

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

PHYLLIS M CLOSSER

Claimant

APPEAL 17R-UI-06936-JP-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

PACIFICA HEALTH SERVICES LLC

Employer

OC: 04/09/17

Claimant: Respondent (2)

Iowa Code § 96.5(2)a – Discharge for Misconduct

Iowa Code § 96.3(7) – Recovery of Benefit Overpayment

Iowa Admin. Code r. 871-24.10 – Employer/Representative Participation Fact-finding Interview

STATEMENT OF THE CASE:

The employer filed an appeal from the April 28, 2017, (reference 01) unemployment insurance decision that allowed benefits. The parties were properly notified about the hearing. A telephone hearing was started on July 26, 2017; however, during the hearing, the employer requested a postponement to allow it to provide claimant its exhibits. The employer's request was granted and the hearing was postponed to July 28, 2017. Both parties waived proper notice for the new hearing date (July 28, 2017). On July 28, 2017, the telephone hearing continued. Claimant participated. Employer participated through human resources manager Kim Miles, director of nursing Mary Hind, and MDS coordinator Melissa Starks. Employer Exhibit 1 was admitted into evidence with no objection. Official notice was taken of the administrative record, including claimant's benefit payment history, with no objection.

ISSUES:

Was the claimant discharged for disqualifying job-related misconduct?

Has the claimant been overpaid unemployment insurance benefits, and if so, can the repayment of those benefits to the agency be waived?

Can charges to the employer's account be waived?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed full-time as a registered nurse from May 18, 2016, and was separated from employment on December 15, 2016, when she was discharged.

The employer is a skilled nursing facility. It is important for employees to document when medication is provided to a resident, so it can be verified the correct medication and amount of medication was provided at the correct time. If a resident's medication is not provided, provided in an incorrect amount, or provided at the incorrect time, it may cause adverse consequences to

the resident, including serious injury. The employer uses a computer system that notifies nurses if any medication needs to be provided to a resident. If a resident has not received their medication by the required time, the computer system shows a different icon that indicates the resident is late in receiving their medication.

Claimant was scheduled to work 6:00 p.m. to 6:00 a.m. from December 11, 2016 to December 12, 2016. During claimant's shift, she did not administer medication to eight residents. The eight residences were required to receive certain medications at certain times during claimant's shift and she failed to provide the residents' their medication. Claimant was the employee responsible for providing the medication to these eight residents. These eight residents should have received their medication by 10:00 p.m. At around 11:30 p.m., claimant contacted Ms. Starks and informed Ms. Starks she was not feeling well and needed to go home. Ms. Starks stated she would finish up where she was and come down, but claimant needed to finish administering medication and charting. At 12:30 a.m., Ms. Starks arrived at claimant's location. Claimant was at the med cart and she told Ms. Starks she just had a few residents to give medication too. Claimant then finished administering medication to these residents and started working on her charting. Ms. Starks started administering treatments to the residents. Claimant then contacted Ms. Starks and informed her she was done administering all her medication to the residents. Ms. Starks and claimant then went through and counted all the narcotics and transferred it to Ms. Starks. Ms. Starks took over for claimant at 1:30 a.m. Claimant then finished up her charting. Ms. Starks went to the computer to see if she needed to provide any medication to the residents. Ms. Starks found eight different residents that were late in receiving their medication; the medication should have been administered to these residents by 10:00 p.m. Claimant was still present, so Ms. Starks asked claimant why the medication had not been given to the eight residents. Claimant stated she was not aware the medication was not given because she had asked a med aide to administer the medication. Ms. Starks asked the med aide about the eight residents and he told Ms. Starks he did not tell claimant he would administer the medication. The med aide did not have access to the medication cart because it was locked and claimant had the keys to the cart. Some of the medications that needed to be administered were narcotics and the med aide did not have access to the narcotic box. The med aide stated he did not administer the medication to the residents. Ms. Starks was able to administer some of the medication to the residents, but approximately 75% of the medication she was not able to administer due to when the next dose of the medication was to be administered. Ms. Starks documented that the medication was not given, contacted Ms. Hind, the physician, and each resident contact person. Ms. Starks also performed assessments on the residents and the employer had to monitor the residents for the next three days because they had not received their medication properly.

The employer then began an investigation. During the investigation the employer reviewed the nurse's notes for the residents, spoke to the families of the eight residents, and spoke with staff that was present. When Ms. Hind spoke to the family members, they complained about claimant not reporting things (e.g., blood pressure). Employer Exhibit 1. Ms. Hind also discovered claimant made documentation errors on December 10, 11, and 12, 2016 and a narcotics documentation error on December 9, 2016. Employer Exhibit 1.

