

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

DONNA R SCOTT
Claimant

APPEAL NO. 13A-UI-08332-S2T

**ADMINISTRATIVE LAW JUDGE
DECISION**

HOLY SPIRIT RETIREMENT HOME
Employer

OC: 06/23/13
Claimant: Respondent (2/R)

Section 96.5-2-a – Discharge for Misconduct

Section 96.3-7 – Recovery of Overpayment of Benefits, Employer participation at Fact Finding

STATEMENT OF THE CASE:

Holy Spirit Retirement Home (employer) appealed a representative's July 11, 2013 decision (reference 01) that concluded Donna Scott (claimant) was discharged and there was no evidence of willful or deliberate misconduct. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was scheduled for August 21, 2013. The claimant participated personally. The employer was represented by Timothy Bottaro, Attorney at Law, and participated by Venetia Gaiani, Activities Coordinator; Debbie Logan, Assisted Living Coordinator; Dorene Becker, Human Resources Coordinator; and Patrick Tomsha, Administrator. The employer offered and Exhibit One was received into evidence.

ISSUE:

The issue is whether the claimant was separated from employment for any disqualifying reason, whether claimant is overpaid unemployment insurance benefits and whether employer's account is charged due to non participation at fact finding.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds that: The claimant was hired on July 13, 2005, as a full-time certified nursing assistant. The claimant signed for receipt of the employer's handbook on July 13, 2005. In April 2012, the claimant was moved from the skilled nursing facility to the memory care area due to her failure to follow instructions in the skilled area. On April 23, 2013, the employer issued the claimant a written warning for leaving a resident unattended. The employer notified the claimant that further infractions could result in termination from employment.

On June 19, 2013, the claimant came upon a resident after being incontinent. The claimant spoke in a loud tone stating repeatedly "unbelievable" and "I can't believe you went in your wheelchair." The activities coordinator who was in the room next door could hear the claimant and was alarmed by the claimant's tone and words. She heard the resident in a shaky voice state, "You're not making me feel very good." The claimant closed the door to the room and claimant said she could not believe the mess. The activities director went to the door and asked

if everything was ok. There was no response. Later the door opened, the claimant brought the resident to the activity table. The coordinator observed the resident was crying and shaking. The coordinator tried to calm the resident. When she was unable to do so, she reported the situation to her supervisor.

The supervisor talked to the resident who was crying and embarrassed. The resident was afraid that she would have to move or see the claimant in the future. The resident told the supervisor that she had an accident, the claimant raised her voice to the resident, and showed the resident the soiled garment. The employer interviewed the claimant and the claimant admitted she could have handled the situation better. The employer suspended the claimant on June 19, 2013, and terminated the claimant on June 24, 2013.

The employer participated at the fact-finding interview on July 10, 2013, by Debbie Logan and Dorene Becker.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow the administrative law judge concludes the claimant was not eligible to receive unemployment insurance benefits.

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 proof in establishing disqualifying job misconduct. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). The claimant clearly disregarded the standards of behavior which an employer has a right to expect of its employees. The claimant's actions were volitional. When a claimant intentionally disregards the standards of behavior that the employer has a right to expect of its employees, the claimant's actions are misconduct. The claimant was discharged for misconduct.

The next issue concerns an overpayment of unemployment insurance benefits.

The unemployment insurance law requires benefits be recovered from a claimant who receives benefits and is later denied benefits even if the claimant acted in good faith and was not at fault. However, a claimant will not have to repay an overpayment when an initial decision to award benefits on an employment separation issue is reversed on appeal if two conditions are met: (1) the claimant did not receive the benefits due to fraud or willful misrepresentation, and (2) the employer failed to participate in the initial proceeding that awarded benefits. In addition, if a claimant is not required to repay an overpayment because the employer failed to participate in the initial proceeding, the employer's account will be charged for the overpaid benefits. Iowa Code section 96.3-7-a, -b.

In this case the employer participated personally in the fact-finding interview and is not chargeable. This matter is remanded to the Claims Section for determination of an overpayment.

DECISION:

The representative's July 11, 2013, decision (reference 01) is reversed. The claimant is not eligible to receive unemployment insurance benefits because the claimant was discharged from work for misconduct. Benefits are withheld until the claimant has worked in and has been paid wages for insured work equal to ten times the claimant's weekly benefit amount provided the claimant is otherwise eligible. This matter is remanded to Claims Section for determination of any overpayment. The employer participated personally in the fact-finding interview and is not chargeable.

Beth A. Scheetz
Administrative Law Judge

Decision Dated and Mailed

bas/css