

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

ROSA L GOMEZ

Claimant

APPEAL NO: 11A-UI-10304-DT

**ADMINISTRATIVE LAW JUDGE
DECISION**

BISHOP DRUMM CARE CENTER

Employer

OC: 07/10/11

Claimant: Respondent (2/R)

Section 96.5-2-a – Discharge
Section 96.3-7 – Recovery of Overpayment of Benefits
871 IAC 26.14(7) – Late Call

STATEMENT OF THE CASE:

Bishop Drumm Care Center (employer) appealed a representative's July 29, 2011 decision (reference 01) that concluded Rosa L. Gomez (claimant) was qualified to receive unemployment insurance benefits after a separation from employment. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on August 24, 2011. The claimant failed to respond to the hearing notice and did not contact the Appeals Section prior to the hearing to provide a telephone number at which she could be reached for the hearing; she therefore did not participate in the hearing. Carey Segar appeared on the employer's behalf and presented testimony from one other witness, Pam Nelson. One other witness, Heather Rehmer, was available on behalf of the employer but did not testify. The record was closed at 12:21 p.m. At 1:18 p.m., the claimant called the Appeals Section and requested that the record be reopened. Based on the evidence, the arguments of the employer, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUE:

Was the claimant discharged for work-connected misconduct?

FINDINGS OF FACT:

The claimant received the hearing notice prior to the August 24, 2011 hearing. The instructions inform the parties that if the party does not contact the Appeals Section and provide the phone number at which the party can be contacted for the hearing, the party will not be called for the hearing. The first time the claimant directly contacted the Appeals Section was on August 24, 2011, over an hour after the scheduled start time for the hearing. The claimant had not read or followed all the information on the hearing notice.

The claimant started working for the employer on March 18, 2009. She worked full time as a certified nursing aide (CNA) at the employer's skilled nursing facility on a 2:45 p.m. to 11:15 p.m. schedule. Her last day of work was July 8, 2011. The employer discharged her on

that date. The stated reason for the discharge was gross negligence in her work performance leading to serious injury.

On July 3 at about 11:00 p.m. the claimant was assisting a severely cognitively impaired resident who had indicated she needed to use the restroom. The resident was also a high fall risk; her care plan, of which the claimant was aware, required that she needed to be in visible sight of an employee or be set with a motion alarm. After the claimant took the resident into the restroom with her wheelchair, the resident indicated she did not need to use the restroom, and told the claimant to leave and close the door. The claimant did close the door and leave the room; she did not set an alarm on the resident in her wheelchair. She then completely left the unit at or by 11:10 p.m., prior to the end of her shift, without advising the charge nurse she was leaving. At about 11:10 p.m. the resident fell from her chair onto the floor, fracturing her hip. When the employer interviewed the claimant regarding the incident on July 5, she admitted she had left the resident without an alarm and with the door closed, as well as that she had then left the unit; she offered no explanation or reason to seek to excuse her conduct.

The employer's disciplinary procedure normally includes a verbal warning, a written warning, and a final warning prior to discharge. The claimant had been given a verbal warning for inappropriate behavior on March 30, 2011, but the employer determined it necessary to skip the second and third steps of the disciplinary process and proceed to discharge the claimant due to the severity of the claimant's breach and the resulting injury to the resident.

The claimant established a claim for unemployment insurance benefits effective July 10, 2011. The claimant has received unemployment insurance benefits after the separation.

REASONING AND CONCLUSIONS OF LAW:

The first issue in this case is whether the claimant's request to reopen the hearing should be granted or denied. After a hearing record has been closed the administrative law judge may not take evidence from a non-participating party but can only reopen the record and issue a new notice of hearing if the non-participating party has demonstrated good cause for the party's failure to participate. 871 IAC 26.14(7)b. The record shall not be reopened if the administrative law judge does not find good cause for the party's late contact. *Id.* Failing to read or follow the instructions on the notice of hearing are not good cause for reopening the record. 871 IAC 26.14(7)c.

The first time the claimant called the Appeals Section for the August 24, 2011 hearing was after the hearing had been closed. Although the claimant had intended to participate in the hearing, she failed to read or follow the hearing notice instructions and did not contact the Appeals Section prior to the hearing. The rule specifically states that failure to read or follow the instructions on the hearing notice does not constitute good cause to reopen the hearing. The claimant did not establish good cause to reopen the hearing. Therefore, the claimant's request to reopen the hearing is denied.

A claimant is not qualified to receive unemployment insurance benefits if an employer has discharged the claimant for reasons constituting work-connected misconduct. Iowa Code § 96.5-2-a. Before a claimant can be denied unemployment insurance benefits, the employer has the burden to establish the claimant was discharged for work-connected misconduct. Cosper v. IDJS, 321 N.W.2d 6 (Iowa 1982); Iowa Code § 96.5-2-a.

In order to establish misconduct such as to disqualify a former employee from benefits an employer must establish the employee was responsible for a deliberate act or omission which was a material breach of the duties and obligations owed by the employee to the employer. 871 IAC 24.32(1)a; Huntoon v. Iowa Department of Job Service, 275 N.W.2d 445 (Iowa 1979); Henry v. Iowa Department of Job Service, 391 N.W.2d 731, 735 (Iowa App. 1986). The conduct must show a 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. 871 IAC 24.32(1)a; Huntoon, supra; Henry, supra. In contrast, 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(1)a; Huntoon, supra; Newman v. Iowa Department of Job Service, 351 N.W.2d 806 (Iowa App. 1984).

The claimant's gross negligence in leaving the resident alone with no alarm with a closed door shows and then leaving the unit, resulting in serious injury to the resident, was a willful or wanton disregard of the standard of behavior the employer has the right to expect from an employee, as well as an intentional and substantial disregard of the employer's interests and of the employee's duties and obligations to the employer. The employer discharged the claimant for reasons amounting to work-connected misconduct.

The unemployment insurance law provides that benefits must be recovered from a claimant who receives benefits and is later determined to be ineligible for benefits, even though the claimant acted in good faith and was not otherwise at fault. However, the overpayment will not be recovered when it is based on a reversal on appeal of an initial determination to award benefits on an issue regarding the claimant's employment separation if: (1) the benefits were not received due to any fraud or willful misrepresentation by the claimant and (2) the employer did not participate in the initial proceeding to award benefits. The employer will not be charged for benefits whether or not the overpayment is recovered. Iowa Code § 96.3-7. In this case, the claimant has received benefits but was ineligible for those benefits. The matter of determining the amount of the overpayment and whether the claimant is eligible for a waiver of overpayment under Iowa Code § 96.3-7-b is remanded the Claims Section.

DECISION:

The representative's July 29, 2011 decision (reference 01) is reversed. The employer discharged the claimant for disqualifying reasons. The claimant is disqualified from receiving unemployment insurance benefits as of July 8, 2011. This disqualification continues until the

claimant has been paid ten times her weekly benefit amount for insured work, provided she is otherwise eligible. The employer's account will not be charged. The matter is remanded to the Claims Section for investigation and determination of the overpayment issue.

Lynette A. F. Donner
Administrative Law Judge

Decision Dated and Mailed

ld/pjs