

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

PAULINE M MOGENSEN  
457 S WALNUT ST  
AVOCA IA 51521

CARE INITIATIVES  
c/o JOHNSON AND ASSOCIATES  
PO BOX 6007  
OMAHA NE 68106-0007

Appeal Number: 05A-UI-06383-HT  
OC: 05/22/05 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, 4<sup>th</sup> 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.

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(Administrative Law Judge)

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(Decision Dated & Mailed)

Section 96.5(2)a – Discharge  
Section 96.3(7) – Overpayment

STATEMENT OF THE CASE:

The employer, Care Initiatives, filed an appeal from a decision dated June 7, 2005, reference 01. The decision allowed benefits to the claimant, Pauline Mogensen. After due notice was issued a hearing was held by telephone conference call on July 18, 2005. The claimant participated on her own behalf. The employer participated by Dietary Supervisor Cheryl Engel, Administrator Kelly Jimerson, Director of Nursing Amber Dau and Cook Carolyn Bentz. The employer was represented by Johnson and Associates in the person of Suzanna Ettrich.

#### 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: Pauline Mogensen was employed by Care Initiatives from October 13, 1992 until May 20, 2005. She was a part-time dietary aide.

During the course of her employment Ms. Mogensen had received written and verbal reprimands regarding her failure to abide by company policies, especially in regards to the dietary requirements of the residents, and her rudeness to staff and residents. Usually the rudeness was more a matter of tone of voice than of the actual comments being made, but many complaints had been made against her. The last one was May 16, 2005, when she "shouted" at a cook regarding food which had been prepared for the claimant's brother, who was a resident. She had been advised her behavior needed to change.

On May 17, 2005, volunteers arrived at the facility to play music for the residents. Ms. Mogensen had been told they would be playing on May 19, 2005, and when they arrived she told them they could not play, it was the wrong time and day. When told she had been given incorrect information, the claimant relented and said she would clear the dining room. In the mean time, the volunteers made a report to one of the nurses on duty about Ms. Mogensen's rudeness, and the report was passed on to Director of Nursing Amber Dau.

Ms. Dau asked Dietary Supervisor Cheryl Engel to talk to the claimant, which she did, and they both Ms. Engel and Administrator Kelly Jimerson talked with the claimant on May 20, 2005. Although she denied being rude to the volunteer, her past history of similar incidents disinclined the employer to accept her statement. She was discharged by Ms. Jimerson at the end of the meeting.

Pauline Mogensen has received unemployment benefits since filing a claim with an effective date of May 22, 2005.

#### REASONING AND CONCLUSIONS OF LAW:

The issue is whether the claimant is disqualified. The judge concludes 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 claimant had been advised her job was in jeopardy as a result of the continued complaints of rudeness made against her by staff and residents. In spite of the warnings the claimant was not able to modify her behavior, or her tone of voice. The discourtesy to a guest and volunteer at the facility cannot be excused on the basis the claimant was unprepared, especially given her prior warnings about communicating with others. Her conduct caused distress to the volunteer and created a poor opinion of the facility. This is conduct not in the best interests of the employer and the claimant is disqualified.

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 claimant has received unemployment benefits to which she is not entitled. These must be recovered in accordance with the provisions of Iowa law.

#### DECISION:

The representative's decision of June 7, 2005, reference 01, is reversed. Pauline Mogensen is disqualified and benefits are withheld until she has earned ten times her weekly benefit amount provided she is otherwise eligible. She is overpaid in the amount of \$625.00.

bgh/sc