

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

TARA A GOBLE

Claimant

BURLINGTON CARE CENTER

Employer

APPEAL NO: 09A-UI-08385-ST

**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 04/26//09

Claimant: Respondent (2-R)

Section 96.5-2-a – Discharge
871 IAC 24.32(1) – Definition of Misconduct
Section 96.3-7 – Recovery of Overpayment

STATEMENT OF THE CASE:

The employer appealed a department decision dated June 3, 2009, reference 01, that held the claimant was not discharged for misconduct on April 29, 2009, and benefits are allowed. A telephone hearing was held on June 29, 2009. The claimant participated. Teletha Guiter, Administrator, and Sarah Sells, CNA, participated for the employer. Employer Exhibits One through Five was received as evidence.

ISSUES:

Whether the claimant was discharged for misconduct in connection with employment.

Whether the claimant is overpaid benefits.

FINDINGS OF FACT:

The administrative law judge having heard the testimony of the witnesses, and having considered the evidence in the record, finds: The claimant began full-time employment as a CNA on January 16, 2008, and last worked for the employer on April 27, 2009. The claimant received written warnings for excessive absenteeism on November 19, 2008, and March 12, 2009. The October absences leading to the November warning were due to her daughter having the chicken-pox, and the March absences were due to personal illness. The claimant provided the employer with doctor excuses for the absences.

The claimant received a written warning with a three-day suspension from employment on October 22, 2008 for violation of the employer/resident confidentiality policy.

The employer posted a new cell phone policy for employees dated April 13, 2009. The old policy was similar, but the new policy did permit employees to have phones in their possession that could be used during break periods. The new policy provides that employees are not permitted to use their phone during work hours and a failure to adhere to this policy could result in discipline.

CNA Sells observed the claimant sitting in a recliner in a resident room on April 25, 2009 making a call and spending four to five minutes on the phone while Sells was caring for the resident. Sells reported the incident to Administrator Guiter. When questioned about it, the claimant admitted to Guiter that she did use her cell phone. Guiter discharged the claimant for violation of the employer's cell phone policy in light of the prior discipline.

REASONING AND CONCLUSIONS OF LAW:

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 administrative law judge concludes the employer has established that the claimant was discharged for misconduct in connection with employment on April 27, 2009 due to a violation of employer policy in light of other discipline.

The employer's testimony on the claimant cell phone usage is more credible than the claimant's denial based on eyewitness testimony from a disinterested employee that is corroborated by the administrator. The claimant's personal and family illness was not considered as misconduct, but the suspension for the confidentiality violation enhances the seriousness of the cell phone policy violation by showing a pattern of disregard for the employer's interests.

Iowa Code section 96.3-7, as amended in 2008, provides:

7. Recovery of overpayment of benefits.

a. 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.

b. (1) 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. However, provided the benefits were not received as the result of fraud or willful misrepresentation by the individual, benefits shall not be recovered from an individual if the employer did not participate in the initial determination to award benefits pursuant to section 96.6, subsection 2, and an overpayment occurred because of a subsequent reversal on appeal regarding the issue of the individual's separation from employment. The employer shall not be charged with the benefits.

(2) An accounting firm, agent, unemployment insurance accounting firm, or other entity that represents an employer in unemployment claim matters and demonstrates a continuous pattern of failing to participate in the initial determinations to award benefits, as determined and defined by rule by the department, shall be denied permission by the department to represent any employers in unemployment insurance matters. This subparagraph does not apply to attorneys or counselors admitted to practice in the courts of this state pursuant to section 602.10101.

Since the claimant is denied benefits by reason of this decision, there is an issue of overpayment that is remanded for determination.

DECISION:

The unemployment insurance decision dated June 3, 2009, reference 01, is reversed. The claimant was discharged for misconduct on April 27, 2009. Benefits are denied until the claimant requalifies by working in and being paid wages for insured work equal to ten times her weekly benefit amount, provided the claimant is otherwise eligible. The overpayment issue is remanded for determination.

Randy L. Stephenson
Administrative Law Judge

Decision Dated and Mailed

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