

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**EVELYN J BUDWEG**  
Claimant

**APPEAL NO. 10A-UI-06258-VST**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**WAVERLY HEALTH CENTER**  
Employer

**OC: 03/21/10**  
**Claimant: Appellant (1)**

Section 96.5-2-A -- Misconduct

**STATEMENT OF THE CASE:**

Claimant filed an appeal from a decision of a representative dated April 20, 2010, reference 01, which held claimant ineligible for unemployment insurance benefits. After due notice, a telephone conference hearing was scheduled for and held on June 10, 2010. Claimant participated. The claimant was represented by David Skilton, Attorney at Law. Adam Huffman was a witness for the claimant. Employer participated by Tina Miller, Human Resources Specialist, and Danae Tjeerdsma, Emergency Department Manager. The record consists of the testimony of Danae Tjeerdsma; the testimony of Tina Miller; the testimony of Evelyn Budweg; and the testimony of Adam Huffman.

**ISSUE:**

Whether the claimant was discharged for misconduct.

**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 non-profit hospital located in Waverly, Iowa. The claimant worked in the emergency department as a part-time nurse. She worked 24 hours per week. She was initially hired on October 25, 2004. She was terminated on March 24, 2010.

The incidents that led to the claimant's termination occurred on March 14, 2010. The employer had a written policy, of which the claimant was aware, concerning breaks and meals. An employee who worked an eight-hour shift was entitled to two fifteen-minute breaks. These breaks had to be taken on the employer's premises. An employee did not clock out for these breaks. The meal break was 30 minutes and an employee did clock out for that period of time. An employee was permitted to leave the premises for the 30-minute meal break.

The claimant is a smoker. Smoking is not permitted on the employer's premises. The claimant wanted to have a cigarette and she left the premises at 9:11 on March 14, 2010. She returned at 9:19. She did not clock out. She left the premises at 12:08 for another smoke break. She returned at 12:24. She did not clock out. The claimant did check out at 13:51 for her meal break and took a nap. She checked back in at 14:35.

The employer was initially concerned about the claimant napping during her mealtime. The claimant was next scheduled to work on March 19, 2010, and the nap was discussed with her at that time. The employer determined that the claimant could take a nap during her meal break as she was clocked out. During subsequent investigation the break times were seen on surveillance tape. The claimant was next scheduled to work on March 24, 2010. At that time she was terminated for violating the employer's rules on leaving the premises.

The claimant had been given a previous one-day suspension on January 5, 2010, concerning her attitude and anger. At that time she was informed that any further violations of the work rules would lead to her termination.

#### **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.

Misconduct occurs when there are deliberate acts or omissions that constitute a material breach of the worker's duty to the employer. An employer is entitled to establish reasonable work rules and to enforce those rules. The employer can reasonably expect that an employee will follow work rules, provided the employer is informed about those rules. The employer has the burden of proof to show misconduct.

The evidence established that the claimant violated the employer's work rules concerning break times on March 14, 2010. An employee was not permitted to leave the premises during a scheduled fifteen-minute break. The claimant knew that the employer had this rule. The claimant was a smoker and wanted to have a cigarette. Smoking was not permitted on the employer's premises. In order to smoke, the claimant had to leave the premises. She knew she was violating the employer's rule by leaving the premises during her break.

The claimant testified that the employer knew that employees were leaving the premises at break times in order to smoke or run errands or get food. Ms. Tjeerdsma denied knowing that this was common practice. Adam Huffman, a former employee, did say that there were times that employees did leave the premises in order to get food or take a smoke break and that this was "common knowledge." Mr. Huffman primarily referred to meal times and had less concrete information about break times. He did not specifically identify which employees took breaks without clocking out and then leaving the premises. He himself had not done this. The evidence is too vague to show that the employer sanctioned or even condoned employees taking smoke breaks away from the premises if an employee had not clocked out.

The claimant also testified that she believes she was terminated in order to hire a new employee at a lower wage. She was told by another employee that she (the other employee) was offered a full-time job in the emergency room before she was terminated. This is hearsay testimony by the claimant. Ms. Tjeerdsma testified that no job was offered before the claimant's termination and that two individuals were hired to replace the claimant's hours. This testimony is accepted.

The claimant had been given a one-day suspension in January 2010 for a different reason and had been informed at that time that any further violations would subject her to termination. The claimant deliberately elected to leave the work site without clocking out during her break times on March 14, 2010. The employer has established misconduct. Benefits are denied.

**DECISION:**

The decision of the representative dated April 20, 2010, reference 01, is affirmed. Unemployment insurance benefits shall be withheld until claimant has worked in and been paid wages for insured work equal to ten times claimant's weekly benefit amount, provided claimant is otherwise eligible.

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Vicki L. Seeck  
Administrative Law Judge

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Decision Dated and Mailed

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