

IOWA WORKFORCE DEVELOPMENT
Unemployment Insurance Appeals Section
1000 East Grand—Des Moines, Iowa 50319
DECISION OF THE ADMINISTRATIVE LAW JUDGE
68-0157 (7-97) – 3091078 - EI

SHEILA A CULBERT
3085 – 140TH ST
CRESTON IA 50801

GOOD SAMARITAN SOCIETY INC
c/o TALX UC EXPRESS
PO BOX 283
ST LOUIS MO 63166-0283

Appeal Number: 05A-UI-01142-RT
OC: 01-02-05 R: 03
Claimant: Respondent (2)

This Decision Shall Become Final, unless within fifteen (15) days from the date below, you or any interested party appeal to the Employment Appeal Board by submitting either a signed letter or a signed written Notice of Appeal, directly to the **Employment Appeal Board, 4th Floor—Lucas Building, Des Moines, Iowa 50319.**

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

STATE CLEARLY

1. The name, address and social security number of the claimant.
2. A reference to the decision from which the appeal is taken.
3. That an appeal from such decision is being made and such appeal is signed.
4. The grounds upon which such appeal is based.

YOU MAY REPRESENT yourself in this appeal or you may obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds. It is important that you file your claim as directed, while this appeal is pending, to protect your continuing right to benefits.

(Administrative Law Judge)

(Decision Dated & Mailed)

Section 96.5-1 – Voluntary Quitting
Section 96.5-2-a – Discharge for Misconduct
Section 96.3-7 – Recovery of Overpayment of Benefits

STATEMENT OF THE CASE:

The employer, Good Samaritan Society, Inc., filed a timely appeal from an unemployment insurance decision dated January 24, 2005, reference 01, allowing unemployment insurance benefits to the claimant, Sheila A. Culbert. After due notice was issued, a telephone hearing was held on February 17, 2005, with the claimant not participating. The claimant did not call in a telephone number, either before the hearing or during the hearing, where she or any of her witnesses could be reached for the hearing, as instructed in the notice of appeal. Jennifer Myers, Administrator, and Lisa Schmidt, Director of Nursing, participated in the hearing for the employer. The administrative law judge takes official notice of Iowa Workforce Development unemployment insurance records for the claimant.

FINDINGS OF FACT:

Having heard the testimony of the witnesses and having examined all of the evidence in the record, the administrative law judge finds: The claimant was employed by the employer as a full-time certified nurses' aide (CNA) from May 18, 2004 until she separated from her employment on December 3, 2004. On November 30, 2004, the claimant was absent and properly informed the employer that she was going to be absent that day because her son was ill. The claimant then never returned to work thereafter. The claimant was absent on December 1 and 2, 2004 and continuing thereafter without notifying the employer. The claimant came in and picked up her check on December 6, 2004, but gave no reason or explanation as to why she had been absent without notifying the employer and did not offer to return to work at that time. The claimant was informed that her absences were being treated as a quit and that she was terminated. The employer has a policy in its handbook, a copy of which the claimant received and for which she signed an acknowledgment, providing that two absences as a no-call/no-show treated as a voluntary quit and result in termination. The policy also provides that an employee who is going to be absent or tardy must notify the employer each day of absence two hours before the start of the employee's shift. When the claimant was absent on December 1 and 2, 2004, the employer tried to call the claimant several times but was unable to reach the claimant. The employer left several voice mails for the claimant but the claimant never responded to them. No one ever told the claimant that she was fired or discharged. The claimant never expressed any concerns to the employer's witness, Jennifer Myers, Administrator, about her working conditions, nor did she do so to anyone else that Ms. Myers heard about. Further, the claimant never indicated or announced an intention to quit to Ms. Myers if any problems she was having at work were not addressed by the employer, nor did she do so to anyone else that Ms. Myers heard about. Pursuant to her claim for unemployment insurance benefits filed effective January 2, 2005, the claimant has received unemployment insurance benefits in the amount of \$414.00 as follows: \$207.00 per week for two weeks, benefit weeks ending January 8 and 15, 2005. Records show no other weekly claims.

REASONING AND CONCLUSIONS OF LAW:

The questions presented by this appeal are as follows:

1. Whether the claimant's separation from employment was a disqualifying event. It was.
2. Whether the claimant is overpaid unemployment insurance benefits. She is.

