

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**MICHELLE M KARDELL**  
Claimant

**APPEAL NO. 14A-UI-01999-SWT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**CARE INITIATIVES**  
Employer

**OC: 01/19/14**  
**Claimant: Respondent (2)**

Section 96.5-2-a – Discharge  
Section 96.3-7 – Overpayment of Benefits

**STATEMENT OF THE CASE:**

The employer appealed an unemployment insurance decision dated February 11, 2014, reference 01, that concluded the claimant voluntarily quit employment with good cause attributable to the employer. A telephone hearing was held on March 13, 2014. The parties were properly notified about the hearing. The claimant participated in the hearing. Alyce Smolsky participated in the hearing on behalf of the employer with witnesses, Kellie Jimberson, Ann Smith, and Phyllis Farrell. Exhibits One, Two, and Three were admitted into evidence at the hearing.

**ISSUES:**

Was the claimant discharged for work-connected misconduct?

Was the claimant overpaid unemployment insurance benefits and is she required to repay the benefits?

Is the employer subject to charge for benefits paid?

**FINDINGS OF FACT:**

The claimant worked full time for the employer from April 2010 to January 7, 2014. The claimant started working as a cook but was promoted to the position of dietary supervisor in April 2012.

The claimant received a performance review on February 5, 2013, which identified deficiencies in her work performance, including lack of cleanliness in the kitchen, dirty dishes, food items without labels or dates, items being ordered from other than the preferred vendors was the policy required, running out of food items, lack of supervision over her staff, not be available during meal service, and not completing her dietary manager training. These items were reviewed in April 2013 and the problems with ordering items from preferred vendors and being available in the kitchen during meal time was resolved. The items regarding kitchen cleanliness, running out of items, and supervising her staff showed improvement.

On December 19, 2013, the claimant was placed on a performance improvement plan due to continued deficiencies in the areas noted above, including kitchen cleanliness, running to the grocery store to pick up items that should have been on hand, and not making sure her staff completed the required documentation on cleaning and food preparation tasks.

The employer continued to monitor the claimant's performance after December 19 and continued deficiencies in kitchen cleanliness, not being available during meal times, not having necessary food items on hand, and problems with documentation not being completed were noted.

On Christmas day, the claimant scheduled a person who was a dietary aide to work as the evening cook responsible for preparing the Christmas dinner that day. The person had never worked as a cook in the facility before. Normally, the cook would report to work at about noon, but the claimant told the person working as the evening cook that she could come in from 2 to 2:30 p.m. The cook was late, which caused the Christmas dinner for the residents to be served late.

On January 6, 2014, the administrator reviewed the claimant's work performance and decided that due to repeated deficiencies in her work performance as described above, that she had no confidence in her abilities in her position. The claimant's employment as a dietary manager was terminated, but she was given the opportunity to step down to the position of a cook.

The claimant declined the cook's job because of the change in her hours and pay. She was allowed to submit a resignation to avoid having a discharge on her record.

The claimant filed for and received a total of \$ 3,409.00 in unemployment insurance benefits for the weeks between January 19 and March 15, 2014. The employer had a representative who participated in the fact-finding interview held on February 10, 2014.

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

The unemployment insurance law disqualifies claimants who voluntarily quit employment without good cause attributable to the employer or who are discharged for work-connected misconduct. Iowa Code § 96.5-1 and 96.5-2-a. The unemployment insurance rules state that when a claimant is compelled to resign when given the choice of resigning or being discharged, it is not considered a voluntary leaving. 871 IAC 24.26(21). In such a case, the separation is treated as a discharge and the question becomes whether the discharge was for misconduct.

Although the Agency viewed the separation as a voluntary quit by the claimant due to a change in the contract of hire, the evidence establishes she was discharged from her job as dietary manager but offered an opportunity to continue to work as a cook. The fact that the employer allowed the claimant to resign to avoid having a discharge on her record does not change the result here. The separation should be treated as a discharge.

The next issue in this case is whether the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law.

The rules define misconduct as (1) deliberate acts or omissions by a worker that materially breach the duties and obligations arising out of the contract of employment, (2) deliberate violations or disregard of standards of behavior that the employer has the right to expect of employees, or (3) carelessness or negligence of such degree of recurrence as to manifest equal culpability, wrongful intent or evil design. 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 misconduct within the meaning of the statute. 871 IAC 24.32(1).

I conclude that the claimant willfully disregarded the employer's policy when she allowed the kitchen to run out of necessary items and then went to the store to buy them. She asserted that she could get them cheaper that way acknowledging that she violated the policy. The remaining deficiencies did not involve willful misconduct. The question is whether the claimant's repeated negligence manifests equal culpability to willful misconduct. Considering the hazards of having unsanitary conditions in the kitchen, it appears that the claimant disregarded the employer's interest in not assuring that the kitchen met cleanliness standards. The fact that the claimant improved at times shows she was capable of performing the job properly. Also, the claimant made a substantial error in judgment in allowing the inexperienced cook to come into work after the normal time on Christmas. This cannot be considered a good faith error in judgment because she should have made sure that the residents' Christmas meal was on time. Work-connected misconduct has been proven in this case.

The unemployment insurance law generally requires benefits be recovered from a claimant who receives benefits and is later denied benefits even if the claimant acted in good faith and was not at fault. But a claimant is not required to repay an overpayment when an initial decision to award benefits on an employment-separation issue is reversed on appeal if two conditions are met: (1) the claimant did not receive the benefits due to fraud or willful misrepresentation, and (2) the employer failed to participate in the initial proceeding that awarded benefits. In addition, if a claimant is not required to repay an overpayment because the employer failed to participate in the initial proceeding, the employer's account will be charged for the overpaid benefits. Iowa Code § 96.3-7-a, -b.

The claimant received benefits but has been denied benefits as a result of this decision. The claimant, therefore, was overpaid \$ 3,409.00 in benefits.

Because the employer participated in the finding interview, the claimant is required to repay the overpayment and the employer's account will not be charged for benefits.

**DECISION:**

The unemployment insurance decision dated February 11, 2014, reference 01, is reversed. The claimant is disqualified from receiving unemployment insurance benefits until she has been paid wages for insured work equal to ten times her weekly benefit amount, provided she is otherwise eligible. The claimant was overpaid \$3,409.00 in benefits, which she is required to repay. The employer is not chargeable for the benefits paid to the claimant.

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Steven A. Wise  
Administrative Law Judge

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Decision Dated and Mailed

saw/pjs