

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

KAYLA GARDNER
Claimant

APPEAL NO: 13A-UI-02245-BT

**ADMINISTRATIVE LAW JUDGE
DECISION**

CARE INITIATIVES
Employer

OC: 01/20/13
Claimant: Respondent (2/R)

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

STATEMENT OF THE CASE:

Care Initiatives (employer) appealed an unemployment insurance decision dated February 20, 2013, reference 02, which held that Kayla Gardner (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 May 3, 2013. The claimant participated in the hearing. The employer participated through Administrator John Hougen; Joy Winkowitsch, Dining Services Manager; Kim Cross, Dietary Aide; and David Williams, Employer Representative. Employer's Exhibits One through Four and Claimant's Exhibit A 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 considered all of the evidence in the record, finds that: The claimant was employed as a part-time dietary aide from June 30, 2011 through December 16, 2012 when she was discharged for a repeated failure to follow directives after repeated warnings. One of the primary duties of a dietary aide is to provide for the needs of the residents eating their meals. Additionally, the employer provides task sheets for the aides to ensure all their duties have been completed. Between the dates of February 15, 2012 through September 11, 2012, the claimant received ten written warnings for failing to provide for the resident's needs and/or failure to complete her job duties.

The employer issued a memo on December 5, 2012 in which it was reported that the residents felt like they were being rushed after their meals and before they were actually done. The memo advised employees not to remove anything from the table if residents were still sitting there and it also advised employees to check with the residents to find out if they needed anything.

A final written warning was issued on November 14, 2012 for leaving before her job duties had been completed. The dish machine was not drained or cleaned; the floor mats had not been swept or mopped; the buckets were not emptied; the fridge and counters were not washed or sanitized; the sprayer was not cleaned; the extras were not put away; the milk was not dated; the carts were not washed, sanitized or put away; the store room was not swept or mopped; and the garbage was not removed. The employer warned the claimant not to say something was not her job and not to throw away notes taped to the counter.

On December 13, 2012, the claimant cleared tables before the residents were done and then she left work before her work was completed. There were nine dirty tables remaining after she left and she did not return to clean them. Additionally, it was reported she drank the residents' juice which is prohibited.

The claimant filed a claim for unemployment insurance benefits effective January 20, 2013 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 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 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 December 16, 2012 for her repeated failure to follow directives even after being warned. 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). The claimant had received 11 written warnings prior to her termination. She testified that she thought her work was done when she left on December 13, 2012 but she did admit she removed a resident's coffee. The fact that she brought him a new cup of coffee does not change that fact. The claimant's refusal to follow directives in carrying out her 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. 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 February 20, 2013, reference 02, 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/tll