

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**DEBROAH L COOLEY**  
Claimant

**APPEAL NO. 13A-UI-07427-H2T**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**CARE INITIATIVES**  
Employer

**OC: 05/26/13**  
**Claimant: Respondent (2R)**

Iowa Code § 96.5(2)a – Discharge/Misconduct  
Iowa Code § 96.3(7) – Overpayment

**STATEMENT OF THE CASE:**

The employer filed an appeal from the June 12, 2013, (reference 01) unemployment insurance decision that allowed benefits. After due notice was issued, a hearing was held on July 29, 2013. Claimant participated. Employer participated through Jackie Garden, Director of Nursing and was represented by Alyce Smolsky of TALX UCM Services Inc. Employer's Exhibits One and Two were entered and received into the record.

**ISSUES:**

Was the claimant discharged due to job-connected misconduct?

Has the claimant been overpaid any unemployment insurance benefits?

**FINDINGS OF FACT:**

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed full time as a certified nurse's aide and certified medication aid beginning on July 28, 2004 through May 7, 2013 when she was discharged. On May 2 the claimant went into the kitchen and dished herself a bowl of mashed potatoes that she ate. She did not have permission from anyone to take the potatoes. Because the claimant deals in direct patient care it is a health violation for her to dish her own potatoes out of the steam table. Additionally, she did not have permission to take any food from the employer. The claimant alleges that Ashley gave her permission to take the food. Ashley did not have authority to give away the employer's property, and Ashley reported the violation to the supervisor. Ashley did not give the claimant permission to take the potatoes. The employer learned of the incident during a quality control meeting on May 3. The claimant did not work again until May 6 at which time Ms. Garden spoke to her. The claimant denied that she had taken the potatoes. Ms. Garden told the claimant that she would investigate further.

Later that afternoon on May 6 the claimant returned to the kitchen and instigated an argument with Ashley and the cook about when trays should be ready. The kitchen had the schedule for when room trays were ready. The claimant had no authority to tell the kitchen when the

resident trays should be ready. The claimant was angry that Ashley and the cook had reported her taking potatoes. The claimant was the one who started and participated in the argument, not Dina another coworker.

When Ms. Garden met with the claimant again on the morning of May 7, they began by discussing the mashed potatoes incident. At that time the claimant admitted that she had taken the mashed potatoes. They then began discussing the argument the claimant started with the cook and cook aide the day before. The claimant began the fight because she was angry that her taking the mashed potatoes had been reported. Because the claimant had been warned in January 2013 and for the mashed potato incident, she was discharged for what the employer believed to be her retaliation against coworkers her reported her wrong doing.

The claimant has received unemployment benefits after the separation on a claim with an effective date of May 26, 2013.

### **REASONING AND CONCLUSIONS OF LAW:**

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

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.

Generally, continued refusal to follow reasonable instructions constitutes misconduct. *Gilliam v. Atlantic Bottling Company*, 453 N.W.2d 230 (Iowa App. 1990). The employer has a right to expect employees to report to them when other employees break the rules. The employer's facility is a nursing home where the health and safety of residents can be jeopardized when employees do not follow the rules. The administrative law judge is persuaded that the claimant went to Ashley and the other cook and entered into an argument, not because of the food trays but because she was angry that Ashley had reported her taking the potatoes. If an employer allows an employee to retaliate against others who report wrong doing, they will soon have no employees reporting wrong doing. Under these circumstances the claimant's conduct, that is picking the fight with coworkers who accurately reported her wrong doing, is sufficient misconduct to disqualify her from receipt of unemployment insurance benefits. Benefits are denied.

Iowa Code § 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.

Because the claimant's separation was disqualifying, benefits were paid to which the claimant was not entitled. 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 § 96.3(7). In this case, the claimant has received benefits but was not eligible for those benefits.

**DECISION:**

The June 12, 2013 (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.

**REMAND:** The matter of determining the amount of the potential overpayment and whether the overpayment should be recovered under Iowa Code § 96.3(7)b is remanded to the Agency.

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Teresa K. Hillary  
Administrative Law Judge

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Decision Dated and Mailed

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