

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

KELLY L SANGER
Claimant

APPEAL NO. 12A-UI-14634-VS

**ADMINISTRATIVE LAW JUDGE
DECISION**

CRESTRIDGE INC
Employer

OC: 08/09/09
Claimant: Respondent (2R)

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

STATEMENT OF THE CASE:

The employer filed an appeal from the representative's decision dated September 17, 2009, reference 01, which held that the claimant was eligible for unemployment insurance benefits. After due notice was issued, an in-person hearing was held by on May 15, 2013, in Davenport, Iowa. The claimant failed to appear and did not participate in the hearing. The employer participated by Harold McElderry, administrator; Gretchen Kramer, director of nursing; and Brenda Heister, bookkeeper. The record consists of the testimony of Harold McElderry; the testimony of Gretchen Kramer; the testimony of Brenda Heister; and Employer's Exhibits 1-15.

ISSUES:

Whether the claimant was discharged for misconduct; and
Whether the claimant has been overpaid unemployment insurance benefits.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge makes the following findings of fact:

The employer is a nursing home located in Maquoketa, Iowa. The claimant was hired on October 30, 2008, as a certified nursing assistant. The claimant worked full-time hours and then switched to part-time hours and back again several times while she was working for the employer. Her last day of work was November 14, 2012. She was terminated on November 16, 2012.

The incident that led to the claimant's termination occurred on November 12, 2012. The claimant called the bookkeeper and asked about the schedule on November 12, 2012. The bookkeeper, Brenda Heister, told the claimant to call the nursing cell phone number, because she did not have the authority to schedule. The claimant then reached the director of nursing, who was not at the facility. She told the claimant that she did not have the schedule with her and to call Ms. Heister back. Ms. Heister told the claimant that no one had called off for the night. The claimant did not have approval to work that night or to trade shifts. The claimant still

came to work and worked from 6:00 p.m. to 10:30 p.m. She filled out a time sheet and signed her name that she worked from 6:00 p.m. to 6:52 a.m. She then came back to the facility ten minutes later and said that she had only worked until 10:30 p.m.

The employer was forced to pay the claimant overtime for the four hours that she worked, for which she was not authorized to work. The claimant did not follow the policy on trading shifts, which requires that all trades must be approved two days in advance. The claimant knew about this policy because she had followed it previously. The claimant had received a disciplinary warning for this same type of violation on October 21, 2011.

REASONING AND CONCLUSIONS OF LAW:

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.

Misconduct that disqualifies an individual from receiving unemployment insurance benefits occurs when there are deliberate acts or omissions that constitute a material breach of the worker's duty to the employer. Insubordination, which is the continued failure to follow reasonable instructions, constitutes misconduct. See Gilliam v. Atlantic Bottling Company, 453 N.W.2d 230 (Iowa App. 1990). The employer has the burden of proof to show misconduct.

The claimant is not eligible for unemployment insurance benefits. The evidence showed that the claimant deliberately violated both employer policy and instructions from the employer on November 12, 2012. She reported for work and worked four hours after she had been told that

there were no hours on the schedule for her to work. The claimant would not have been approved to work those hours had she followed the schedule because it placed her in an overtime situation. The employer was forced to pay overtime because of the claimant's actions. The claimant knew what the employer's policy was about trading shifts and deliberately ignored that policy. This was her second violation. The most reasonable inference from the evidence is that claimant refused to follow reasonable policies set in place for staffing shifts. This is insubordination, which is misconduct. Benefits are denied.

The next issue is overpayment of benefits.

Iowa Code section 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.

The overpayment issue is remanded to the claims section for determination.

DECISION:

The unemployment insurance decision dated September 17, 2009, reference 01, is reversed. The overpayment issue is remanded to the claims section for determination.

Vicki L. Seeck
Administrative Law Judge

Decision Dated and Mailed

vls/pjs