

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

LUAN M BUEHL
Claimant

APPEAL NO: 09A-UI-17340-ST

**ADMINISTRATIVE LAW JUDGE
DECISION**

FIVE STAR QUALITY CARE INC
Employer

OC: 10/11/09
Claimant: Respondent (2-R)

Section 96.5-2-a - Discharge
871 IAC 24.32(1) – Definition of Misconduct
Section 96.3-7 – Recovery of Overpayment

STATEMENT OF THE CASE:

The employer appealed a department decision dated November 6, 2009, reference 01, that held the claimant was not discharged for misconduct on October 16, 2009, and benefits are allowed. A telephone hearing was held on December 23, 2009. The claimant participated. Bekki Hohenthanner, Director of Nursing, participated for the employer. Employer Exhibit One was received as evidence.

ISSUE:

Whether the claimant was discharged for misconduct in connection with employment.

FINDINGS OF FACT:

The administrative law judge having heard the testimony of the witnesses, and having considered the evidence in the record, finds: The claimant began employment as a full-time certified nursing assistant on August 7, 2008, and last worked for the employer on October 16, 2009. The claimant received the employer disciplinary policies that include the work rules in an employee handbook.

The employer issued the claimant a written warning on May 14, 2009 for failing to provide a resident with a bed alarm. The claimant admits fault in this matter. The claimant was issued a written warning on May 27 for failing to activate a resident floor alarm and provide it to the resident. The claimant admits she was partially responsible for this incident, but she believes that co-workers were also at fault. The claimant made no employee comments on the warning when she signed it. The claimant was issued a written warning on September 23rd for failing to activate a resident alarm that she signed without comment.

The claimant was discharged on October 16, 2009 for failing to activate a motion sensor alarm to a resident who suffered a fall on October 11. The claimant made no comment to the nursing director who discharged her that any other worker was responsible for the incident.

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.

The administrative law judge concludes the employer has established that the claimant was discharged for misconduct in connection with employment on October 16, 2009, for repeated failure to provide and/or activate resident personal alarms in light of corrective progressive discipline.

The claimant admitted all or partial responsibility for resident alarm issues on two occasions, but she denies responsibility for the most recent incident. The employer evidence is more persuasive that claimant failed to activate the resident alarm on October 11 based on her history for this conduct, and her failure to make this contention at discharge.

The claimant has received benefits on this claim.

Iowa Code section 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.

Since the claimant has received benefits, the overpayment issue is remanded to claims for determination.

DECISION:

The department decision dated November 6, 2009, reference 01, is reversed. The claimant was discharged for misconduct on October 16, 2009. Benefits are denied until the claimant requalifies by working in and being paid wages for insured work equal to ten times her weekly benefit amount, provided the claimant is otherwise eligible. The overpayment issue is remanded.

Randy L. Stephenson
Administrative Law Judge

Decision Dated and Mailed

rls/pjs