

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

KAY REED

Claimant

APPEAL NO. 10A-UI-06325-VST

**ADMINISTRATIVE LAW JUDGE
DECISION**

CARE INITIATIVES

Employer

**Original Claim: 03/14/10
Claimant: Respondent (2-R)**

Section 96.5-1 – Voluntary Quit

STATEMENT OF THE CASE:

The employer filed an appeal from a representative's decision dated April 15, 2010, reference 01, which held the claimant eligible for unemployment insurance benefits. After due notice, a telephone conference hearing was scheduled for and held on June 9, 2010. The claimant participated. The employer participated by Tammy Kappel, director of nursing, and Tammy Bowser, assistant director of nursing. The employer was represented by Tom Kuiper. The record consists of the testimony of Tammy Kappel; the testimony of Tammy Bowser; and the testimony of Kay Reed.

ISSUE:

Whether the claimant was discharged for misconduct.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony of the witnesses and having considered all of the evidence in the record, makes the following findings of fact:

The employer is a long-term care facility in Waterloo, Iowa. The claimant had worked for the employer as a certified nursing assistant since December 8, 1981. She was terminated on March 11, 2010.

The incident that led to the claimant's termination occurred on March 8, 2010. In February 2010, the employer changed its scheduling to 12-hour shifts. This meant that the claimant would now work from 10:00 p.m. to 10:00 a.m. The claimant's first 12-hour shift was on March 8, 2010. The claimant came to work but left at 7:30 a.m. Her reason for leaving was that she had to go home to her grandchildren. The claimant did not ask permission from either the director of nursing or the assistant director of nursing to leave early. Tammy Kappel, the director of nursing, was called by the ward clerk and informed that the claimant had left early and had refused to stay until the end of her shift. As a result, the shift was not properly staffed.

Ms. Kappel attempted to call the claimant numerous times, but the claimant did not answer her phone and did not have an answering service. Ms. Kappel finally got ahold of the claimant on

March 11, 2010. During the phone conversation, the claimant admitted that she left early because she felt there was adequate help and the other aides told her she should leave.

The employer has a written policy, of which the claimant was aware, that leaving a shift early without permission is considered job abandonment and calls for immediate termination.

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 workers' duty to the employer. An employer can reasonably expect that an employee will work scheduled hours and will not leave early without first obtaining permission from the employer. The employer in this case is a long-term care facility and the employer has a material interest in providing proper staffing to care for all of its residents. The employer has the burden of proof to show misconduct.

The greater weight of the credible evidence in this case is that the claimant deliberately left early from her shift of March 8, 2010. The claimant was scheduled to work from 10:00 p.m. to 10:00 a.m. This was a new time for the claimant, but she had been informed about this in February 2010 and was reminded about the 12-hour shift on March 8, 2010, prior to March 8, 2010. Although the claimant testified that her shift was from 10:00 p.m. to 7:00 a.m., this

testimony is not credible. First, the claimant knew that shifts had been changed to 12-hour shifts. Second, the claimant worked until 7:30 a.m. and was trying to get as much work done as possible. A reasonable inference is that the claimant knew she was supposed to work until 10:00 a.m. If she truly thought she was scheduled to leave at 7:00 a.m. and did not work until 10:00 a.m., it is illogical that she would have stayed until 7:30 a.m. and left because she thought the work had been done.

The claimant knew that leaving a shift early was a violation of a written policy that would result in termination. The claimant deliberately chose to leave early. Although she may have had to go home to care for her grandchildren, she still had an obligation to work as scheduled or get permission from the proper persons in order to leave. Misconduct has been established. 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.

This matter is remanded to the claims section for determination of the overpayment issue.

DECISION:

The representative's decision dated April 15, 2010, reference 01, is reversed. Unemployment insurance benefits shall be withheld until the claimant has worked in and been paid wages for insured work equal to ten times her weekly benefit amount, provided she is otherwise eligible. The overpayment issue is remanded to the claims section for determination.

Vicki L. Seeck
Administrative Law Judge

Decision Dated and Mailed

vls/kjw