

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

JOSHUA BAUER
Claimant

APPEAL NO: 10A-UI-10281-ET

**ADMINISTRATIVE LAW JUDGE
DECISION**

BENTON HEALTHCARE LLC
Employer

OC: 06-13-10
Claimant: Respondent (2-R)

Section 96.5-2-a – Discharge/Misconduct
Section 96.3-7 – Recovery of Benefit Overpayment

STATEMENT OF THE CASE:

The employer filed a timely appeal from the July 12, 2010, reference 01, decision that allowed benefits to the claimant. After due notice was issued, a hearing was held by telephone conference call before Administrative Law Judge Julie Elder on October 11, 2010. The claimant participated in the hearing. Kari Gerst, Administrator, participated in the hearing on behalf of the employer.

ISSUE:

The issue is whether the employer discharged the claimant for work-connected misconduct.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed as a part-time cook for Blair House from January 10, 2008 to June 16, 2010. On October 14, 2008, he received a written warning for not following the proper procedure when pureeing soups and not offering alternative menu selections. On November 24, 2008, he received a written warning for not following the temperature guidelines for soup. On December 29, 2008, he received a written warning for failing to follow a resident's dietary guidelines requiring ground meat and giving her regular meat on which she choked and then required the Heimlich maneuver to be performed on her. In December 2008 he received a verbal warning for failing to properly pureeing the diets of some residents and heating food in the microwave which is not allowed because it can result in hot spots. The claimant declined additional training. The employer gave him further training and went through the dietary procedures and explained again that he had to follow state and federal dietary guidelines or the facility would be deficient. On April 6, 2009, he received a written warning for serving meals before the residents were there resulting in improper food temperatures. On February 24, 2010, he received a final written warning for failing to follow the menu by serving bread and butter in the cracker baskets. The claimant said he forgot but the menu is posted in writing. The administrator and dietary supervisor reviewed the importance of following the menu as determined by the residents' doctors and then written by the corporate dietician. On June 8, 2010, the menu called for cinnamon apples to be served. State and federal guidelines require

that a certain amount of meat, vegetables and fruits, among other items, be served at each meal. The charge nurse and a CNA reported to the claimant that two residents did not receive their fruit. The claimant said he ran out and then declined to get the residents anything else, which violated state and federal guidelines as well as the employer's policy. The claimant could have opened another can of cinnamon apples or served apple sauce but did not offer to do anything to insure the residents had their fruit. After reviewing the situation the employer terminated the claimant's employment June 16, 2010.

The claimant has claimed and received unemployment insurance benefits since his separation from this employer.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment for disqualifying job misconduct.

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 of proving disqualifying misconduct. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). The claimant received a verbal warning, four written warnings and a final written warning before his employment was terminated. He had demonstrated he was capable of performing the job to the employer's satisfaction on most occasions but failed to follow dietary plans and state and federal guidelines which made the

employer deficient. The employer offered him additional training after the December 2008 verbal warning but the claimant declined to accept the offer of help which showed an unwillingness to improve his performance when given the opportunity to learn to perform his job to the best of his ability. The final incident involved the claimant's refusal to provide the required fruit to two residents despite being notified of his error by the charge nurse and a CNA. He could have simply opened another can of cinnamon apples or provided them with some applesauce to meet the dietary requirements but refused to do so. This was not an isolated incident but part of a pattern of indifference to following the menus and making sure he met the dietary guidelines as established by the state and federal governments. Under these circumstances, the administrative law judge concludes the claimant's conduct demonstrated a willful disregard of the standards of behavior the employer has the right to expect of employees and shows an intentional and substantial disregard of the employer's interests and the employee's duties and obligations to the employer. The employer has met its burden of proving disqualifying job misconduct. Cosper v. IDJS, 321 N.W.2d 6 (Iowa 1982). Therefore, benefits are denied.

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 section 96.3-7. In this case, the claimant has received benefits but was not eligible for those benefits. The matter of determining the amount of the overpayment and whether the overpayment should be recovered under Iowa Code section 96.3-7-b is remanded to the Agency.

DECISION:

The July 12, 2010, reference 01, decision is reversed. The claimant was discharged from employment due to job-related misconduct. Benefits are withheld until such time as he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible. The claimant has received benefits but was not eligible for those benefits. The matter of determining the amount of the overpayment and whether the overpayment should be recovered under Iowa Code section 96.3-7-b is remanded to the Agency.

Julie Elder
Administrative Law Judge

Decision Dated and Mailed

je/css