

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

DIANA L DAVIDSON
Claimant

APPEAL NO. 13A-UI-06020-N

**ADMINISTRATIVE LAW JUDGE
DECISION**

CARE INITIATIVES
Employer

OC: 04/14/13
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 May 10, 2013, reference 01, which held claimant eligible to receive unemployment insurance benefits. After due notice, a hearing was held in Ottumwa, Iowa on July 22, 2013. Although duly notified, the claimant did not respond to the notice of hearing and did not participate. The employer participated by Mr. John Garb, Hearing Representative (via telephone) and witnesses: Ms. Linda Grinstead, Director of Nursing; Ms. Eula Fosdyck, Licensed Practical Nurse; and Ms. Shirley DePue, Charge Nurse; and Mr. Brandon Kranovich, Administrator. Employer's Exhibits One through Five were received into evidence.

ISSUE:

The issue is whether the claimant was discharged for misconduct.

FINDINGS OF FACT:

Diana Davidson was employed by the captioned employer d/b/a Ridgewood Care Center from October 20, 2009 until April 18, 2013 when she was discharged from employment. Ms. Davidson was employed as a full-time certified nursing assistant and was paid by the hour. Her immediate supervisor was the charge nurse on duty.

Ms. Davidson was discharged on April 18, 2013 when the employer concluded that the claimant had not heeded previous warnings about resident care and the manner in which she interacted with fellow employees. On that final day, Ms. Davidson did not respond to instructions to change a wet resident and did not summon a resident to lunch although it was the claimant's job responsibility to do so that day. The claimant also engaged in arguing with another CNA at a nursing station in the presence of other staff and family members. Although Ms. Davidson was instructed to stop that behavior by a licensed practical nurse, Ms. Fosdyck, the claimant continued to argue loudly for an extended period. Ms. Fosdyck was required to summon the Director of Nursing to stop Nurse Davidson's inappropriate conduct.

Ms. Davidson had been warned on February 26, 2013 with regard to the need to maintain acceptable standards of respect and courtesy with residents and staff and to follow directives of management. Claimant was warned at that time that continued failure to follow those requirements could result in termination from employment. Claimant had also been warned on February 11, 2013 for harassing another employee about national origin. Claimant had been warned on numerous occasions about the necessity that she perform her job duties without being argumentative and that she properly conduct herself and be courteous to staff members and family.

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 bears the burden of proof in establishing that the claimant's discharge took place under disqualifying conditions.

In the case at hand the employer's witnesses appeared personally and provided sworn testimony testifying the claimant had been repeatedly warned and counseled about her demeanor and her failure to follow work instructions. The witnesses further testified that

Ms. Davidson continued to act in an inappropriate manner after being repeatedly warned and that the claimant was discharged when she violated the previous warnings that had been served upon her by failing to follow directives to change a resident that needed changing and to call another resident to lunch. Claimant also engaged in loudly arguing with another CNA in public and refused to stop arguing until directed to do so by the Director of Nursing.

In view of the previous warnings that had been served upon the claimant and the evidence in the record regarding the claimant's most recent conduct, the administrative law judge concludes that the employer has sustained its burden of proof in establishing intentional, disqualifying misconduct on the part of the claimant. Unemployment insurance benefits are 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 May 10, 2013, reference 01, is reversed. 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 his weekly benefit amount and is otherwise eligible. The issue of whether the claimant will have to repay unemployment insurance benefits is remanded to the UIS Division for determination.

Terence P. Nice
Administrative Law Judge

Decision Dated and Mailed

pjs/pjs