

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

AMANDA D DAVIS
Claimant

APPEAL NO. 10A-UI-14732-VS

**ADMINISTRATIVE LAW JUDGE
DECISION**

TWYLA VEGTER
Employer

OC: 09/19/10
Claimant: Respondent (2R)

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

STATEMENT OF THE CASE:

Employer filed an appeal from a decision of a representative dated October 15, 2010, reference 01, which held claimant eligible for unemployment insurance benefits. After due notice, a hearing was scheduled for and held on February 10, 2011, in Davenport, Iowa. Claimant participated. The claimant was represented by Andre Harrison. Employer participated by Dawn Aldridge, director of human resources; Theresa Nelsen, director of nursing; Takia Yarbrough, certified nursing assistant; Atesha Ellis, certified nursing assistant; The record consists of the testimony of Dawn Aldridge; the testimony of Takia Yarbrough; the testimony of Atesha Ellis; the testimony of Theresa Nelsen; the testimony of Amanda Davis; Claimant's Exhibits A through F: and Employer's Exhibit One.

ISSUE:

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 home facility located in Clinton, Iowa. The claimant was hired on June 3, 2009, as a full-time certified nursing assistant. Her last day of work was September 23, 2010. She was terminated on September 24, 2010.

The incident that led to the claimant's termination occurred on September 23, 2010. The claimant arrived at work for her shift, which started at 2:00 p.m. When the claimant arrived, she was informed that one of the residents needed to be changed. The family was visiting at the time and the claimant was told to wait until the family left. At approximately 2:30 p.m., the family left and the claimant was ready to assist the resident. The claimant asked another CNA, Takia Yarbrough, to assist her with the patient.

While the claimant and Ms. Yarbrough were in the room, Ms. Yarbrough asked the claimant about her daughter, who had been ill. Ms. Yarbrough heard the claimant say that her daughter's care had been or was "fucked up." The conversation then turned to a condition that was observed on the resident and the claimant asked which nurses were on duty. Ms. Yarbrough told the claimant the names of the nurses. Ms. Yarbrough heard the claimant to say that she did not want either nurse as neither would do a god dammed or god danged thing. The claimant denied she used any profanity in the room although she did express a preference for one nurse over another because that nurse was more familiar with the patient.

Ms. Yarbrough reported to her nurse that the claimant had used profanity in the resident's room. The use of profanity on the job is absolutely prohibited by the employer. The claimant knew this was the policy. The nurse in turn reported the incident to Dawn Aldridge, director of human resources. The claimant was asked to clock out while there was an investigation.

What occurred next was hotly contested between the parties. Atesha Ellis, another CNA and cousin of Ms. Yarbrough, saw the claimant walking to her babysitter's house. Ms. Ellis offered the claimant a ride and the claimant told Ms. Ellis that she had sworn in a patient's room and that she needed Ms. Yarbrough to cover her. Ms. Ellis took the claimant to Ms. Yarbrough's mother's house, which is where Ms. Yarbrough happened to be. The claimant asked Ms. Yarbrough to lie for her. This conversation was overheard by Ms. Ellis. The claimant denied that any of these events took place. Ms. Yarbrough told Ms. Aldridge that the claimant had asked her to cover up the situation.

The claimant was contacted by telephone the next day, September 24, 2010, and was told that she was terminated. The employer took into account both the use of profanity in a patient's room and the report that the claimant had asked Ms. Yarbrough to cover for her.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code § 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 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. An employer can reasonably expect that an employee will follow its work rules. An employer can also reasonably expect that an employee will be truthful during an investigation as honesty is one of the most fundamental duties any employee owes to the employer. The employer has the burden of proof to show misconduct.

It is impossible to reconcile the testimony of the witnesses in this case. The testimony from the claimant and the employer's witnesses could not be more polar opposites. This is particularly true with respect to what the administrative law judge believes to be the misconduct in this case, namely, the claimant's request that Ms. Yarbrough lie on her behalf and say that the use of profanity in front of a patient never occurred.

Ms. Yarbrough testified that she did hear the claimant use profanity and make disparaging comments about the two nurses on duty in front of a resident. The resident had short term memory problems and when asked about the incident by the director of nursing, could not remember anything. Ms. Yarbrough was sufficiently troubled about the claimant's comments that she went to her supervisor and the matter was then brought to the attention of management. The claimant was interviewed and denied having made the statements attributed to her.

The claimant's explanation for Ms. Yarbrough's complaint was that Ms. Yarbrough was retaliating against the claimant because the claimant had previously lodged a complaint against Ms. Yarbrough. The difficulty with this explanation is that the problem appeared to have been ironed out and the dispute does not seem serious enough to merit retaliation. The claimant also never mentioned retaliation when she was interviewed by Ms. Aldridge during the investigation. Retaliation also does not explain the testimony of Ms. Ellis. Ms. Ellis testified that the claimant asked her if her cousin would cover up for her. Ms. Ellis also testified that she overheard the claimant make the same request to Ms. Yarbrough.

After carefully weighing all of the testimony in this case, the administrative law judge concludes that the employer has established misconduct. The claimant violated the employer's rule on the use of profanity in the workplace. She realized her mistake and then attempted to cover up her mistake by asking Ms. Yarbrough to confirm the version of events she gave Ms. Aldridge. This is a violation of the fundamental duty of honesty and truthfulness owed to the employer. Benefits are denied.

The next issue is overpayment of benefits.

Iowa Code § 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.

This matter is remanded to the claims section for determination.

DECISION:

The decision of the representative dated October 15, 2010, reference 01, is reversed. 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. The overpayment issue is remanded to the claims section for determination.

Vicki L. Seeck
Administrative Law Judge

Decision Dated and Mailed

vls/pjs