

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

**ELIZABETH STEVENS
PO BOX 9402
CEDAR RAPIDS IA 52404-9402**

APPEAL NO. 09O-UI-15250-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

**RUTH A STARK
STARK EXCAVATING
4010 TARPY DR SW
CEDAR RAPIDS IA 52404-7150**

APPEAL RIGHTS:

This Decision Shall Become Final, unless within fifteen (15) days from the date below, you or any interested party appeal to the Employment Appeal Board by submitting either a signed letter or a signed written Notice of Appeal, directly to:

***Employment Appeal Board
4th Floor – Lucas Building
Des Moines, Iowa 50319***

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

AN APPEAL TO THE BOARD SHALL STATE CLEARLY:

The name, address and social security number of the claimant.

A reference to the decision from which the appeal is taken.

That an appeal from such decision is being made and such appeal is signed.

The grounds upon which such appeal is based.

YOU MAY REPRESENT yourself in this appeal or you may obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds. It is important that you file your claim as directed, while this appeal is pending, to protect your continuing right to benefits.

SERVICE INFORMATION:

A true and correct copy of this decision was mailed to each of the parties listed.

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

ELIZABETH STEVENS
Claimant

APPEAL NO. 09O-UI-15250-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

RUTH A STARK
STARK EXCAVATING
Employer

OC: 06/21/09
Claimant: Appellant (1-R)

Iowa Code Section 96.5(2)(a) – Discharge for Misconduct

STATEMENT OF THE CASE:

This matter was before the administrative law judge as the result of an Employment Appeal Board remand for a new hearing. Elizabeth Stevens had filed a timely appeal from the July 20, 2009, reference 01, decision that denied benefits. After due notice was issued, a new hearing was held on December 11, 2009. Claimant Elizabeth Stevens had provided a telephone number for the hearing, but was not available at that number at the time of the hearing. Shawn Engbretson represented the employer and presented additional testimony through Lisa Stark and Ruth Stark. Exhibits One through 12 were received into evidence.

ISSUE:

Whether the claimant was discharged for misconduct in connection with the employment that disqualifies the claimant for unemployment insurance benefits.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Elizabeth Stevens worked for the employer from April 2008 until June 24, 2009, when Ruth Stark and Lisa Stark discharged her from the employment. Ruth Stark hired Ms. Stevens to provide full-time care to her husband, Art Stark. Mr. Stark and Ruth Stark are elderly persons. Both use a walker. Lisa Stark is their daughter. Mr. Stark suffered a stroke two years ago. Ruth Stark hired Ms. Stevens to prepare Mr. Stark's meals, to assist him with personal hygiene, to assist him with his medications, to assist him with walking, and to otherwise assist Mr. Stark as needed. Though Ms. Stevens' primary duty was to provide care to Mr. Stark, the employer also had Ms. Stevens perform light housekeeping when Mr. Stark was sleeping and after Mr. Stark's needs were attended to. The work was performed at the Stark's home. Ms. Stevens had represented herself to be a certified health aide.

Though the employer had intended for the employment to be full-time, from 9:30 a.m. to 4:30 or 5:30 p.m., Ms. Stevens developed the habit of showing up at one or two hours late, if she showed up at all, and leaving at 2:30 p.m. Toward the end of the employment, the Starks had to resort to having an employee from their family business work from the Stark home when

Ms. Stevens failed to appear for work and/or no one else was available to supervise Ms. Stevens' work.

A week or two before the employment came to an end, Ms. Stevens made repeated requests for a raise, which the employer denied. Ms. Stevens made a point of telling Mr. Stark that if she did not receive a raise, Mr. Stark would have no one to care for him. At about the same time, Ms. Stevens asked Lisa Stark how unemployment insurance worked. Ms. Stevens shared with the employer that her boyfriend was unemployed and was receiving unemployment insurance benefits.

The final incidents that triggered the discharge occurred on June 24, 2009. On that day, Lisa Stark left her father in Ms. Stevens' care while she took her mother to an appointment. Ms. Stark told Ms. Stevens that she would drop her mother off and then return to her parents' home. Ms. Stark had also warned Ms. Stevens that her father wanted to go outside, but that he should only go outside if Ms. Stevens went with him and only after Ms. Stevens got him dressed. A physical therapist had trained Ms. Stevens on the need to assist Mr. Stark while he was walking to prevent injury. A short while later, Lisa Stark returned to her parents' home and found her father outside and naked except for a t-shirt. Ms. Stevens had neglected to put shorts or slipper socks on Mr. Stark. Ms. Stevens had either facilitated Mr. Stark leaving the house undressed and alone or had so neglected supervising him that he was able to get out of the house unnoticed. Ms. Stark assisted her father to a seat by the house and then entered the home. Ms. Stark located Ms. Stevens sitting at the dining room table watching television. When Ms. Stark began to express concern about her father, Ms. Stevens said, "Oh, what do you mean, he's in the living room." Ms. Stevens asserted she had been cleaning. Ms. Stark directed Ms. Stevens to get Mr. Stark's socks and shoes and to meet her outside to assist Mr. Stark. Ms. Stevens knew where Mr. Stark's socks and shoes were located, but 10 minutes later, had still not appeared with the items. Ms. Stark entered the home to see what the delay was and only then did Ms. Stevens provide the socks and shoes. Ms. Stark and Ms. Stevens then dressed Mr. Stark.

