

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

ALLAN R SIMMS
Claimant

APPEAL NO. 10A-UI-08636-CT

**ADMINISTRATIVE LAW JUDGE
DECISION**

HILLCREST FAMILY SERVICES
Employer

OC: 05/23/10
Claimant: Respondent (2-R)

Section 96.5(2)a – Discharge for Misconduct
Section 96.3(7) – Recovery of Overpayments

STATEMENT OF THE CASE:

Hillcrest Family Services filed an appeal from a representative's decision dated June 15, 2010, reference 01, which held that no disqualification would be imposed regarding Allan Simms' separation from employment. After due notice was issued, a hearing was held by telephone on August 4, 2010. Mr. Simms participated personally. The employer participated by Sharron Hagensten, Recruitment and Retention Specialist, and Stephanie Carpenter, Associate Principal. Exhibits One through Nine were admitted on the employer's behalf.

ISSUE:

At issue in this matter is whether Mr. Simms was separated from employment for any disqualifying reason.

FINDINGS OF FACT:

Having heard the testimony and having reviewed all of the evidence in the record, the administrative law judge finds: Mr. Simms was employed by Hillcrest Family Services from March 28, 2006 until May 24, 2010. He was a full-time teacher associate and sometimes worked as a substitute teacher. The employer provides services to adolescents with delinquency or mental health issues. Mr. Simms was discharged for violating known company standards.

On February 19, 2010, Mr. Simms received a written warning after he used excessive force to restrain a student. The student had a pencil and was threatening to stab him with it. Mr. Simms used a hip toss to throw the student to the floor and then held him down. These actions were contrary to the behavior management program he had been trained to use. He had been trained to use blocking techniques if a student attempted to strike him. Mr. Simms had been disciplined on October 24, 2007 because he was involved in attempting to restrain a student in spite of having been told on September 17 not to engage in any holds or restraints.

Prior to February 19, 2010, Mr. Simms had been directed not to engage in any physical restraints as a result of his own medical condition and restrictions. As a result of the

February 19 incident, he was directed to participate in additional training on verbal de-escalation and proper physical holds. He was not to engage in any physical restraints until he received the additional training. The training was offered on three separated occasions prior to May 20, 2010 but Mr. Simms did not take the training as directed. The final incident that prompted his discharge occurred on May 20.

On May 20, a group of 9 to 11 students were in the park across from the facility for their physical education class. There were five staff members present. During the outing, two students started fighting and wound up on the ground. Mr. Simms ran to the two and began trying to separate them. As he ran over, he inadvertently tripped another staff person, causing her to roll down the hill. Part of Mr. Simms' training was that staff was not to get on the ground with students when restraining them. This was to avoid the possibility of positional asphyxiation. Mr. Simms also had physical limitations on his own activities at the time. He was suspended on May 20 and notified of his discharge on May 24, 2010.

Mr. Simms filed a claim for job insurance benefits effective May 23, 2010. He has received a total of \$3,654.00 in benefits since filing the claim.

REASONING AND CONCLUSIONS OF LAW:

An individual who was discharged from employment is disqualified from receiving job insurance benefits if the discharge was for misconduct. Iowa Code section 96.5(2)a. The employer had the burden of proving disqualifying misconduct. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). Mr. Simms was discharged because he violated the employer's standards with respect to managing students. He had gone through training on at least four occasions on how to deal with students who were having behavioral problems. Based on his training, he knew there was a limit to his ability to physically restrain them. He also knew the employer did not want him to physically intervene if his own restrictions limited him from doing so.

In spite of his prior training and the fact that he had been written up in October of 2007, Mr. Simms inappropriately restrained a student on February 20, 2010. He threw the student to the floor and held him down instead of trying to block whatever attempts the student may have made to actually stab him with the pencil. He was warned at that point that he was not to physically restrain students until he completed re-training on the proper techniques to restrain. He also knew he was not to restrain students until such time as his own physical condition allowed him to do so. In spite of the warning, Mr. Simms again restrained students on May 20 without having completed the required re-training and in spite of his own physical limitations.

There was no emergency situation that required Mr. Simms to intervene when the two students were fighting on May 20. There were four other staff members in the area. Neither student was using or brandishing a weapon of any sort. He knew he had not completed the re-training the employer required for him to be able to physically restrain students again. His use of improper restraint had the potential of causing harm to a student, harm for which the employer could be held legally liable. As such, his actions had the potential of having an adverse impact on the employer's license to do business. Moreover, his conduct had the potential of aggravating his own physical problems, thereby increasing the employer's exposure to worker's compensation liability.

Mr. Simms had ample notice of what the employer expected and required of him. There was no justification for his failure to conform his behavior to the standards he knew the employer expected. For the reasons stated herein, it is concluded that his conduct constituted a

substantial disregard of the employer's interests and standards. Misconduct was alleged as the reason for discharge and misconduct has been established by the evidence. Accordingly, benefits are denied.

Mr. Simms has received benefits since filing his claim. Based on the decision herein, the benefits received now constitute an overpayment. As a general rule, an overpayment of job insurance benefits must be repaid. Iowa Code section 96.3(7). If the overpayment results from the reversal of an award of benefits based on an individual's separation from employment, it may be waived under certain circumstances. An overpayment will not be recovered from an individual if the employer did not participate in the fact-finding interview on which the award of benefits was based, provided there was no fraud or willful misrepresentation on the part of the individual. This matter shall be remanded to Claims to determine if benefits already received will have to be repaid.

DECISION:

The representative's decision dated June 15, 2010, reference 01, is hereby reversed. Mr. Simms was discharged by Hillcrest Family Services for misconduct in connection with his employment. Benefits are denied until he has worked in and been paid wages for insured work equal to ten times his weekly job insurance benefit amount, provided he is otherwise eligible. This matter is remanded to Claims to determine the amount of any overpayment and whether Mr. Simms will be required to repay benefits.

Carolyn F. Coleman
Administrative Law Judge

Decision Dated and Mailed

cfc/css