

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

MEGAN STOWE
Claimant

APPEAL NO. 13A-UI-02238-NT

**ADMINISTRATIVE LAW JUDGE
DECISION**

CARE INITIATIVES
Employer

OC: 01/20/13
Claimant: Respondent (2/R)

Section 96.5-2-a – Discharge
Section 96.3-7 – Benefit Overpayment

STATEMENT OF THE CASE:

Care Initiatives filed a timely appeal from a representative's decision dated February 21, 2013, reference 01, which held claimant eligible to receive unemployment insurance benefits. After due notice, a telephone hearing was held on April 24, 2013. The claimant participated. The employer participated by Ms. Alyce Smolsky, Hearing Representative and witnesses Jonathan Hougen, Administrator; Joy Winkowitsch, Dietary Manager; Kathleen Lashbrook, Charge Nurse and Tara Bondy, Assistant Activities Director.

ISSUE:

An issue is whether the claimant was discharged for misconduct in connection with her work.

FINDINGS OF FACT:

Having considered the evidence in the record, the administrative law judge finds: Megan Stowe was employed by Care Initiatives from April 28, 2005 until January 26, 2013 when she was discharged from employment. Ms. Stowe last worked at the company's Windsor facility where she was employed from August 28, 2008. Ms. Stowe held the position of full-time cook and was paid by the hour. Her immediate supervisor was Joy Winkowitsch. Ms. Stowe was discharged on January 26, 2013 following the employer's investigations of incidents that had taken place on January 15, 2013 and on January 23, 2013.

On January 23, 2013 the facility's assistant activities director, Ms. Bondy, went to the dietary area in an attempt to find the dietary manager, Ms. Winkowitsch. When the claimant was asked if she knew where the dietary manager was, the claimant responded, "I don't fucking care where Joy is!" Ms. Bondy concluded by the tone of the claimant's voice that the statement had been made in a rude and angry way and she also concluded that it may have been overheard by a new kitchen worker who was working some feet away. Because of the claimant's statement and the way it was said, Ms. Bondy found it inappropriate and out of character for the claimant and reported the matter to management.

On January 15, 2013, Ms. Lashbrook, a charge nurse, had specifically requested that Ms. Stowe save a tray for a resident who had a medical appointment during the noon hour. Upon the resident's return, Ms. Lashbrook inquired about the tray and at that time was told that a tray was not saved for the resident and Ms. Stowe offered only "snacks" as an alternative for the resident before she walked away from Ms. Lashbrook. Ms. Lashbrook considered the claimant's conduct to be inappropriate as it was the claimant's obligation to provide meals to residents and a specific request to save a tray had been made. This matter was reported to company management as well.

The employer, after reflecting on the most recent incidents and other more generalized information concluded the claimant's attitude had been deteriorating in recent weeks and believed the claimant had seriously violated the care facility policies by using inappropriate language and being insubordinate in refusing to follow a reasonable work directive to save a tray. The decision was therefore made to terminate Ms. Stowe from her employment. Prior to the discharge the claimant had received only a verbal or counselings that had been documented in writing.

It is the claimant's position that her statement about the location of the dietary manager was made in a "joking" manner. It was not uncommon for her and Ms. Bondy to banter back and forth. It was the claimant's position that the dietary manager took the order for the tray in question, that various alternative meals were offered, and that subsequently the missing tray was located.

REASONING AND CONCLUSIONS OF LAW:

The question before the administrative law judge is whether the evidence in the record establishes misconduct sufficient to warrant the denial of unemployment insurance benefits. It does.

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 proof in this matter. See Iowa Code section 96.6(2). Misconduct must be substantial in order to justify the denial of unemployment benefits. The focus is on deliberate, intentional or culpable acts by the employee. See Gimbel v. Employment Appeal Board, 489 N.W.2d 36, 39 (Iowa Ct. of Appeals 1992).

The administrative law judge concludes, based upon the evidence in the record, that while Ms. Stowe may have offered other alternatives to the resident regarding the missing lunch tray, her statements and demeanor in response to the company's assistant director was both inappropriate and insubordinate. Claimant knew or should have known that the use of foul language in the work setting was contrary to the employer's interests and standards of behavior. The claimant's inappropriate response to a management representative showed a disregard for the employer's interests and standard of behavior that the employer had a reasonable right to expect of its employees under the provision of the Employment Security Law. Unemployment insurance benefits are therefore withheld.

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.

DECISION:

The representative's decision dated February 21, 2013, reference 01, is reversed. The claimant is disqualified. Unemployment insurance benefits are withheld until the claimant has worked in and been paid wages for insured work equal to ten times her weekly benefit amount, and is otherwise eligible. The issue of whether the claimant must repay unemployment insurance benefits is remanded to UIS division for determination.

Terence P. Nice
Administrative Law Judge

Decision Dated and Mailed

tll/tll