

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**CHERYLE L SMITH**  
Claimant

**APPEAL NO. 10A-UI-01267-H2T**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**FAITH LUTHERAN HOME CORP**  
Employer

**OC: 10-18-09**  
**Claimant: Respondent (2R)**

Iowa Code § 96.5(2)a – Discharge/Misconduct  
Iowa Code § 96.3(7) – Recovery of Benefit Overpayment

**STATEMENT OF THE CASE:**

The employer filed a timely appeal from the January 12, 2010, reference 02, decision that allowed benefits. After due notice was issued, a hearing was held on March 5, 2010. The claimant did participate. The employer did participate through (representative) Gloria Hein, Food Service Supervisor and Colette Wyatt, Cook. Employer's Exhibit One was received.

**ISSUE:**

Was the claimant discharged for work-related misconduct?

Has the claimant been overpaid any unemployment insurance benefits?

**FINDINGS OF FACT:**

Having reviewed the testimony and all of the evidence in the record, the administrative law judge finds: Claimant was employed as a night cook part time beginning July 29, 2009 through December 14, 2009 when she was discharged.

The claimant worked a part-time schedule where she would work Thursday, Saturday and Sunday of one week and then be off the entire next week. She worked every other Thursday, Saturday and Sunday. The claimant last worked on Saturday November 7, 2009. She was to work on Sunday November 8 but called in sick. Her next scheduled work days were Thursday November 19, Saturday November 21 and Sunday November 22. The claimant called the employer on November 19 and said her brother in Pennsylvania was dying and she needed to leave town to be with him and her family. The claimant gave the employer the impression that she was unable to work because she needed to leave immediately to drive to Pennsylvania. The claimant was seen shopping by another employee on November 21 still in town. The claimant called the employer on November 24 to inform them that her brother had died and that she had not yet left town. The claimant did not leave town to drive to Pennsylvania until November 26, 2009. The claimant was in town and did not work her shifts on November 19, 21 and 22 because she led the employer to believe she needed to leave town immediately which clearly she did not as she did not leave town until two days after her brother's death.

The claimant was to return to work on December 3, 5 and 6. The claimant called the employer on December 1 and indicated that her niece's grandfather-in-law had died and she wanted to stay in Pennsylvania and be with her family for another week. The claimant returned to town on December 6 but did not call the employer to tell them she was home until December 14. On December 14 Ms. Hein called the claimant into work and told her she was being discharged for failing to work her assigned hours and for failing to find her own replacements. The employer believed the claimant had taken advantage of the employer's generosity by indicating she needed to leave town when she did not leave and by indicating she needed to stay for another death in the family when the person was not even a blood relation to her.

The claimant has received unemployment benefits since filing a claim with an effective date of October 18, 2009.

### **REASONING AND CONCLUSIONS OF LAW:**

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment due to job-related misconduct.

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.

The claimant could have worked on November 19, 21 and 22 and was duplicitous when she asked for time off from the employer indicating she needed to leave town. The claimant

indicated that she needed to leave for Pennsylvania immediately to be with her family but she did not. The claimant did not even leave town immediately when her brother died, she waited until two days after his death to leave town. The claimant was not forthcoming with the employer about her reason for not wanting to work on November 19, 21 and 22. If the claimant would have wanted to leave work immediately upon her brother's death, the employer would have accommodated that request. The claimant did not want to work and told the employer she needed to leave town in order to be relieved from her scheduled hours. The employer grew frustrated when the claimant again called and wanted another week off work due to her niece's grandfather-in-law's death. The claimant's niece's grandfather in law was no relation to the claimant and was simply used by the claimant to avoid returning to her work shifts. The claimant's disregard of the employer's interests in not working her scheduled shifts constitutes disqualifying misconduct. Benefits are denied.

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.

Because the claimant's separation was disqualifying, benefits were paid to which the claimant was not entitled. The unemployment insurance law provides that benefits must be recovered from a claimant who receives benefits and is later determined to be ineligible for benefits, even though the claimant acted in good faith and was not otherwise at fault. However, the overpayment will not be recovered when it is based on a reversal on appeal of an initial determination to award benefits on an issue regarding the claimant's employment separation if: (1) the benefits were not received due to any fraud or willful misrepresentation by the claimant and (2) the employer did not participate in the initial proceeding to award benefits. The

employer will not be charged for benefits whether or not the overpayment is recovered. Iowa Code § 96.3(7). In this case, the claimant has received benefits but was not eligible for those benefits. The matter of determining whether the overpayment should be recovered under Iowa Code § 96.3(7)b is remanded to the Agency.

**DECISION:**

The January 12, 2010, reference 02, decision is reversed. The claimant was discharged from employment due to job-related misconduct. Benefits are withheld until such time as 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 claimant is overpaid benefits in the amount of \$7,566.21.

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Teresa K. Hillary  
Administrative Law Judge

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Decision Dated and Mailed

tkh/pjs