

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

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Appeal Number: 04A-UI-11072-S2T
OC: 09/12/04 R: 02
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 96.5-2-a – Discharge for Misconduct
Section 96.4-3 – Able and Available
Section 96.3-7 – Overpayment

STATEMENT OF THE CASE:

Care Initiatives (employer) appealed a representative's October 4, 2004 decision (reference 01) that concluded Janet Huisman (claimant) was eligible to receive unemployment insurance benefits. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on November 5, 2004. The claimant participated personally. The employer was represented by Lynn Corbeil, Attorney at Law, and participated by Allison Anderson, Administrator. The employer offered one exhibit which was marked for identification as Exhibit One. Exhibit One was received into evidence.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds that: The claimant was hired on October 26, 1998, as a full-time certified nurse's aid. The employer considered 30 hours per week to be full-time work. An employee had to maintain 30-hours per week of work to be eligible for insurance benefits. The claimant was scheduled for at least 30-hours of work per week but consistently worked less than 30-hours per week. The claimant gave her hours to other staff members. The employer discussed the situation with the claimant and placed the claimant in a part-time position working 23 to 33 hours per week. The claimant had no complaints about the situation.

The employer issued the claimant a verbal warning on January 12, 2004, for failing to follow instructions regarding answering alarms and smoking with a resident. On March 1, 2004, the employer issued the claimant a final written warning for failing to bring a resident to supper and changing his soaked incontinence pad. The claimant understood she would be terminated for further infractions.

On September 7, 2004, the claimant did not pass snacks to the Alzheimer's residents. She told a newly hired individual to record that the snacks had been distributed when they had not. The newly hired employee reported the incident to her supervisor. The employer issued the claimant a written warning and suspension on September 9, 2004, for falsifying records. The employer immediately investigated whether the claimant's actions would place the employer in jeopardy of losing state funding. The employer completed the investigation, finding the claimant was out of compliance with the employer's and State of Iowa rules. The employer terminated the claimant on October 4, 2004.

The claimant applied for benefits with an effective date of September 12, 2004.

The testimony of the employer and claimant was conflicting. The administrative law judge finds the employer's testimony to be more credible because the claimant's testimony was inconsistent.

REASONING AND CONCLUSIONS OF LAW:

The first issue is whether the claimant was able and available for work. For the following reasons, the administrative law judge concludes she is not.

871 IAC 24.23(26) provides:

Availability disqualifications. The following are reasons for a claimant being disqualified for being unavailable for work.

(26) Where a claimant is still employed in a part-time job at the same hours and wages as contemplated in the original contract for hire and is not working on a reduced workweek basis different from the contract for hire, such claimant cannot be considered partially unemployed.

The claimant was hired as a full-time worker. In May 2004, she became a part-time worker and was still working part-time for the employer until her termination. The employer changed the claimant's schedule to part-time hours to reflect the hours the claimant was willing to work. The claimant did not complain or ask that the hours be increased. At the time the claimant applied

for benefits she was still employed in a part-time position as was agreed to at the time she renegotiated her contract for hire in May 2004. The claimant is disqualified from receiving unemployment insurance benefits because she was not available for work.

The next issue is whether the claimant was discharged for misconduct. For the following reasons, the administrative law judge concludes she was.

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 employer has the burden of proof in establishing disqualifying job misconduct. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). Repeated failure to follow an employer's instructions in the performance of duties is misconduct. Gilliam v. Atlantic Bottling Company, 453 N.W.2d 230 (Iowa App. 1990). The falsification of an activity log book constitutes job misconduct. Smith v. Sorensen, 222 Nebraska 599, 386 N.W.2d 5 (1986). An employer has a right to expect employees to follow instructions and not falsify documents. The claimant disregarded the employer's right by falsifying a record and repeatedly failing to follow instructions. The claimant's disregard of the employer's interests is misconduct. As such she is not eligible to receive unemployment insurance benefits.

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 claimant has received benefits in the amount of \$728.00 since filing her claim herein. Pursuant to this decision, those benefits now constitute an overpayment which must be repaid.

DECISION:

The representative's October 4, 2004 decision (reference 01) is reversed. The claimant is not eligible to receive unemployment insurance benefits because she was discharged from work for misconduct. Benefits are withheld until she has worked in and has been paid wages for insured work equal to ten times her weekly benefit amount, provided she is otherwise eligible. In addition, the claimant is disqualified from receiving unemployment insurance benefits because she is not available for work with the employer. The claimant is overpaid benefits in the amount of \$728.00.

bas/tjc