

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

ANGELA H GULBERTSON
Claimant

APPEAL NO: 06A-UI-08944-S2T

**ADMINISTRATIVE LAW JUDGE
DECISION**

TIMELY MISSION NURSING HOME
Employer

**OC: 08/13/06 R: 02
Claimant: Respondent (2)**

Section 96.5-2-a – Discharge for Misconduct
Section 96.3-7 – Overpayment

STATEMENT OF THE CASE:

Timely Mission Nursing Home (employer) appealed a representative's September 1, 2006 decision (reference 01) that concluded Angela Gulbertson (claimant) was discharged and there was no evidence of willful or deliberate misconduct. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on September 21, 2006. The claimant participated personally. The employer participated by Roberta Hagedorn, Director of Nurses.

ISSUE:

The issue is whether the claimant was discharged for misconduct and is not eligible to receive unemployment insurance benefits.

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 July 3, 2003, as a full-time certified nursing assistant. The claimant signed for receipt of the company handbook on July 10, 2003. The handbook has a policy which indicates that an employee will be considered to have quit if she does not notify the employer of an absence for two days. During training the employer notified the claimant that she had to find her own replacement should she be absent from work.

On January 9, 2006, the employer issued the claimant a written warning for absenteeism. The claimant took a family trip to Texas. She returned to Iowa on January 6, 2006, and was too tired to go to work that day. She did not find a replacement for her shift.

On August 7, 2006, the claimant telephoned the employer and said she was having family problems. The claimant was upset that her children's father wanted to keep the children. She told the employer she would try to find a replacement. Later she told the employer she could not find a replacement but would try to start work one hour late. The claimant did not appear for

work at 3:00 p.m. or notify the employer of her absence. The employer left a message for the claimant stating she should not bother coming to work that day.

On August 8, 2006, the claimant did not appear for work or notify the employer of her absence. She thought she might have been terminated but did not call the employer to ask. On August 9, 2006, the claimant contacted the employer and asked if she still had a job. The employer told the claimant she was terminated.

REASONING AND CONCLUSIONS OF LAW:

For the following reasons the administrative law judge finds the claimant was discharged for misconduct and is not eligible to receive unemployment insurance benefits.

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). An employer has a right to expect employees to

follow the instructions they give. The claimant disregarded the employer's right by failing to appear for work, failing to properly notify the employer of her absence and failing to provide a replacement worker for her shift. 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 \$1,300.00 since filing her claim herein. Pursuant to this decision, those benefits now constitute an overpayment which must be repaid.

DECISION:

The representative's September 1, 2006 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. The claimant is overpaid benefits in the amount of \$1,300.00.

Beth A. Scheetz
Administrative Law Judge

Decision Dated and Mailed

bas/cs