

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

MARGARET BELTZ

Claimant

APPEAL NO: 09A-UI-11827-E

**ADMINISTRATIVE LAW JUDGE
DECISION**

B & D SERVICES INC

Employer

OC: 07-19-09

Claimant: Respondent (2R)

Section 96.5-2-a - Discharge/Misconduct

Section 96.3-7 - Recovery of Benefit Overpayment

STATEMENT OF THE CASE:

The employer filed a timely appeal from the August 14, 2009, reference 01, decision that allowed benefits to the claimant. After due notice was issued, a hearing was held in Waterloo, Iowa, before Administrative Law Judge Julie Elder on September 29, 2009. The claimant participated in the hearing with her husband, Charles Beltz. Julie Schwarting, Executive Director, participated in the hearing on behalf of the employer.

ISSUE:

The issue is whether the employer discharged the claimant for work-connected misconduct.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed as a full-time program assistant for B & D Services from approximately May 2, 2000 to July 10, 2009. She worked directly with mentally challenged and developmentally disabled individuals. It was important that the claimant encourage and facilitate community involvement by and for the individuals for whom she provided care. She had been previously counseled with regard to fulfilling those job duties. There were complaints that the claimant was not taking the residents out to eat, to the grocery store, to potlucks and to church. Her June 2007 evaluation advised she needed to improve her documentation and performance of her job duties. Each cottage has boxes where clients can make suggestions and the claimant sent her husband in the cottage to get the box instead of retrieving it herself. She was counseled November 7, 2008, for various issues relating to not completing her job duties. The resident for whom the claimant provided care wanted to go bowling but the claimant did not take the resident bowling. The claimant stayed at the resident's cottage while the resident was at church stating she did not feel well. The residents are expected to cook but the claimant allowed this resident to order out several times. The claimant also needed to pick up and drop off bags at the house herself. She was counseled again March 4, 2009, for again failing to pick up and drop off bags herself. The residents had expressed concern as to the claimant's health and this created a question of her abilities to ensure the health and safety of the residents. The employer received an e-mail from a case manager at the end of June 2009

who reported that a resident complained that the claimant refused to take him to various grocery stores. It was also reported that the claimant called the resident to come out to her car instead of going into the house to get the resident. The employer felt the claimant was not fulfilling her job duties even though she was capable of doing so. The claimant was discharged July 10, 2009, for a repeated failure to perform her duties.

The claimant has claimed and received unemployment insurance benefits since her separation from this employer.

REASONING AND CONCLUSIONS OF LAW:

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

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 employer has the burden to prove the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). The claimant was discharged July 10, 2009, for repeated failure to perform her duties. When an individual is discharged due to a failure in job performance, proof of that individual's ability to do the job is required to justify disqualification, rather than accepting the employer's subjective view. To do so is to impermissibly shift the

burden of proof to the claimant. Kelly v. Iowa Department of Job Service, 386 N.W.2d 552 (Iowa App. 1986). The claimant was clearly capable of performing her job duties but for whatever reason, she voluntarily chose not to take a resident to the grocery store and to other activities. The claimant's failure to perform those duties 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. Consequently, work-connected misconduct as defined by the unemployment insurance law has been established in this case. Therefore, benefits are denied.

The unemployment insurance law 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. However, the overpayment will not be recovered when it is based on a reversal on appeal of an initial determination to award benefits on an issue regarding the claimant's employment separation if: (1) the benefits were not received due to any fraud or willful misrepresentation by the claimant and (2) the employer did not participate in the initial proceeding to award benefits. The employer will not be charged for benefits whether or not the overpayment is recovered. Iowa Code section 96.3-7. In this case, the claimant has received benefits but was not eligible for those benefits. The matter of determining the amount of the overpayment and whether the overpayment should be recovered under Iowa Code section 96.3-7-b is remanded to the Agency.

DECISION:

The August 14, 2009, 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 has received benefits but was not eligible for those benefits. The matter of determining the amount of the overpayment and whether the overpayment should be recovered under Iowa Code section 96.3-7-b is remanded to the Agency.

Julie Elder
Administrative Law Judge

Decision Dated and Mailed

je/pjs