

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**KERRY L SOKOLIK**  
Claimant

**APPEAL NO. 07A-UI-05701-DT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**GOOD SAMARITAN SOCIETY INC**  
Employer

**OC: 05/06/07 R: 03**  
**Claimant: Respondent (2)**

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

**STATEMENT OF THE CASE:**

Good Samaritan Society, Inc. (employer) appealed a representative's May 23, 2007 decision (reference 01) that concluded Kerry L. Sokolik (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 June 25, 2007. The claimant received the hearing notice and responded by calling the Appeals Section on June 20, 2007. She indicated that she would be available at the scheduled time for the hearing at a specified telephone number. However, when the administrative law judge called that number at the scheduled time for the hearing, the claimant was not available; therefore, she did not participate in the hearing. Fred Metcalf appeared on the employer's behalf. During the hearing, Employer's Exhibits One through Three were entered into evidence. The record was closed at 9:23 a.m. At 9:25 a.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 parties were properly notified of the scheduled hearing on this appeal. The claimant received the hearing notice prior to the June 25, 2007 hearing. The claimant failed to be available at the scheduled day and time set for the hearing and did not participate in the hearing or request a postponement of the hearing as required by the hearing notice. The reason the claimant was unavailable was that she had set her phone on vibrate and did not notice when the phone rang when the administrative law judge called for the hearing. When she had called on June 20 to provide her phone number for the hearing she had been instructed that if she did not hear from the judge by 9:05 a.m. that she was to call back into the Appeals Section to find out if there was a problem, but she failed to comply with those instructions as she assumed she would still be getting a call from the judge even without further action on her part. The instructions inform the parties that they are to be available at the specified time for the hearing,

and that if they cannot be reached at the time of the hearing at the number they provided, the judge may decide the case on the basis of other available evidence.

The claimant started working for the employer on November 17, 2006. She worked full time as a certified nursing aide (CNA) at the employer's long-term care nursing facility. Her last day of work was May 9, 2007. The employer discharged her on that date. The stated reason for the discharge was a third disciplinary action which was for insubordination.

On March 5, 2007, the claimant was given a first disciplinary notice for use of a cell phone for personal matters while on duty. On May 7, 2007, the employer issued her a second disciplinary notice designated as a final warning for being insubordinate by contacting a resident's family member after having been previously instructed not to do so. Finally, on May 9 the claimant was instructed by her supervisor to go to a specific area and assist some other aides in providing showers to residents. She failed to comply with this instruction, and when questioned by coworkers, falsely asserted that she had been instructed to do other tasks. As a result of this final incident of insubordination after the final disciplinary warning, the employer discharged the claimant.

The claimant established a claim for unemployment insurance benefits effective May 6, 2007. The claimant has received unemployment insurance benefits after the separation from employment in the amount of \$484.00.

#### **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.

871 IAC 26.14(7) provides:

(7) If a party has not responded to a notice of telephone hearing by providing the appeals section with the names and telephone numbers of its witnesses by the scheduled time of the hearing, the presiding officer may proceed with the hearing.

a. If an absent party responds to the hearing notice while the hearing is in progress, the presiding officer shall pause to admit the party, summarize the hearing to that point, administer the oath, and resume the hearing.

b. If a party responds to the notice of hearing after the record has been closed and any party which has participated is no longer on the telephone line, the presiding officer shall not take the evidence of the late party. Instead, the presiding officer shall inquire as to why the party was late in responding to the notice of hearing. For good cause shown, the presiding officer shall reopen the record and cause further notice of hearing to be issued to all parties of record. The record shall not be reopened if the presiding officer does not find good cause for the party's late response to the notice of hearing.

c. Failure to read or follow the instructions on the notice of hearing shall not constitute good cause for reopening the record.

After not being available when the administrative law judge called the claimant's number at the scheduled time for the hearing, the claimant did not recontact the Appeals Section for the June 25, 2007 hearing until after the hearing had been closed. Although the claimant intended to participate in the hearing, the claimant failed to read or follow the hearing notice instructions to be available at the scheduled time for the hearing and did not contact the Appeals Section as instructed when she had not received the call for the hearing by five minutes after the scheduled time for 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. Choosing to set a phone set on vibrate instead of to audibly ring or forgetting to reset the phone to an audible ring is not 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.

Iowa Code § 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 focus of the definition of misconduct is on acts or omissions by a claimant that "rise to the level of being deliberate, intentional or culpable." Henry v. Iowa Department of Job Service, 391 N.W.2d 731, 735 (Iowa App. 1986). The acts must show:

1. Willful and wanton disregard of an employer's interest, such as found in:
  - a. Deliberate violation of standards of behavior that the employer has the right to expect of its employees, or
  - b. Deliberate disregard of standards of behavior the employer has the right to expect of its employees; or

2. Carelessness or negligence of such degree of recurrence as to:
  - a. Manifest equal culpability, wrongful intent or evil design; or
  - b. Show an intentional and substantial disregard of:
    1. The employer's interest, or
    2. The employee's duties and obligations to the employer.

The claimant's repeated insubordination in deliberately acting contrary to instruction after prior warning shows 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.

Iowa Code § 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.

Because the claimant's separation was disqualifying, benefits were paid to which the claimant was not entitled. Those benefits must be recovered in accordance with the provisions of Iowa law.

#### **DECISION:**

The representative's May 23, 2007 decision (reference 01) is reversed. The employer discharged the claimant for disqualifying reasons. The claimant is disqualified from receiving unemployment insurance benefits as of May 9, 2007. 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 claimant is overpaid benefits in the amount of \$484.00.

---

Lynette A. F. Donner  
Administrative Law Judge

---

Decision Dated and Mailed

ld/css