

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

KELLY E ROKER
Claimant

APPEAL NO. 07A-UI-11195-DT

**ADMINISTRATIVE LAW JUDGE
DECISION**

FIVE STAR QUALITY CARE INC
Employer

**OC: 03/11/07 R: 01
Claimant: Respondent (2)**

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

STATEMENT OF THE CASE:

Five Star Quality Care, Inc. (employer) appealed a representative's November 28, 2007 decision (reference 02) that concluded Kelly E. Roker (claimant) was qualified to receive unemployment insurance benefits after a separation from employment. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on December 18, 2007. The claimant participated in the hearing. Darlene Brown appeared on the employer's behalf and presented testimony from one other witness, Eric Seitz. One additional witness, Crystal Caldwell, was available on behalf of the employer but did not testify. During the hearing, Employer's Exhibits One and Two were entered 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:

Was the claimant discharged for work-connected misconduct?

FINDINGS OF FACT:

The claimant started working for the employer on January 13, 2004. She worked full time as a direct support professional in the employer's ICFMR (intermediate care facility for mentally retarded) service. Her last day of work was October 28, 2007. The employer suspended her that day and discharged her on November 5, 2007. The stated reason for the discharge was not cooperating with an investigation into an incident.

On October 28, the claimant was with a client who was at a hospital overnight to provide additional care assistance. He client was being difficult for the hospital staff to handle. The claimant got on her cell phone to another employee who had more experience working with the client and asked her to speak to the client. The claimant then put the phone on speaker phone. The other employee then said to the client that he had better settle down or when he got back to the facility she would "flick your f - - -ing ears off." The claimant responded by saying to the other employee, "nurses, nurses!" and then took the phone off of speaker. There were two hospital staff persons in the client's room during this time.

The hospital staff persons viewed this interaction as inappropriate and reported it to their superiors, who reported it to the employer. Mr. Seitz, the facility administrator, spoke to the two hospital staff persons and wrote down their statements. When he questioned the claimant, she denied anything inappropriate had occurred. She further denied during the hearing that the exchange had occurred as reported, but she could not provide any explanation as to why both of the hospital staff had reported otherwise.

The claimant established a claim for unemployment insurance benefits effective March 11, 2007. She filed an additional claim effective November 4, 2007. The claimant has received unemployment insurance benefits after the separation from employment in the amount of \$1,416.00.

REASONING AND CONCLUSIONS OF LAW:

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. Before a claimant can be denied unemployment insurance benefits, the employer has the burden to establish the claimant was discharged for work-connected misconduct. Cosper v. IDJS, 321 N.W.2d 6 (Iowa 1982); Iowa Code § 96.5-2-a.

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.

The focus of the definition of misconduct is on acts or omissions by a claimant that “rise to the level of being deliberate, intentional or culpable.” Henry v. Iowa Department of Job Service, 391 N.W.2d 731, 735 (Iowa App. 1986). The acts must show:

1. Willful and wanton disregard of an employer’s interest, such as found in:
 - a. Deliberate violation of standards of behavior that the employer has the right to expect of its employees, or
 - b. Deliberate disregard of standards of behavior the employer has the right to expect of its employees; or
2. Carelessness or negligence of such degree of recurrence as to:
 - a. Manifest equal culpability, wrongful intent or evil design; or
 - b. Show an intentional and substantial disregard of:
 1. The employer’s interest, or
 2. The employee’s duties and obligations to the employer.

A finding in an administrative hearing is to be “based upon the kind of evidence on which reasonably prudent persons are accustomed to rely for the conduct of their serious affairs, and may be based upon such evidence even if it would be inadmissible in a jury trial.” Iowa Code § 17A.14(1). Hearsay can in some instances constitute substantial evidence to support a conclusion of fact in an administrative proceeding. Gaskey v. Iowa Dep’t. of Transp., 537 N.W.2d 695, 698 (Iowa 1995); McConnell v. Iowa Dep’t of Job Svc., 327 N.W.2d 234, 237 (Iowa 1982); Grover v. Empl. App. Bd., No. 7-340 / 06-02081, filed June 27, 2007 (Iowa App.)

In considering the reliability of specific hearsay testimony, five factors are to be considered: in the evaluation, the fact-finder should conduct a common sense evaluation of (1) the nature of the hearsay; (2) the availability of better evidence; (3) the cost of acquiring better information; (4) the need for precision; and (5) the administrative policy to be fulfilled. Schmitz v. IDHS, 461 N.W.2d 603, 608 (Iowa App. 1990); Grover, id., slip opinion at p. 5. The hospital’s two staff persons, the persons involved in the incident with the claimant, made direct statements regarding the incident to Mr. Seitz. While it would have been most beneficial to have had first-hand testimony from one or both of these hospital staff persons, they are not within the employer’s control such as to direct their participation in the hearing. Under all of these criteria, the administrative law judge concludes that there is no apparent motivation for the hospital staff persons to have provided false information to Mr. Seitz. Further, the two independent reports from the two hospital staff persons are consistent with each other. Therefore, given this consistency and the lack of motivation to provide false information, the hearsay statement of the maintenance manager has the necessary level of trustworthiness, credibility, and accuracy required by a reasonably prudent person in the conduct of their serious affairs.

The claimant’s failure to come forth with the information regarding the incident when questioned 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. The employer discharged the claimant for reasons amounting to work-connected misconduct.

Iowa Code § 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.

Because the claimant's separation was disqualifying, benefits were paid to which the claimant was not entitled. Those benefits must be recovered in accordance with the provisions of Iowa law.

DECISION:

The representative's November 28, 2007 decision (reference 02) is reversed. The employer discharged the claimant for disqualifying reasons. The claimant is disqualified from receiving unemployment insurance benefits as of October 28, 2007. This disqualification continues until the claimant has been paid ten times her weekly benefit amount for insured work, provided she is otherwise eligible. The employer's account will not be charged. The claimant is overpaid benefits in the amount of \$1,416.00.

Lynette A. F. Donner
Administrative Law Judge

Decision Dated and Mailed

ld/css