

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**PAMELA KLUVER**

Claimant

**APPEAL NO. 13A-UI-10153-BT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**GOOD SAMARITAN SOCIETY INC**

Employer

**OC: 07/28/13**

**Claimant: Respondent (2)**

Iowa Code § 96.5(2)(a) - Discharge for Misconduct

Iowa Code § 96.3-7 - Overpayment

**STATEMENT OF THE CASE:**

Good Samaritan Society, Inc. (employer) appealed an unemployment insurance decision dated August 29, 2013, reference 02, which held that Pamela Kluver (claimant) was eligible for unemployment insurance benefits. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on September 26, 2013. The claimant participated in the hearing with her husband Mark Kluver and Attorney Mary Hamilton. The employer participated through Amanda Nobles, Sherry Hogle and Representative Alyce Smolsky. Employer's Exhibits One and Two were admitted into evidence. Attorney Hamilton submitted a continuance request on September 24, 2013 which was denied and the attorney objected to the denial.

The employer submitted documents to the Agency containing information that is confidential under Iowa Code §§ 235A.15 and 235B.6, which prohibits dissemination and redissemination of confidential child abuse and adult abuse information. The related documents have been placed in a sealed envelope marked: "Confidential pursuant to Iowa Code §§ 235A.15 and 235B.6 DO NOT OPEN WITHOUT A COURT ORDER." No evidence with respect to the documents or disclosure of any information derived from any Iowa Department of Human Services (DHS) investigation of alleged child or dependent adult abuse was considered in making this decision.

**ISSUE:**

The issues are whether the claimant is disqualified for benefits, whether she was overpaid unemployment insurance benefits, whether she is responsible for repaying the overpayment and whether the employer's account is subject to charge.

**FINDINGS OF FACT:**

Before the facts of the case will be addressed, the information surrounding the postponement request will be provided. The hearing was originally scheduled for Wednesday, October 2, 2013 at 9:00 a.m. The employer requested a postponement on September 18, 2013, as its witnesses would not be available on that date. The administrative law judge was not working on that date so called the employer representative and the claimant's attorney on September 19, 2013. The

employer's representative and a representative from the claimant's attorney's office agreed to an earlier hearing date of September 26, 2013. The employer representative subsequently contacted her clients who also agreed to the new date and an email was sent to the administrative law judge. The administrative law judge forwarded the email to the claimant's attorney questioning if the date was acceptable and the claimant's attorney sent emails on both September 19, 2013 and September 20, 2013 confirming the new hearing date was fine.

On September 24, 2013, the claimant's attorney submitted a continuance of the September 26, 2013 hearing. It was forwarded on September 25, 2013, to the administrative law judge who promptly called the claimant's attorney and denied the request. The request for continuance was based on the following reasons:

- “1. There is an on-going investigation by the Iowa Department of Inspections and Appeals into the incidents surround this unemployment matter.
2. The results of this investigation will assist in resolving the Claimant's employment issues.
3. The results of this investigation have not yet been received by the Claimant.
4. The results of this investigation will enable the Claimant to better present her position at the time of the hearing.”

871 IAC 26.8(2) provides that a hearing may be postponed by the presiding officer for good cause, either upon the presiding officer's own motion or upon the request of any party in interest. A party's request for postponement may be in writing or oral, provided the oral request is tape-recorded by the presiding officer, and is made not less than three days prior to the scheduled hearing.

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds that: The claimant was employed as a full-time licensed practical nurse/charge nurse from May 1, 2012 through August 1, 2013 when she was discharged for “actual abusive treatment of a resident.” On July 29, 2013, co-workers reported to the employer that the claimant had mistreated a resident on July 26, 2013. The employer conducted an investigation into the matter and concluded the claimant abused a cognitively impaired resident.

On July 26, 2013, the female resident who has dementia had become incontinent and called the claimant for assistance in cleaning herself. The claimant told the resident that she would come and help the resident but then the resident would have to stay up for the rest of the evening in the dining room. This particular resident does not remain in the dining room for very long after she eats and often leaves the dining room in the middle of meals. The resident went to the dining room with the claimant at 4:30 p.m. and remained there until the claimant went on break around 6:15 p.m. When the claimant was gone, the resident returned to her room but when the claimant returned, she retrieved the resident and brought her back to the dining room to sit. The resident was still sitting in the dining room when the claimant got off work and left the facility at approximately 10:00 p.m.

