

**IOWA WORKFORCE DEVELOPMENT
Unemployment Insurance Appeals Section
1000 East Grand—Des Moines, Iowa 50319
DECISION OF THE ADMINISTRATIVE LAW JUDGE
68-0157 (7-97) – 3091078 - EI**

**BETTY J STEINBACH
827 E ERIE
MISSOURI VALLEY IA 51555**

**CROSSROADS OF WESTERN IOWA
1 CROSSROADS PL
MISSOURI VALLEY IA 51555**

**Appeal Number: 05A-UI-05215-RT
OC: 04/17/05 R: 01
Claimant: Respondent (2)**

This Decision Shall Become Final, unless within fifteen (15) days from the date below, you or any interested party appeal to the Employment Appeal Board by submitting either a signed letter or a signed written Notice of Appeal, directly to the **Employment Appeal Board, 4th Floor—Lucas Building, Des Moines, Iowa 50319**.

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

STATE CLEARLY

1. The name, address and social security number of the claimant.
2. A reference to the decision from which the appeal is taken.
3. That an appeal from such decision is being made and such appeal is signed.
4. The grounds upon which such appeal is based.

YOU MAY REPRESENT yourself in this appeal or you may obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds. It is important that you file your claim as directed, while this appeal is pending, to protect your continuing right to benefits.

(Administrative Law Judge)

(Decision Dated & Mailed)

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

STATEMENT OF THE CASE:

The employer, Crossroads of Western Iowa, filed a timely appeal from an unemployment insurance decision dated May 6, 2005, reference 01, allowing unemployment insurance benefits to the claimant, Betty J. Steinbach. After due notice was issued, a telephone hearing was held on June 6, 2005, with the claimant participating. Matt Zima, Administrative Director, and Martie Chauvin, Service Coordinator, participated in the hearing for the employer. The administrative law judge takes official notice of Iowa Workforce Development Department unemployment insurance records for the claimant.

FINDINGS OF FACT:

Having heard the testimony of the witnesses, and having examined all of the evidence in the record, the administrative law judge finds: The claimant was employed by the employer as a part-time intermediate care facility (ICF) supervisor from September 1, 2004, until she was discharged on April 18, 2005. Prior to September 1, 2004, the claimant was a temporary employee. The employer provides care for mentally disabled persons, both for clients who are taken to the employer's location, and for residents. The claimant was discharged for insubordination and failure to perform job duties and responsibilities arising out of two incidents, one on April 5, 2005, and the other on April 13, 2005.

On April 5, 2005, the claimant was responsible for Client A. Client A is incontinent and his Depends, or disposable underwear, need to be changed at least twice a day. The claimant appropriately changed Client A in the morning. The claimant did not change Client A in the afternoon. Client A did not have an extra pair of Depends, and although the employer always has extra Depends for clients and residents who do not have their own, the claimant did not change Client A because he was "wet, but not that wet." On April 13, 2005, the claimant was, at least, partially responsible for Client B. Client B is incontinent, but can, if taken to the restroom, use a restroom on her own. Client B is supposed to be taken to the restroom, but no one took Client B to the restroom, including the claimant. If no one else had taken Client B to the restroom, then it was the claimant's responsibility to do so. In any event, Client B went outside and then became incontinent and wet, and was then changed. Prior to being taken outside, Client B had been sitting for a long period of time instead of being actively engaged in some kind of activity. The employer is supposed to provide activities to keep the clients and residents busy. The employer learned about these two incidents on April 13, 2005, and the claimant was discharged on April 18, 2005, after the employer's witness, Martie Chauvin, Service Coordinator, was out of the office for two days and then after the weekend.

The claimant received a written warning on October 21, 2004, for a failure to provide assistance to clients with needs. On January 19, 2005, the claimant was placed on a performance development plan for the same reason. On February 23, 2005, a review of the performance development plan was held, and the claimant was noted as "improving," but this improvement was not consistent. On March 30, 2005, a second review of the claimant's performance development plan was performed and, as a result, the claimant was given a two-day suspension because she was not participating enough with client activities. The claimant had had no prior experience dealing with mentally handicapped individuals, but she had received some training when hired, including, at least, one day of training specifically for Client A.

Pursuant to her claim for unemployment insurance benefits filed effective April 17, 2005, the claimant has received unemployment insurance benefits in the amount of \$1,013.00 as follows: \$163.00 for benefit week ending April 23, 2005 (earnings \$49.00); and \$170.00 per week for five weeks from benefit week ending April 30, 2005, to benefit week ending May 28, 2005.

