

IOWA WORKFORCE DEVELOPMENT
Unemployment Insurance Appeals Section
1000 East Grand—Des Moines, Iowa 50319
DECISION OF THE ADMINISTRATIVE LAW JUDGE
68-0157 (7-97) – 3091078 - EI

LINDA M LUBBEN
1299 – 4TH AVE SE UNIT 101
LE MARS IA 51031-2888

GOOD SAMARITAN SOCIETY INC
C/o FRICK UC EXPRESS
PO BOX 283
SAINT LOUIS MO 63166-0283

Appeal Number: 06A-UI-04247-S2T
OC: 03/19/06 R: 01
Claimant: Respondent (2)

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 the **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.

STATE CLEARLY

1. The name, address and social security number of the claimant.
2. A reference to the decision from which the appeal is taken.
3. That an appeal from such decision is being made and such appeal is signed.
4. 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.

(Administrative Law Judge)

(Decision Dated & Mailed)

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

STATEMENT OF THE CASE:

Good Samaritan Society (employer) appealed a representative's April 10, 2006 decision (reference 01) that concluded Linda Lubben (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 held on May 4, 2006. The claimant participated personally. She offered additional witnesses Kenneth Koth and Pat Denney. The employer participated by Corinne Herdina, Administrator, and Betty Fuller, Activity Director. The employer offered one exhibit, which was marked for identification as Exhibit One. Exhibit One was received into evidence.

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 December 21, 2000, as a part-time activity assistant. The claimant signed for receipt of the company handbook and code of ethics on December 21, 2005. The claimant understood that federal regulations required her to inform residents of activities and encourage them to participate.

On April 18, 2005, the employer issued the claimant a Performance Improvement Plan. The employer expected the claimant to improve on three pages of comments by May 31, 2005. On August 30, 2005, the employer issued the claimant a Performance Improvement Plan. The employer expected the claimant to improve on three pages of comments by September 30, 2005. This Plan noted the claimant had not provided activities for residents between 4:00 and 5:00 p.m. In addition, the claimant was not adequately assisting residents and spending too much time with her Palm Pilot.

On September 1, 2005, the employer issued the claimant a written warning for treating residents and staff in an inconsiderate manner. On September 22, 2005, the employer issued the claimant a written warning for failing to follow instructions. The employer warned the claimant both times that further infractions could result in her termination from employment.

On November 1, 2005, the employer had a discussion with the claimant about her failure to attend to required tasks. On November 16, 2005, the employer told the claimant to provide a "Fun With Music" activity. The claimant disregarded the instructions. The employer discussed the claimant's shortcomings.

Each time the claimant received a warning or had a discussion with the employer, her performance would improve for a short time. Then the claimant would revert to her previous behavior.

On March 20, 2006, the claimant did not properly invite residents to the potato peeling session. She did not have residents ready for a visiting reverend. In addition, she did not have any activity planned from 4:00 to 5:00 p.m. On March 21, 2006, the claimant admitted to the employer that she did not perform her work as assigned. The employer terminated the claimant.

REASONING AND CONCLUSIONS OF LAW:

The issue is whether the claimant was discharged for misconduct. For the following reasons, the administrative law judge concludes she was.

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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. Huntoon v. Iowa Department of Job Service, 275 N.W.2d 445, 448 (Iowa 1979).

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). Poor work performance is not misconduct in the absence of evidence of intent. Miller v. Employment Appeal Board, 423 N.W.2d 211 (Iowa App. 1988). The employer discharged the claimant for poor work performance and has the burden of proof to show evidence of intent. The claimant admitted at the hearing she did not follow the employer's instructions because she thought the employer's requests were unreasonable but she did not ask for help. She was able to follow the instructions when she chose to do so. The claimant's poor work performance was a result of her lack of willingness to follow the employer's instructions. The employer has met its burden of proof to show misconduct. Benefits are denied.

Iowa Code section 96.3-7 provides:

7. Recovery of overpayment of benefits. 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.

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.

The claimant has received benefits in the amount of \$1,079.00 since filing her claim herein. Pursuant to this decision, those benefits now constitute an overpayment which must be repaid.

DECISION:

The representative's April 10, 2006 decision (reference 01) is reversed. The claimant is not eligible to receive unemployment insurance benefits because she was discharged from work for misconduct. Benefits are withheld until she has worked in and has been paid wages for insured work equal to ten times her weekly benefit amount, provided she is otherwise eligible. The claimant is overpaid benefits in the amount of \$1,079.00.

bas/kkf