The claimant said that she brought the resident down to the dining room so the resident could sit and talk with the claimant but the claimant did not sit at the table with the resident. She was busy doing other work and admitted she was in and out of the dining room taking care of the needs of other residents. When the claimant was questioned why the resident needed to stay in the dining room, she explained that it was because it was not good for the resident to sit in her own urine and feces. The resident had previously called the claimant to report her incontinence so when she was questioned why she could not simply check on the resident in the resident's

room, she testified she could not leave the other residents in the dining room because they were fall risks.

The claimant filed a claim for unemployment insurance benefits effective July 28, 2013 and has received benefits after the separation from employment in the amount of \$1,696.00.

### **REASONING AND CONCLUSIONS OF LAW:**

The first issue to be addressed is whether the employer's continuance request should have been granted and for the following reasons; it should not have been granted. A hearing may be postponed for good cause, provided the request is in writing or tape recorded by the presiding officer and is made not less than three days prior to the scheduled hearing. See 871 IAC 26.8(2). The claimant's attorney agreed to the changed hearing date but then submitted a postponement request only two days before the hearing, which was not within the statutory time frame.

More importantly though, the attorney requested a postponement based on the fact that DIA had not completed its investigation and the attorney wanted to rely on that investigation. The employer's decision to discharge the claimant was made based on its own investigation and was wholly unrelated to the independent investigation of the DIA. Furthermore, parties are not permitted to testify or refer to documents or disclose any information derived from any Iowa Department of Human Services (DHS) investigation of alleged child or dependent adult abuse. The confidentiality statute for child abuse is found in Iowa Code § 235A.15. The parallel statute for dependent adult abuse is Iowa Code § 235B.6. Certain individuals and entities may have authorization to access this information but there is no circumstance that would allow disclosure of a report or the results of an investigation by DHS in an unemployment insurance case. Dissemination or redissemination in violation of the law subjects the violator to civil penalties (§ 235B.11), and criminal penalties (§ 235B.12). Consequently, the reasons for the postponement cited by the claimant's attorney did not constitute good cause and the request was properly denied.

The substantive issue to be determined in this case is whether the employer discharged the claimant for work-connected misconduct. 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. 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. 871 IAC 24.32(1).

The employer has the burden to prove the discharged employee is disqualified for benefits for misconduct. *Sallis v. Employment Appeal Bd.*, 437 N.W.2d 895, 896 (Iowa 1989). The claimant was discharged on August 1, 2013 for abusing a cognitively impaired resident. As a result of the claimant's request or directive, the resident was forced to sit in the dining room for five or six hours on July 26, 2013 when she had never done that before. The claimant's testimony confirms the allegation of abuse and her actions were punitive in nature. She has shown 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. Work-connected misconduct as defined by the unemployment insurance law has been established in this case and benefits are denied.

Because the claimant has been deemed ineligible for benefits, any benefits she has received could constitute an overpayment. The unemployment insurance law requires benefits be recovered from a claimant who receives benefits from an initial decision and is later denied benefits from an appeal decision, even though the claimant acted in good faith and was not otherwise at fault. In some cases, the claimant might not have to repay the overpayment if both of the following conditions are met: 1) there was no fraud or willful misrepresentation by the claimant; and 2) the employer failed to participate in the fact-finding interview. If the overpayment is waived due to the employer's failure to participate, that employer's account continues to be subject to charge for the overpaid amount. See Iowa Code § 96.3-7.

In the case herein, a waiver cannot be considered because the employer participated in the fact-finding interview even though the claimant did not. See 871 IAC 24.10. Its account is not subject to charge and the claimant is responsible for repaying the overpayment amount of \$1,696.00.

**DECISION:**

The unemployment insurance decision dated August 29, 2013, reference 02, is reversed. The claimant is not eligible to receive unemployment insurance benefits because she was discharged from work for misconduct. Benefits are withheld until she has worked in and been paid wages for insured work equal to ten times her weekly benefit amount, provided she is otherwise eligible. The claimant is overpaid benefits in the amount of \$1,696.00.

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Susan D. Ackerman  
Administrative Law Judge

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Decision Dated and Mailed

sda/pjs