

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

KELLY LOCKHART
Claimant

APPEAL NO: 12A-UI-03674-BT

**ADMINISTRATIVE LAW JUDGE
DECISION**

BETHANY MANOR INC
Employer

OC: 02/19/12
Claimant: Respondent (2/R)

Iowa Code § 96.5(2)(a) - Discharge for Misconduct
Iowa Code § 96.3-7 - Overpayment

STATEMENT OF THE CASE:

Bethany Manor, Inc. (employer) appealed an unemployment insurance decision dated March 28, 2012, reference 01, which held that Kelly Lockhart (claimant) was eligible for unemployment insurance benefits. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on April 24, 2012. The claimant did not comply with the hearing notice instructions and did not call in to provide a telephone number at which she could be contacted and, therefore, did not participate. The employer participated through Peter Limas, human resources generalist, and Tina Larson, director of clinical services. Employer's Exhibits One through Five were admitted into evidence. Based on the evidence, the arguments of the parties, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUE:

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

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and having considered all of the evidence in the record, finds that: The claimant was employed as a full-time certified nursing assistant from May 22, 2009 through February 22, 2012. She was discharged for the denial of critical care on February 13, 2012. The employer only learned about the incident on February 21, 2012, when the claimant's co-worker submitted a written complaint about her.

Co-worker Mindy Schnath prepared her written statement on February 15, 2012, but never provided it to the employer until February 21, 2012. She reported that on February 13, 2012 she was in a resident's room, Room 227, and needed some assistance transferring the resident, so she pushed the call light. Ms. Schnath wrote: "I couldn't leave because she is alarmed. I waited about 10-12 minutes until I heard a loud beep. Kelly had used the phone to shut off the call light so I pushed it again. I waited another 7-8 minutes until Kelly came in saying, 'Wow

(resident's name) stop pushing the button when you already have help' not knowing that it was me that pushed it."

Ms. Schnath reported that the claimant does not help "toilet and lay down the residents" after lunch. One day the claimant was eating a bag of chips and simply watched Ms. Schnath take care of the residents. Ms. Schnath said the claimant "says she toilets them but I re-check them and their (sic) always soaked and it's obvious they have not been changed for a while." The claimant was also rude to the residents and "has no respect for any of them." One resident "gets confused and depressed. Kelly yells at her and tells her she needs to quit crying and get up. She snaps her fingers in her face and yells at her to get up faster." A resident has difficulty standing and the claimant yelled at this resident for not helping. She yells at another resident about where the resident sits and makes the resident move. A different resident "smelt of urine so I asked her if she could go put on different clothes. Kelly went to her closet. Grabbed an outfit and threw it at (resident's name) and told her to change right now." Ms. Schnath concluded her complaint by stating, "I know most of the residents back here are not mentally with it all the time but they all still have feelings and deserve to be treated better than this."

The employer began an investigation and spoke with Ms. Schnath and the claimant. The employer has a call light system that is on an electronic tracking device. A print-out was run of the call light activity for Room 227 from February 9, 2012 through February 19, 2012. The records show there was a call light on February 13, 2012 at 09:38:42 a.m. that was ignored and another one at 10:11:26 a.m. that was ignored. The electronic records show the claimant denied critical care two times for the resident on Room 227 and her actions resulted in the claimant's termination.

The claimant filed a claim for unemployment insurance benefits effective February 19, 2012 and has received benefits after the separation from employment.

REASONING AND CONCLUSIONS OF LAW:

The issue is whether the employer discharged the claimant for work-connected misconduct. A claimant is not qualified to receive unemployment insurance benefits if an employer has discharged the claimant for reasons constituting work-connected misconduct. Iowa Code § 96.5-2-a.

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 employer has the burden to prove the discharged employee is disqualified for benefits for misconduct. *Sallis v. Employment Appeal Bd.*, 437 N.W.2d 895, 896 (Iowa 1989). The claimant was discharged on February 22, 2012 for the denial of critical care. The employer's electronic records confirm two incidents of the denial of critical care. The claimant's conduct shows a willful or wanton disregard of the standard of behavior the employer has the right to expect from an employee, as well as an intentional and substantial disregard of the employer's interests and of the employee's duties and obligations to the employer. Work-connected misconduct as defined by the unemployment insurance law has been established in this case and benefits are denied.

Iowa Code § 96.3(7) provides that benefits must be recovered from a claimant who receives benefits and is later determined to be ineligible for benefits, even though the claimant acted in good faith and was not otherwise at fault. The overpayment recovery law was updated in 2008. See Iowa Code § 96.3(7)(b). Under the revised law, a claimant will not be required to repay an overpayment of benefits if all of the following factors are met. First, the prior award of benefits must have been made in connection with a decision regarding the claimant's separation from a particular employment. Second, the claimant must not have engaged in fraud or willful misrepresentation to obtain the benefits or in connection with the Agency's initial decision to award benefits. Third, the employer must not have participated at the initial fact-finding proceeding that resulted in the initial decision to award benefits. If Workforce Development determines there has been an overpayment of benefits, the employer will not be charged for the benefits, regardless of whether the claimant is required to repay the benefits.

Because the claimant has been deemed ineligible for benefits, any benefits the claimant has received could constitute an overpayment. Accordingly, the administrative law judge will remand the matter to the Claims Division for determination of whether there has been an overpayment, the amount of the overpayment, and whether the claimant will have to repay the benefits.

DECISION:

The unemployment insurance decision dated March 28, 2012, 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 been paid wages for insured work equal to ten times her weekly benefit amount, provided she is otherwise eligible. The matter is remanded to the Claims Section for investigation and determination of the overpayment issue.

Susan D. Ackerman
Administrative Law Judge

Decision Dated and Mailed

sda/kjw