

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**LEAH A MARCOTTE**  
Claimant

**APPEAL NO. 09A-UI-19348-VST**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**ABCM CORPORATION**  
Employer

**Original Claim: 11/22/09  
Claimant: Respondent (2-R)**

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

**STATEMENT OF THE CASE:**

The employer filed an appeal from a representative's decision dated December 14, 2009, reference 01, which held the claimant eligible for unemployment insurance benefits. After due notice, a telephone conference hearing was scheduled for and held on February 3, 2010. The employer participated by Mary Tirevold, administrator, and Dawn Runksmeiers, director of nursing. The claimant failed to respond to the hearing notice and did not participate. The record consists of the testimony of Mary Tirevold and the testimony of Dawn Runksmeiers.

**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 in this case owns and operates a nursing home called Valley View Care Center in Armstrong, Iowa. The claimant was hired on July 2, 2009, as a part-time certified nursing assistant. She was terminated on October 9, 2009.

The events that led to the claimant's termination occurred on October 4, 2009. At approximately 3:30 p.m., a resident was attempting to leave the building. The resident was using an ambulatory chair. The claimant attempted to stop him and the resident spit on the claimant. The claimant said "Are you 'f...ing' kidding me?" She then pushed the resident's chair. At 5:30 p.m., this same resident was trying to get into the second dining room and was following another certified nursing assistant. The claimant intervened, as she was supposed to, and once again the resident spit on her. The claimant told the resident that he had to stop spitting on her and if he did not, she was going to take out his false teeth and feed him pureed food.

On or about 7:00 p.m., the claimant was assisting this same resident while the resident was using the toilet. He became agitated and the claimant thought he was going to spit again. She said: "I told you if you don't stop spitting I will take away your teeth." A nurse was in the room and witnessed what happened.

The claimant was suspended on October 5, 2009, pending an investigation by the employer. An investigation was conducted and all persons were interviewed. The employer concluded that the claimant had violated its policies and that she had improperly threatened the resident. The claimant admitted to the employer that these events did occur. The claimant was terminated on October 9, 2009.

#### **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 occurs when there are deliberate acts or omissions that constitute a material breach of the worker's duty to the employer. Profanity or other offensive language in a confrontational or disrespectful context may constitute misconduct, even in the isolated situations or in situations in which the target of the statements is not present to hear them. See Myers v. EAB, 462 N.W.2d 734 (Iowa App. 1990). The employer has the burden of proof to show misconduct.

The evidence in this case showed that the claimant deliberately violated the employer's policies by using profanity and threatening a resident because he was spitting on her. The employer provides nursing care to individuals and can reasonably expect that the nursing staff will handle residents with dignity and respect and follow its policies on how to deal with agitated residents. The claimant deliberately chose to ignore those policies at three separate times on the same day. The employer has established 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.

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

**DECISION:**

The representative's decision dated December 14, 2009, 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. This matter is remanded to the claims section for determination on the overpayment issue.

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Vicki L. Seeck  
Administrative Law Judge

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Decision Dated and Mailed

vls/kjw