

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

ANDREA BECKER
Claimant

APPEAL NO: 12A-UI-08981-ET

**ADMINISTRATIVE LAW JUDGE
DECISION**

AREA RESIDENTIAL CARE INC
Employer

OC: 06-17-12
Claimant: Respondent (2R)

Section 96.5-2-a – Discharge/Misconduct
Section 96.3-7 – Recovery of Benefit Overpayment

STATEMENT OF THE CASE:

The employer filed a timely appeal from the July 17, 2012, reference 01, decision that allowed benefits to the claimant. After due notice was issued, a hearing was held by telephone conference call before Administrative Law Judge Julie Elder on August 20, 2012. The claimant did not respond to the hearing notice and did not participate in the hearing or request a postponement of the hearing as required by the hearing notice. Teri Pitzen, Human Resources Director; Traci Reisen, Supervisor; and Elly Day, Residential Services Department Director; participated in the hearing on behalf of the employer. Employer's Exhibits One through Six were admitted into evidence.

ISSUE:

The issue is whether the employer discharged the claimant for work-connected misconduct.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed as a part-time community living instructor for Area Residential Care from April 3, 2012 to June 19, 2012. She worked less than 20 hours per week and was only required to work eight hours every two weeks. The employer received a report from Supervisor Traci Reisen that the claimant was not performing her required duties. The employer had received other complaints regarding the claimant's work performance and actions and consequently the claimant was suspended June 11, 2012, while the employer fully investigated the situation. The investigation determined the claimant violated the following work rules: failure to perform job duties; sleeping on the job; violation of the attendance policy; violation of the cell phone policy; engaging in unauthorized personal business while at work; and refusing or failing to follow orders or instructions of a supervisor (Employer's Exhibit Three). The claimant attended pre-service training classes April 9 through April 13, 2012 and April 24 through April 27, 2012 for a total of 36.5 hours of classroom training (Employer's Exhibit Three). She then job shadowed other employees for two full weeks and was then expected to start working on her own but her supervisor was not comfortable with the claimant's abilities yet and assigned her an additional full week of job shadowing (Employer's Exhibit Three). Even after that training

the claimant's supervisor was uncomfortable scheduling her to work by herself and only scheduled her with another staff member (Employer's Exhibit Three). The employer's investigation determined the claimant often lay down during work hours and on one occasion was observed by other staff members at the residence for a birthday party go lay down on the sofa and fall asleep. The claimant was also required to help the individuals in the residence with their meals. She was expected to help them prepare their foods, insuring they were following their special diets, and dish out the food so they did not take too much food, make sure they had the correct food, cut up one individual's food because of a choking risk, remind them to slow down and drink while they were eating, make sure they were using adaptive equipment, supervise what they were eating to be sure it was nutritious, and to sit with them through the entire meal so she could assist them with everything listed above. The claimant would fill her plate first and go sit down without helping the individuals with any of the items listed above and then get up when she was done and leave the room, despite being told what the meal time expectations and routines were for that house. The claimant also spent a great deal of time on her cell phone talking and texting, which was a violation of the employer's policy (Employer's Exhibit Six). The employer also discovered the claimant filling out an apartment application while at work and she accumulated three incidents of minor tardiness. Ms. Reisen worked with the claimant and told her and wrote lists for her regarding what she needed to do. The claimant would start various tasks and then return to the sofa and sit down without completing them. She did not help an individual who was at risk for falls with his showers and did not want to help the individual who required help with toileting. She also failed to help them with hygiene. The claimant had not completed the required orientation paperwork by mid-May even though Ms. Reisen attempted to help the claimant finish it but the claimant would say she forgot the paperwork or make other excuses. As a result, Residential Services Department Director Elly Day scheduled a meeting with the claimant May 17, 2012, so they could finish the paperwork together but the claimant failed to call Ms. Day or show up for their meeting. On June 7, 2012, other staff members reported the claimant fell asleep after going to the sofa during a birthday party at the house. On June 8, 2012, the claimant failed to help the individuals with everything required at meal time. The employer suspended the claimant June 11, 2012, due to her poor work performance and failure to follow procedure. After conducting an investigation, the employer determined the claimant was not performing her duties and her employment was terminated June 19, 2012. The employer was not able to act more quickly because the claimant worked so few hours and the employer had a difficult time contacting her by phone.

The claimant has claimed and received unemployment insurance benefits since her separation from this employer.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment for disqualifying job misconduct.

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 has the burden of proving disqualifying misconduct. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). While the claimant was a relatively new employee, she was trained extensively and once she was trained it should not have been difficult to meet the employer's expectations. Following the meal time and hygiene procedures are not particularly difficult tasks to perform after the amount of training the claimant received and some of her behaviors, including lying down on the sofa, falling asleep and using a cell phone excessively, simply require common sense. The claimant repeatedly failed to follow several important procedures in the performance of her job, placing the individuals at risk in some cases, despite repeated training and direction. Under these circumstances, the administrative law judge concludes the claimant's conduct demonstrated a willful disregard of the standards of behavior the employer has the right to expect of employees and shows an intentional and substantial disregard of the employer's interests and the employee's duties and obligations to the employer. The employer has met its burden of proving disqualifying job misconduct. Cosper v. IDJS, 321 N.W.2d 6 (Iowa 1982). Therefore, benefits are denied.

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 section 96.3-7. In this case, the claimant has received benefits but was not eligible for those benefits. The matter of determining the amount of the overpayment and whether the overpayment should be recovered under Iowa Code section 96.3-7-b is remanded to the Agency.

DECISION:

The July 17, 2012, reference 01, decision is reversed. The claimant was discharged from employment due to job-related misconduct. Benefits are withheld until such time as 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 has received benefits but was not eligible for those benefits. The matter of determining the amount of the overpayment and whether the overpayment should be recovered under Iowa Code section 96.3-7-b is remanded to the Agency.

Julie Elder
Administrative Law Judge

Decision Dated and Mailed

je/pjs