

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

SARAH B POSEKANY
Claimant

APPEAL NO. 12A-UI-02795-HT

**ADMINISTRATIVE LAW JUDGE
DECISION**

CARE INITIATIVES
Employer

OC: 02/05/12
Claimant: Respondent (2-R)

Section 96.5(2)a – Discharge

STATEMENT OF THE CASE:

The employer, Care Initiatives, filed an appeal from a decision dated March 14, 2012, reference 01. The decision allowed benefits to the claimant, Sarah Posekany. After due notice was issued, a hearing was held by telephone conference call on April 5, 2012. The claimant participated on her own behalf. The employer participated by Administrator Phyllis Hunt, Assistant Director of Nursing (ADON) Teresa Ancona and was represented by TALX in the person of David Williams.

ISSUE:

The issue is whether the claimant was discharged for misconduct sufficient to warrant a denial of unemployment benefits.

FINDINGS OF FACT:

Sarah Posekany was employed by Care Initiatives from January 8, 2010 until February 7, 2012 as a full-time LPN. She had been rehired by the employer in January 2010 and during her prior period of employment Care Initiatives had brought to her attention she was required to take her two 15-minute paid breaks and punch out for her 30-minute meal break. She had been failing to do this. Her rehiring was contingent on her following all of the employer's policies.

Ms. Posekany received warnings in July 2010 and July 2011 for continued and consistent failure to take her unpaid 30-minute meal break. She did, however, find time to take smoke breaks every day. Her supervisor, ADON Teresa Ancona, told her to punch out for her smoke breaks if nothing else, but she did not do so.

The employer's concern was that without a period of rest employees would not be "at their best" to help deal with the residents and also that failing to take a meal break was a violating of employment law. She kept using the excuse that family members would have questions of her or that she would receive phone calls. But it does not appear she ever asked for specific guidelines as to what the employer expected to do in those cases if the questions arose while she was punched out for her unpaid break.

The employer discharged her on February 7, 2012, after a review of her time cards revealed she had not punched out for her meal break during one entire month when the facility had less than a full census of residents.

Sarah Posekany has received unemployment benefits since filing a claim with an effective date of February 5, 2012.

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 claimant had known for some time, including during her prior period of employment, that Care Initiatives expected her to take her 30-minute meal break. And she consistently refused to do so. Her excuse that she would be summoned to talk to family members or on the phone is not convincing since it seems apparent other staff members had sufficient time to take the required breaks. And that she herself had time to take smoke breaks and failed to punch out when she did so, even when her supervisor told her to.

It is uncertain whether the claimant's problem was a failure to organize her time and priorities, or whether she simply wanted the overtime pay. Nonetheless, she knew full well what the employer expected of her and willfully refused to comply which is insubordination. This is a violation of the duties and responsibilities the employer has the right to expect of an employee and conduct not in the best interests of the employer. The claimant is disqualified.

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.

The claimant has received unemployment benefits to which she is not entitled. The question of whether the claimant must repay these benefits is remanded to the UIS division.

DECISION:

The representative's decision of March 14, 2012, reference 01, is reversed. Sarah Posekany is disqualified and benefits are withheld until she has earned ten times her weekly benefit amount in insured work, provided she is otherwise eligible. The issue of whether the claimant must repay the unemployment benefits is remanded to UIS division for determination.

Bonny G. Hendricksmeier
Administrative Law Judge

Decision Dated and Mailed

bgh/css