives from August 28, 2007 to September 26, 2008. On September 2, 2008, the employer became aware that the claimant had committed herself to a hospital and it did not know when she would return. On September 4, 2008, the claimant called the employer and asked for FMLA paperwork and Administrator Kyle Merry gave the paperwork to a friend of the claimant's to give to her. Over the next few weeks the employer attempted to call the claimant to notify her that the deadline to return the FMLA paperwork was September 26, 2008, but was only able to reach her twice, including the week of September 15, 2008, when the claimant said she did not have the paperwork. The employer sent the FMLA paperwork again September 18, 2008. On September 22, 2008, the claimant called and asked for a personal leave of absence and Mr. Merry said he would ask the corporate office. He contacted the corporate office with the claimant's request for a leave of absence and the corporate office denied her request. Mr. Merry notified the claimant of the corporate office's decision and again reminded her the FMLA paperwork needed to be returned by September 26, 2008. The claimant failed to return the paperwork by September 26, 2008. The employer tried to contact the claimant October 2, 6 and 9, 2008, to inform her that her employment was terminated because she did not return the FMLA paperwork and had been absent from September 4 through September 26, 2008, without

calling in on a consistent basis or providing a doctor's excuse for her absences but was unable to reach her October 2 and 6, 2008, and on October 9, 2008, a phone company message stated her phone had been shut off. On October 15, 2008, the claimant called the employer to ask if she still had a job even though she had already filed for unemployment insurance benefits and the employer told her it had terminated her employment.

The claimant has claimed and received unemployment insurance benefits since her separation from this employer.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment for disqualifying job misconduct.

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 of proving disqualifying misconduct. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). The claimant requested FMLA paperwork September 4, 2008, and the employer reminded her at least three times that the deadline to return the FMLA paperwork was September 26, 2008, but the claimant failed to file it by the due date or to communicate on a regular basis with the employer. The employer made several attempts to contact the claimant but was usually unsuccessful in reaching her. On the occasions it did talk to her she initially stated she had not received the paperwork and then

asked for and was denied a personal leave of absence and was told both times that the FMLA paperwork was due September 26, 2008. The claimant not only missed the deadline but failed to provide any doctor's excuses between September 2 and September 26, 2008, and because she did not call in and properly report her 24 absences they were considered unexcused. Under these circumstances, the administrative law judge concludes the claimant's conduct demonstrated a willful disregard of the standards of behavior the employer has the right to expect of employees and shows an intentional and substantial disregard of the employer's interests and the employee's duties and obligations to the employer. The employer has met its burden of proving disqualifying job misconduct. Cosper v. IDJS, 321 N.W.2d 6 (Iowa 1982). Benefits are denied.

The unemployment insurance law 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. However, the overpayment will not be recovered when it is based on a reversal on appeal of an initial determination to award benefits on an issue regarding the claimant's employment separation if: (1) the benefits were not received due to any fraud or willful misrepresentation by the claimant and (2) the employer did not participate in the initial proceeding to award benefits. The employer will not be charged for benefits whether or not the overpayment is recovered. Iowa Code section 96.3-7. In this case, the claimant has received benefits but was not eligible for those benefits. The matter of determining the amount of the overpayment and whether the overpayment should be recovered under Iowa Code section 96.3-7-b is remanded to the Agency.

DECISION:

The November 19, 2008, reference 01, decision is reversed. The claimant was discharged from employment due to job-related misconduct. Benefits are withheld until such time as 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 of determining the amount of the overpayment and whether the overpayment should be recovered under Iowa Code section 96.3-7-b is remanded to the Agency.

Julie Elder
Administrative Law Judge

Decision Dated and Mailed

je/pjs