Lisa Stark left her father in Ms. Stevens' care while she went to collect her mother. Upon their return, the Starks told Ms. Stevens they could not trust Ms. Stevens to look after Mr. Stark and discharged her from the employment. Lisa and Ruth Stark concluded that Ms. Stevens had intentionally created a situation that would provoke her discharge from the employment.

In April 2009, Ms. Stevens had ignored Ruth Stark's repeated directives to check on Mr. Stark. After Ms. Stevens failed to respond to the third directive, Mrs. Stark checked on Mr. Stark and found him on the floor. Mr. Stark had suffered a fall. Earlier in the day, Lisa Stark had told Ms. Stevens that Mr. Stark would be rising soon and that Ms. Stevens needed to check on him.

In May 2009, Lisa Stark had to intervene to make Ms. Stevens stop referring to Ruth Stark as "old lady." Ruth Stark had asked Ms. Stevens several times to refrain from calling her that, but Ms. Stevens had continued until Lisa Stark threatened to take disciplinary steps to address the conduct.

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.

The employer has the burden of proof in this matter. See Iowa Code section 96.6(2). Misconduct must be substantial in order to justify a denial of unemployment benefits. Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of unemployment benefits. See Lee v. Employment Appeal Board, 616 N.W.2d 661 (Iowa 2000). The focus is on deliberate, intentional, or culpable acts by the employee. See Gimbel v. Employment Appeal Board, 489 N.W.2d 36, 39 (Iowa Ct. App. 1992).

Continued failure to follow reasonable instructions constitutes misconduct. See Gilliam v. Atlantic Bottling Company, 453 N.W.2d 230 (Iowa App. 1990). An employee's failure to perform a specific task may not constitute misconduct if such failure is in good faith or for good cause. See Woods v. Iowa Department of Job Service, 327 N.W.2d 768, 771 (Iowa 1982). The administrative law judge must analyze situations involving alleged insubordination by evaluating the reasonableness of the employer's request in light of the circumstances, along with the worker's reason for non-compliance. See Endicott v. Iowa Department of Job Service, 367 N.W.2d 300 (Iowa Ct. App. 1985).

The weight of the evidence indicates a pattern of negligence and insubordination. With regard to the final incident that prompted the discharge, Ms. Stevens unreasonably failed to follow Ms. Stark's reasonable directive to get her father dressed. Ms. Stevens at the very least

neglected to properly supervise Mr. Stark. The weight of the evidence indicates that Ms. Stevens was most likely aware that Mr. Stark had left the home unaccompanied and undressed. The final incident followed multiple earlier incidents where Ms. Stevens unreasonably failed to follow the employer's reasonable directives. The negligence was sufficiently recurrent to indicate a willful and wanton disregard of the employer's interests. The recurrent insubordination also indicated a willful and wanton disregard of the employer's interests.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Ms. Stevens was discharged for misconduct. Accordingly, Ms. Stevens is disqualified for benefits 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 employer's account shall not be charged for benefits paid to Ms. Stevens.

Ms. Stevens received no benefits in connection with the July 20, 2009, reference 01 decision that denied benefits. But Ms. Stevens later was awarded and received benefits as a result of the administrative law judge decision in Appeal Number 09A-UI-10894-MT. It was that decision that the employer appealed to the Employment Appeal Board and that case that the Employment Appeal Board remanded for a new hearing after the employer was denied a reasonable opportunity to participate in the initial appeal hearing. Overpayment of benefits was not included as an issue in a new appeal hearing and the claimant was not available to waive form notice on the issue. Accordingly, this matter will need to be remanded to the Claims Division for entry of an overpayment decision in light of the present decision. See Iowa Code section 96.3(7).

DECISION:

The Agency representative's July 20, 2009, reference 01, decision is affirmed. The claimant was discharged for misconduct. The claimant is disqualified for unemployment benefits until she has worked in and been paid wages for insured work equal to ten times her weekly benefit allowance, provided she meets all other eligibility requirements. The employer's account shall be relieved of charges.

This matter is remanded to the Claims Division for entry of an overpayment decision in light of the present decision.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/pjs