

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**RUTH A KELLNER**  
Claimant

**APPEAL NO. 13A-UI-10523-VST**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**CARE INITIATIVES**  
Employer

**OC: 07/08/12**  
**Claimant: Respondent (2R)**

Section 96.5-2-a – Discharge for Misconduct

**STATEMENT OF THE CASE:**

The employer filed an appeal from a representative's decision dated September 4, 2013, reference 05, which held that the claimant was eligible for unemployment insurance benefits. After due notice, a hearing was held on November 4, 2013. The claimant participated personally. The claimant was represented by Matt Riley, attorney at law. The employer participated by Jennifer Swindler, clinical director, and Kristina Carte, team director. The employer was represented by Alyce Smolsky. The record consists of the testimony of Jennifer Swindler; the testimony of Kristina Carte; the testimony of Ruth Kellner; and Employer's Exhibits 1-13.

**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 hospice provider. The claimant was hired on March 18, 2013, as a registered nurse—case manager. She was a full-time employee. In order to perform her job, the claimant provided her services in a patient's home or in a facility. She was required to travel from location to location. Her last day of work was August 5, 2013. She was terminated on August 5, 2013.

The claimant was terminated because she worked unauthorized overtime and at an unauthorized location. The final incident that led to her termination occurred on August 4, 2013. The claimant turned in a time sheet that showed she worked 12 hours of unauthorized overtime for the week of July 18, 2013, through July 24, 2013. (Exhibit 3) The employer also determined that the claimant was doing her charting late at night, likely in her hotel room. The employer had a policy, of which the claimant was aware, that all charting was to be done at the bedside.

The claimant was on a final written warning for the same reasons as led to her termination. The final written warning was given on July 11, 2013, along with a suspension. (Exhibit 7) The claimant had been given a sheet with reminders on June 28, 2013, concerning charting and time sheet preparation.

## **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 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. Insubordination, which is the continued failure to follow reasonable instructions, constitutes misconduct. See Gilliam v. Atlantic Bottling Company, 453 N.W.2d 230 (Iowa App. 1990). The employer has the burden of proof to show misconduct.

The claimant is not eligible for unemployment insurance benefits. The greater weight of the credible evidence in this case shows that claimant failed to follow reasonable and known employer policies concerning time card preparation and charting. The claimant worked unauthorized overtime and continued to do her charting late at night instead of at the bedside as she was required to do by the employer. The claimant's testimony concerning her overtime and her charting is not credible. The administrative law judge asked the claimant why she was terminated and her first answer was that she did not know the reason. By the end of the questioning, the claimant admitted that she was terminated for working unauthorized overtime

and late charting. Her explanation on the late charting was that she was in the facility. This charting was done close to midnight and the likelihood that she was in the facility when she did the charting is small. Concerning the overtime, she claimed she did not realize that she was working overtime. She was counseled in the past on how to do her timecards and she had worked for the employer since March 2013. Her insistence that she did not realize she was working overtime is simply not believable.

The claimant's repeated failure to follow known and reasonable policies is insubordination. Insubordination is misconduct. Benefits are denied.

The next issue is overpayment of benefits. 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 charge for the overpaid benefits. Iowa code Section 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.

There is no indication that the parties were provided with the fact finding documents in this case. The issues of whether the employer participated in the fact finding interview, whether the claimant is required to repay the overpayment and whether the employer will be charged for benefits paid is remanded to the claims division for further determination.

**DECISION:**

The decision of the representative dated September 4, 2013, reference 05, is reversed. Unemployment insurance benefits shall be withheld until claimant worked in and been paid wages for insured worked equal to ten times claimant's weekly benefits amount, provided claimant is otherwise eligible. The overpayment issue is remanded to the claims division for further determination.

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Vicki L. Seeck  
Administrative Law Judge

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Decision Dated and Mailed

vls/pjs