

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

ASHLEY N BRIMMER
Claimant

APPEAL NO: 14A-UI-05219-DT

**ADMINISTRATIVE LAW JUDGE
DECISION**

BARTELS LUTHERAN HOME INC
Employer

OC: 04/27/14

Claimant: Respondent (2)

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

STATEMENT OF THE CASE:

Bartels Lutheran Home, Inc. (employer) appealed a representative's May 14, 2014 decision (reference 01) that concluded Ashley N. Brimmer (claimant) was qualified to receive unemployment insurance benefits after a separation from employment. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on June 9, 2014. The claimant participated in the hearing. Veronica Shea appeared on the employer's behalf and presented testimony from one other witness, Ryan Gulick. Based on the evidence, the arguments of the parties, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUES:

Was the claimant discharged for work-connected misconduct?

Was the claimant overpaid unemployment insurance benefits, and if so, is that overpayment subject to recovery based upon whether the employer participated in the fact-finding interview?

FINDINGS OF FACT:

The claimant started working for the employer on August 19, 2010. She worked most recently as a full-time environmental services technician. Her last day of work was April 28, 2014. The employer discharged her on that date. The reason asserted for the discharge was excessive absenteeism, specifically tardiness.

In 2013 the claimant had seven attendance occurrences, three of which would be treated as excused absences due to illness, but four of which were due to tardies, and three of those tardies were due to oversleeping. The claimant had been given some warnings in 2013 because of these occurrences. The claimant again had a tardy on February 27, 2014 due to oversleeping. As a result of this incident she had been given a three-day working suspension. She understood that if she had another unexcused occurrence prior to July 5, 2014 she would be discharged.

The final occurrence which triggered the employer's decision was on April 26, 2014. This was a Saturday, and the claimant was scheduled to report for work at 6:30 a.m. She did not report until about 20 minutes later. This was due to her oversleeping, as her son had taken her cell phone which she used as an alarm. As a result of this additional occurrence the employer determined to and did discharge the claimant on April 28.

The claimant established a claim for unemployment insurance benefits effective April 27, 2014. A fact-finding interview was held with a Claims representative on May 13, 2014. The employer, through Gulick and Shea, participated directly in the fact-finding interview. The claimant has received unemployment insurance benefits after the separation in the amount of \$836.00.

REASONING AND CONCLUSIONS OF LAW:

A claimant is not qualified to receive unemployment insurance benefits if an employer has discharged the claimant for reasons constituting work-connected misconduct. Iowa Code § 96.5-2-a. Before a claimant can be denied unemployment insurance benefits, the employer has the burden to establish the claimant was discharged for work-connected misconduct. *Cosper v. IDJS*, 321 N.W.2d 6 (Iowa 1982); Iowa Code § 96.5-2-a.

In order to establish misconduct such as to disqualify a former employee from benefits an employer must establish the employee was responsible for a deliberate act or omission which was a material breach of the duties and obligations owed by the employee to the employer. 871 IAC 24.32(1)a; *Huntoon v. Iowa Department of Job Service*, 275 N.W.2d 445 (Iowa 1979); *Henry v. Iowa Department of Job Service*, 391 N.W.2d 731, 735 (Iowa App. 1986). The conduct must show a 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. 871 IAC 24.32(1)a; *Huntoon*, supra; *Henry*, supra. In contrast, 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. 871 IAC 24.32(1)a; *Huntoon*, supra; *Newman v. Iowa Department of Job Service*, 351 N.W.2d 806 (Iowa App. 1984).

Excessive unexcused absenteeism can constitute misconduct. 871 IAC 24.32(7). Tardies are treated as absences for purposes of unemployment insurance law. *Higgins v. Iowa Department of Job Service*, 350 N.W.2d 187 (Iowa 1984). The presumption is that oversleeping is generally within an employee's control. *Higgins*, supra. The claimant's final occurrence of tardiness which triggered the discharge decision was not excused and was not due to illness or other reasonable grounds. The claimant had previously been warned that future occurrences could result in termination. *Higgins*, supra. The employer discharged the claimant for reasons amounting to work-connected misconduct.

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 § 96.3-7-a,--b.

The claimant received benefits but has been denied benefits as a result of this decision. The claimant, therefore, was overpaid benefits. Because the employer participated in the fact-finding interview, the claimant is required to repay the overpayment and the employer will not be charged for benefits paid.

DECISION:

The representative's May 14, 2014 decision (reference 01) is reversed. The employer discharged the claimant for disqualifying reasons. The claimant is disqualified from receiving unemployment insurance benefits as of April 28, 2014. This disqualification continues until she has been paid ten times her weekly benefit amount for insured work, provided she is then otherwise eligible. The employer's account is not subject to charge. The claimant is overpaid \$836.00, which is subject to recovery.

Lynette A. F. Donner
Administrative Law Judge

Decision Dated and Mailed

ld/pjs