

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

MAURINA OFFIELD
Claimant

APPEAL NO. 10A-UI-04846-NT

**ADMINISTRATIVE LAW JUDGE
DECISION**

CARE INITIATIVES
Employer

**Original Claim: 02/28/10
Claimant: Respondent (2-R)**

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

STATEMENT OF THE CASE:

The employer filed a timely appeal from a representative's decision dated March 25, 2010, reference 01, which held the claimant eligible to receive unemployment insurance benefits based upon her separation from Care Initiatives. After due notice was issued, a telephone hearing was held on July 1, 2010. The claimant participated personally. The employer participated by Ms. Lynn Corbeil, attorney/representative Johnson & Associates, and witness Geannie Fletchall, RN/Director of Nursing. Employer's Exhibits One through Nine were received into evidence.

ISSUE:

At issue is whether the claimant was discharged for misconduct sufficient to warrant the denial of unemployment insurance benefits and whether the claimant has been overpaid unemployment insurance benefits.

FINDINGS OF FACT:

Having considered all the evidence in the record, the administrative law judge finds: Maurina Offield was employed by Care Initiatives beginning in June of 2008. On December 7, 2009, the claimant was assigned to work at the Lamoni, Iowa, care facility, working as a full-time certified nursing assistant. Ms. Offield was paid by the hour. Her immediate supervisor was the charge nurse on duty. The claimant was discharged when the employer reasonably concluded the claimant had not reported for scheduled work nor notified the employer of her impending absences on Saturday, February 20, 2010; Sunday, February 21, 2010; or Wednesday, February 24, 2010.

When Ms. Offield was reassigned to work at the Lamoni nursing facility, the director of nursing, Ms. Fletchall, specifically visited with the claimant to emphasize the need for Ms. Offield to have good attendance and punctuality. The claimant had attendance issues at the previous Care Initiatives facility she had been assigned to. After being assigned to the Lamoni facility, the claimant continued to be absent at times. Ms. Offield was placed on a 60-day probationary period for poor attendance on February 15, 2010.

The employer posts its work schedules for employees prior to the beginning of each month and schedules are prepared in advance for each month. Employees are specifically instructed that if they are unable to report for scheduled work, they are to notify the employer at least two hours before the beginning of their work shift and that notification must be provided to a charge nurse on duty. Ms. Offield was aware of the policies and had signed an acknowledgement of receipt of the company handbook.

The claimant was discharged after she failed to report for scheduled work or to provide notification on Saturday, February 20; and Sunday, February 21, 2010; and Wednesday, February 24, 2010. When the claimant did not report on February 20 and 21, the employer went through extensive efforts to contact the claimant by telephone to ensure staffing and also to ensure that the claimant had not been involved in a mishap en route to work. In spite of leaving repeated messages, the employer received no responses from Ms. Offield. The company's director of nursing checked with all charge nurses and specifically determined that the claimant had not called in as directed.

On Wednesday, February 24, 2010, the claimant was to work 6:00 a.m. until 2:00 p.m. Ms. Offield called in at approximately 9:00 a.m., stating that she was "not sure what her schedule was and not sure if she still had a job." The claimant was requested to come to the facility for a meeting about her attendance but declined. Because the claimant had provided no reasonable explanation for her failure to report for scheduled shifts that had been scheduled in advance and her failure to provide notification, a decision was then made to terminate Ms. Offield from her employment.

It is the claimant's position that she believes that she called in on February 20, and 21, 2010, and reported her impending absence due to weather conditions on those dates. It is the claimant's further position that she misread the schedule for February 24 and believed that she was to report to work for the afternoon shift that date.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes that the employer has sustained its burden of proof in establishing the claimant's discharge took place under disqualifying conditions.

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.

871 IAC 24.32(7) provides:

(7) Excessive unexcused absenteeism. Excessive unexcused absenteeism is an intentional disregard of the duty owed by the claimant to the employer and shall be considered misconduct except for illness or other reasonable grounds for which the employee was absent and that were properly reported to the employer.

The testimony in this case is highly disputed. The claimant was discharged from her employment when the facility's director of nursing reasonably concluded that the claimant had not only failed to report for scheduled work on February 20, 21, and 24, 2010, but that she had also failed to provide proper notification of her impending absences. Schedules for nursing staff are posted in one month increments and are posted in advance of each month. Employees are expected to check the schedule and report for work, make arrangements for replacements, or to request off in advance of the scheduled date. If an employee is unable to report to work, they are to specifically call in two hours before the beginning of the work shift and speak to a charge nurse about their impending absence.

When the claimant had not reported for work on February 20 and 21, the employer went to great lengths making repeated calls to the claimant in attempt to reach her, not only for staffing purposes but also to ensure that the claimant was safe. The employer received no responses from its repeated calls. Ms. Fletchall spoke to each of the charge nurses on duty and specifically determined that the claimant had not called in on February 20 or 21, 2010.

When the claimant spoke to Ms. Fletchall on Wednesday, February 24, approximately three hours after the beginning of her work shift, Ms. Offield did not state that she had previously called in to report her impending absences but instead made an inquiry as to whether she was still employed by the facility. The administrative law judge finds Ms. Fletchall to be a credible witness and finds that her testimony is not inherently improbable. Ms. Fletchall testified with specificity regarding the reasons for the claimant's separation and Ms. Fletchall's conduct in investigating the matter.

In contrast, Ms. Offield testified in generalities, stating at one point that she had called in and stating later that she “believed” that she had called in on February 20 and 21. The administrative law judge also notes that although the claimant was aware that whether she provided notice to the employer was an important matter, the claimant took no action to provide phone records in support of her position that she had notified the employer as required.

For these reasons, the administrative law judge concludes the evidence in support of the employer should be accorded more weight. The administrative law judge finds that the claimant was discharged for failure to report for scheduled work on three consecutive workdays without providing proper notification to the employer of her impending absences. This conduct was in willful disregard of the employer’s interests and standards of behavior and was disqualifying under the provisions of the Iowa Employment Security Act. Benefits are withheld.

The claimant has received unemployment insurance benefits to which she is not entitled.

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 issue of whether the claimant must repay the unemployment insurance benefits she has received is remanded to the Unemployment Insurance Services Division for a determination.

DECISION:

The representative's decision dated March 25, 2010, reference 01, is reversed. Maurina Offield is disqualified and benefits are withheld until she has worked in and been paid ten times her weekly benefit amount for insured work, provided she is otherwise eligible. The issue of whether the claimant must repay the unemployment insurance benefits she has received is remanded to the Unemployment Insurance Services Division for a determination.

Terence P. Nice
Administrative Law Judge

Decision Dated and Mailed

kjw/kjw