Iowa Code section 96.5-1 provides:

An individual shall be disqualified for benefits:

1. Voluntary quitting. If the individual has left work voluntarily without good cause attributable to the individual's employer, if so found by the department.

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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. Huntoon v. Iowa Department of Job Service, 275 N.W.2d 445, 448 (Iowa 1979).

The first issue to be resolved is the character of the separation. The employer maintains that the claimant voluntarily quit when she was absent as a no-call/no-show without notifying the employer for two consecutive days, December 1 and 2, 2004. The claimant does not seem to profess any kind of separation. The claimant did not participate in fact finding, nor are there any other statements from the claimant. Accordingly, the administrative law judge concludes that the claimant voluntarily left her employment on December 3, 2004 when she was absent as a no-call/no-show on December 1 and 2, 2004 and continuing thereafter. Although the claimant returned to the employer on December 6, 2004, she did not return to go back to work but rather, simply to pick up her check. By failing to return to work the administrative law judge concludes that the claimant both demonstrated an intention to terminate the employment relationship and performed an overt act to carry out that intention, as required for a voluntary quit by Local Lodge #1426 v. Wilson Trailer, 289 N.W.2d 608, 612 (Iowa 1980). Accordingly, the administrative law judge concludes that the claimant voluntarily left her employment on December 3, 2004. The issue then becomes whether the claimant left her employment without good cause attributable to the employer.

The administrative law judge concludes that the claimant has the burden to prove that she has left her employment with the employer herein with good cause attributable to the employer. See Iowa Code section 96.6-2. The administrative law judge concludes that the claimant has failed to meet her burden of proof to demonstrate by a preponderance of the evidence that she left her employment with the employer herein with good cause attributable to the employer. The claimant did not participate in the hearing and provide evidence of reasons attributable to the employer for her quit. The employer's witnesses testified that they had no idea why the claimant quit coming to work. There is no evidence that the claimant's working conditions were

unsafe, unlawful, intolerable or detrimental, or that she was subjected to a substantial change in her contract of hire. There is also no evidence that the claimant ever expressed any concerns to the employer about her working conditions or that she ever indicated or announced an intention to quit if her concerns were not addressed by the employer. Accordingly, the administrative law judge concludes that the claimant left her employment voluntarily without good cause attributable to the employer and, as a consequence, she is disqualified to receive unemployment insurance benefits. Unemployment insurance benefits are denied to the claimant until and unless she requalifies for such benefits.

Even should the claimant's separation be considered a discharge, the administrative law judge would conclude that the claimant was discharged for disqualifying misconduct. The evidence establishes that the claimant was absent from the employer on December 1 and 2, 2004 and continuing thereafter. The employer has a policy that provides that an employee must call and notify the employer on each day of absence for that employee and must do so two hours before the employee's shift is to start. It is true that the claimant was absent on November 30, 2004 and called and informed the employer that she was absent because her son was ill. However, that call only applied to that day, November 30, 2004, and the claimant was thereafter absent without notifying the employer. The administrative law judge would conclude that these absences were not for reasonable cause and not properly reported and were excessive unexcused absenteeism. Even if there was a reasonable cause for the absences, they were clearly not properly reported to the employer and would still be excessive unexcused absenteeism. Therefore, even should the claimant's separation be considered a discharge, the administrative law judge would conclude that the claimant was discharged for excessive unexcused absenteeism, which is disqualifying misconduct, and the claimant would still be disqualified to receive unemployment insurance benefits. See 871 IAC 24.32(7).

Iowa Code section 96.3-7 provides:

7. Recovery of overpayment of benefits. 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.

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.

The administrative law judge concludes that the claimant has received unemployment insurance benefits in the amount of \$414.00 since separating from the employer herein on or about December 3, 2004 and filing for such benefits effective January 2, 2005. The administrative law judge further concludes that the claimant is not entitled to these benefits and is overpaid such benefits. The administrative law judge finally concludes that these benefits must be recovered in accordance with the provisions Iowa law.

DECISION:

The representative's decision dated January 24, 2005, reference 01, is reversed. The claimant, Sheila A. Culbert, is not entitled to receive unemployment insurance benefits until or unless she requalifies for such benefits, because she left her employment voluntarily without good cause attributable to the employer. She has been overpaid unemployment insurance benefits in the amount of \$414.00.

b/tjc