

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

MICHELLE R BINNS

Claimant

APPEAL NO. 08A-UI-10936-HT

**ADMINISTRATIVE LAW JUDGE
DECISION**

FIVE STAR QUALITY CARE INC

Employer

**OC: 10/12/08 R: 02
Claimant: Respondent (2-R)**

Section 96.5(2)a – Discharge

STATEMENT OF THE CASE:

The employer, Five Star Quality Care, Inc. (Five Star), filed an appeal from a decision dated November 10, 2008, reference 01. The decision allowed benefits to the claimant, Michelle Binns. After due notice was issued, a hearing was held by telephone conference call on December 8, 2008. The claimant participated on her own behalf and with a witness Dusty Tuttle. The employer participated by Human Resources Representative Bonnie Decker. Exhibits One, Two, Three, Four, and Five were admitted into the record.

ISSUE:

The issue is whether the claimant was discharged for misconduct sufficient to warrant a denial of unemployment benefits.

FINDINGS OF FACT:

Michelle Binns was employed by Five Star from August 8, 2007 until October 9, 2008 as a full-time certified nursing assistant (CNA). She was trained and knew the procedures regarding the care of the residents. One of the procedures requires there to be two people using a Hoyer lift to move a resident, and Ms. Binns received written warnings on July 1 and 27, 2008, for failing to follow this procedure and putting the resident's safety at risk. The second warning was a final written warning with a three-day suspension. She was advised her job was in jeopardy.

On October 9, 2008, the claimant and another CNA, BJ, were showering and changing a resident. Ms. Binns was trying to use a wash cloth that had been dropped on the floor to clean an open wound, and then attempting to wash out the cloth instead of putting it in a "red bag" which is for contaminated items. She then left the resident alone in the shower room, which is also considered putting the resident's safety at risk. It was only for a brief period of time while she asked another CNA to bring her a Depends.

When the other CNA attempted to remind her of what she should be doing, Ms. Binns became very hostile, stating the other person was "not the boss of [her]" and not to tell her what to do. BJ kept saying she was only trying to help and to remind the claimant of what she should be

doing in these circumstances. After the resident was properly cared for, BJ went to Unit Manager Corey Stull to notify him of the situation.

Ms. Binns was questioned by Mr. Stull and she admitted to leaving the resident alone in the shower and attempting to wash out the bloody cloth rather than put it in the red bag, but did not provide any explanation. She was discharged for a final incident of risking the safety of the resident.

Michelle Binns has received unemployment benefits since filing a claim with an effective date of October 12, 2008.

REASONING AND CONCLUSIONS OF LAW:

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 claimant had been advised her job was in jeopardy as a result of her failure to follow safety procedures in the care of residents. She was capable of performing the job to the employer's satisfaction, as she had done so in the past after receiving the required training and certification. Her failure on these occasions to follow the required procedures did jeopardize the safety of the residents. The employer is obligated to provide safe and effective care for the dependent adults in its charge. The claimant's conduct interfered with its ability to do so and is conduct not in the best interests of the employer. The claimant is disqualified.

Iowa Code section 96.3-7, as amended in 2008, provides:

7. Recovery of overpayment of benefits.

a. 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.

b. (1) 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. However, provided the benefits were not received as the result of fraud or willful misrepresentation by the individual, benefits shall not be recovered from an individual if the employer did not participate in the initial determination to award benefits pursuant to section 96.6, subsection 2, and an overpayment occurred because of a subsequent reversal on appeal regarding the issue of the individual's separation from employment. The employer shall not be charged with the benefits.

(2) An accounting firm, agent, unemployment insurance accounting firm, or other entity that represents an employer in unemployment claim matters and demonstrates a continuous pattern of failing to participate in the initial determinations to award benefits, as determined and defined by rule by the department, shall be denied permission by the department to represent any employers in unemployment insurance matters. This subparagraph does not apply to attorneys or counselors admitted to practice in the courts of this state pursuant to section 602.10101.

The claimant has received unemployment benefits to which she is not entitled. The question of whether the claimant must repay these benefits is remanded to the UIS division.

DECISION:

The representative's decision of November 10, 2008, reference 01, is reversed. Michelle Binns is disqualified and benefits are withheld until she has earned ten times her weekly benefit amount, provided she is otherwise eligible. The issue of whether the claimant must repay the unemployment benefits is remanded to UIS division for determination.

Bonny G. Hendricksmeier
Administrative Law Judge

Decision Dated and Mailed

bgh/kjw