REASONING AND CONCLUSIONS OF LAW:

The questions presented by this appeal are as follows:

1. Whether the claimant's separation from employment was a disqualifying event. It was.
2. Whether the claimant is overpaid unemployment insurance benefits. She is.

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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. Huntoon v. Iowa Department of Job Service, 275 N.W.2d 445, 448 (Iowa 1979).

The parties agree, and the administrative law judge concludes, that the claimant was discharged on April 18, 2005. In order to be disqualified to receive unemployment insurance benefits pursuant to a discharge, the claimant must have been discharged for disqualifying misconduct. The administrative law judge concludes that the employer has met its burden of proof to demonstrate by a preponderance of the evidence that the claimant was discharged for disqualifying misconduct. The employer's witness, Martie Chauvin, Services Coordinator, credibly testified that the claimant was discharged for two incidents: one on April 5, 2005, and the second on April 13, 2005. On April 5, 2005, the claimant failed to change the Depends, or disposable underwear, for an incontinent client, Client A, even though the claimant noted in writing that Client A was "wet, but not that wet." The claimant testified at the hearing that Client A was not wet, but that the pants of Client A were wet, but from sweat. The claimant's testimony was equivocal, and in regard to the written notes, the claimant testified that she did not remember. The claimant's testimony is not credible, based upon her equivocation here and the clear statement she had made in writing. The administrative law judge is constrained to conclude that the claimant failed to change the disposable underwear, or Depends, for Client A, even though she should have. The claimant stated in the writing that Client A had no Depends,

but the evidence establishes, and the claimant so conceded, that the employer has extra Depends for those clients and residents who do not have any. On April 13, 2005, the claimant was, at least, partially responsible for taking Client B to the restroom, but failed to do so. This led, eventually, to Client B becoming incontinent and wet. The claimant also did not properly engage Client B in activities, allowing Client B to sit for approximately an hour and a half. The claimant seems to concede that she failed in these two areas, but stated first that Client B was watching a movie and, therefore, was sitting for a long period of time, but the evidence does establish that the employer is supposed to keep clients busy with certain, and various, activities. The claimant did not do so. The claimant also, as noted above, failed to take Client B to the restroom.

The claimant received a written warning and a performance development plan, with reviews of that development plan; including a second review on March 30, 2005, in which the claimant was given a two-day suspension for not participating enough with clients. This suspension occurred just a few days before the incidents set out above. The administrative law judge must conclude on the evidence here that, having been previously warned and suspended for failing to assist and participate with clients, that the claimant's actions on April 5 and 13, 2005, were deliberate acts or omissions constituting a material breach of the claimant's duties and obligations arising out of her worker's contract of employment and evince a willful or wanton disregard of the employer's interests and are, at the very least, carelessness or negligence in such a degree of recurrence as to establish disqualifying misconduct. The administrative law judge notes that the claimant was, at least, partially responsible for the care of mentally disabled individuals, which is a serious and important responsibility. There is some evidence that the claimant had no prior experience, but there was evidence that the claimant had received some training. The administrative law judge also notes that the claimant had been employed for 7½ months and, in view of the warnings, should have paid more attention to the care that she was giving and the assistance that she was providing to the clients and residents. This was the claimant's job responsibility. Accordingly, the administrative law judge concludes that the claimant was discharged for disqualifying misconduct and, as a consequence, she is disqualified to receive unemployment insurance benefits. Unemployment insurance benefits are denied to the claimant until or unless she requalifies for such benefits.

Iowa Code section 96.3-7 provides:

7. Recovery of overpayment of benefits. 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.

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.

The administrative law judge concludes that the claimant has received unemployment insurance benefits in the amount of \$1,013.00 since separating from the employer herein on, or about, April 18, 2005, and filing for such benefits effective April 17, 2005. The administrative law judge further concludes that the claimant is not entitled to these benefits and is overpaid

such benefits. The administrative law judge finally concludes that these benefits must be recovered in accordance with the provisions of Iowa law.

DECISION:

The representative's decision of May 6, 2005, reference 01, is reversed. The claimant, Betty J. Steinbach, is not entitled to receive unemployment insurance benefits, until or unless she requalifies for such benefits, because she was discharged for disqualifying misconduct. She has been overpaid unemployment insurance benefits in the amount of \$1,013.00.

kjw/pjs