

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**BRANDY M OVERBAY**  
Claimant

**APPEAL NO. 08A-UI-04490-H2T**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**FIVE STAR QUALITY CARE INC**  
Employer

**OC: 04-06-08 R: 01  
Claimant: Respondent (2)**

Iowa Code § 96.5(2)a – Discharge/Misconduct  
Iowa Code § 96.3(7) - Recovery of Benefit Overpayment

**STATEMENT OF THE CASE:**

The employer filed a timely appeal from the April 29, 2008, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on May 22, 2008. The claimant did not participate. The employer did participate through (representative) Denise Krueger, Director of Nursing; Lisa White, LPN; and Ken Poock, Administrator. Employer's Exhibit One was received.

**ISSUES:**

Was the claimant discharged for work related misconduct?

Has the claimant been overpaid any unemployment insurance benefits?

**FINDINGS OF FACT:**

Having reviewed the testimony and all of the evidence in the record, the administrative law judge finds: Claimant was employed as a certified nurses aide full time beginning July 25, 2007 through December 28, 2007 when she was discharged.

On December 26, 2007, she walked off the job without permission. The claimant was to work from 2:00 p.m. until 10:00 p.m. on December 26. The claimant left early without punching out on the time clock that day. The claimant did not have permission to leave early and knew that she was to punch out on the time clock when she did leave. Lisa White was the claimant's supervisor on December 26 and saw the claimant sleeping on a couch at 9:00 p.m. When at 9:30 p.m. the claimant could not be located, Ms. White and the other employees began looking for the claimant. After searching the facility they determined that the claimant had left without telling anyone she was leaving and without obtaining permission from her supervisor. The claimant had received the employer's handbook which clearly indicates that leaving work early without permission will be considered job abandonment by the employer. When the claimant returned to work on December 28, 2007 she was told she was discharged for leaving work early without permission on December 26. The claimant told Ms. Krueger that she had finished her work and had taken out the trash and just did not go back in to punch out on the time clock.

The claimant estimated that she left work at approximately 9:45 p.m. The claimant had no explanation for why she left early and for why she did not punch out on the time clock. The claimant had previously punched out after completing her work.

The claimant has received unemployment benefits since filing a claim with an effective date of April 6, 2008.

The claimant called after the hearing record had been closed and had not followed the hearing notice instructions pursuant to 871 IAC 26.14(7)a-c.

The claimant received the hearing notice prior to the May 22, 2008 hearing. The instructions inform the parties that if the party does not contact the Appeals Section and provide the phone number at which the party can be contacted for the hearing, the party will not be called for the hearing. The first time the claimant directly contacted the Appeals Section was on May 22, 2008, after the scheduled start time for the hearing. The claimant had not read all the information on the hearing notice, and had assumed that the Appeals Section would initiate the telephone contact even without a response to the hearing notice.

#### **REASONING AND CONCLUSIONS OF LAW:**

The first issue in this case is whether the claimant's request to reopen the hearing should be granted or denied.

871 IAC 26.14(7) provides:

(7) If a party has not responded to a notice of telephone hearing by providing the appeals section with the names and telephone numbers of its witnesses by the scheduled time of the hearing, the presiding officer may proceed with the hearing.

a. If an absent party responds to the hearing notice while the hearing is in progress, the presiding officer shall pause to admit the party, summarize the hearing to that point, administer the oath, and resume the hearing.

b. If a party responds to the notice of hearing after the record has been closed and any party which has participated is no longer on the telephone line, the presiding officer shall not take the evidence of the late party. Instead, the presiding officer shall inquire as to why the party was late in responding to the notice of hearing. For good cause shown, the presiding officer shall reopen the record and cause further notice of hearing to be issued to all parties of record. The record shall not be reopened if the presiding officer does not find good cause for the party's late response to the notice of hearing.

c. Failure to read or follow the instructions on the notice of hearing shall not constitute good cause for reopening the record.

The first time the claimant called the Appeals Section for the May 22, 2008 hearing was after the hearing had been closed. Although the claimant may have intended to participate in the hearing, the claimant failed to read or follow the hearing notice instructions and did not contact the Appeals Section as directed prior to the hearing. The rule specifically states that failure to read or follow the instructions on the hearing notice does not constitute good cause to reopen the hearing. The claimant did not establish good cause to reopen the hearing. Therefore, the claimant's request to reopen the hearing is denied.

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment due to job-related misconduct.

Iowa Code § 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 walked off the job prior to completing her shift without obtaining permission and without punching out on the time clock. The administrative law judge is persuaded that the claimant left the workplace sometime between 9:00 p.m. when she was seen sleeping on a couch and 9:30 p.m. when the employer began looking for her. The claimant did not punch out in order to conceal that she had left early. The claimant knew that she was to work her entire shift, not just until she felt her duties were completed. The claimant had received the employer's handbook which specifically warned her that leaving work early without permission was cause for termination. The claimant's leaving work early without permission constitutes disqualifying misconduct. Benefits are denied.

Iowa Code § 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.

Because the claimant's separation was disqualifying, benefits were paid to which the claimant was not entitled. Those benefits must be recovered in accordance with the provisions of Iowa law.

**DECISION:**

The April 29, 2008, reference 01, decision is reversed. The claimant was discharged from employment due to job-related misconduct. Benefits are withheld until such time as she has worked in and been paid wages for insured work equal to ten times her weekly benefit amount, provided she is otherwise eligible. The claimant is overpaid benefits in the amount of \$1,730.00.

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Teresa K. Hillary  
Administrative Law Judge

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Decision Dated and Mailed

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