On December 15, 2016, Ms. Hind met with claimant. Ms. Hind discussed with claimant about not administering the eight residents their medication. Ms. Hind also discussed with claimant the documentation concerns from December 10, 11, and 12, 2016 and her talking in a demeaning manner. Employer Exhibit 1. The employer then discharged claimant on December 15, 2016 due to the seriousness of not administering medication to eight residents. Employer Exhibit 1.

The administrative record reflects that claimant has received unemployment benefits in the amount of \$2,682.00, since filing a claim with an effective date of April 9, 2017, for the nine weeks ending June 10, 2017. The administrative record also establishes that the employer did participate in the fact-finding interview.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes claimant was discharged from employment due to job-related misconduct. Benefits are denied.

It is the duty of an administrative law judge and the trier of fact in this case, to determine the credibility of witnesses, weigh the evidence and decide the facts in issue. *Arndt v. City of LeClaire*, 728 N.W.2d 389, 394-395 (Iowa 2007). The administrative law judge, as the finder of fact, may believe all, part or none of any witness's testimony. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996). In assessing the credibility of witnesses, the administrative law judge should consider the evidence using his or her own observations, common sense and experience. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996). In determining the facts, and deciding what testimony to believe, the fact finder may consider the following factors: whether the testimony is reasonable and consistent with other evidence you believe; whether a witness has made inconsistent statements; the witness's conduct, age, intelligence, memory and knowledge of the facts; and the witness's interest in the trial, their motive, candor, bias and prejudice. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996).

This administrative law judge assessed the credibility of the witnesses who testified during the hearing, considering the applicable factors listed above, and used my own common sense and experience. This administrative law judge reviewed the exhibit admitted into evidence. This administrative law judge finds the employer's version of events to be more credible than claimant's recollection of those events.

Iowa Code section 96.5(2)a provides:

An individual shall be disqualified for benefits, regardless of the source of the individual's wage credits:

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 disqualification shall continue 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.

Iowa Admin. Code r. 871-24.32(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 Dep't of Job Serv.*, 275 N.W.2d 445, 448 (Iowa 1979).

The employer has the burden of proof in establishing disqualifying job misconduct. *Cosper v. Iowa Dep't of Job Serv.*, 321 N.W.2d 6 (Iowa 1982). The issue is not whether the employer made a correct decision in separating claimant, but whether the claimant is entitled to unemployment insurance benefits. *Infante v. Iowa Dep't of Job Serv.*, 364 N.W.2d 262 (Iowa Ct. App. 1984). What constitutes misconduct justifying termination of an employee and what misconduct warrants denial of unemployment insurance benefits are two separate decisions. *Pierce v. Iowa Dep't of Job Serv.*, 425 N.W.2d 679 (Iowa Ct. App. 1988). Misconduct serious enough to warrant discharge is not necessarily serious enough to warrant a denial of job insurance benefits. Such misconduct must be "substantial." *Newman v. Iowa Dep't of Job Serv.*, 351 N.W.2d 806 (Iowa Ct. App. 1984). When based on carelessness, the carelessness must actually indicate a "wrongful intent" to be disqualifying in nature. *Id.* Negligence does not constitute misconduct unless recurrent in nature; a single act is not disqualifying unless indicative of a deliberate disregard of the employer's interests. *Henry v. Iowa Dep't of Job Serv.*, 391 N.W.2d 731 (Iowa Ct. App. 1986).

Workers in the medical or dependent care profession, reasonably have a higher standard of care required in the performance of their job duties. That duty is evident by special licensing requirements. Claimant was responsible for ensuring all of the residents she was responsible for received their medication on time. During claimant's shift from December 11, 2016 to December 12, 2016, she failed to administer medication to eight residents.

Claimant's argument that she was not feeling well during her shift and it caused her to get behind is not persuasive. Although claimant may not have been feeling well and it caused her to get behind, she failed to report her illness until approximately 1.5 hours after the medication was already to have been administered. Claimant was aware that she was falling behind, but she still had a duty to administer the eight residents' medication on time. Not only did claimant fail to administer the medication to the eight residents, she waited to report her illness for approximately 1.5 hours after the medication should have been administered, and after she did report her illness, she failed to tell Ms. Sparks that she did not administer the medication to the eight residents. Claimant was aware that the residents needed their medication on time or it could cause potential health risks for the residents.

Claimant's argument that she had asked a med aide to administer the medication to the residents is also not persuasive. Ms. Starks spoke to the med aide and the med aide denied agreeing to administer the medication. Although the med aide did not testify, Ms. Starks's testimony about the med aide's denial is corroborated by the evidence that claimant had the key to the med cart and the med aide did not have a key. Even if claimant asked the med aide to administer the medication, she was ultimately responsible for ensuring that medication was properly administered. Furthermore, claimant testified because that she was unfamiliar with these residents, she had to continually check the computer system and because the computer

system would have shown that the eight residents had not been administered their medication, she should have been aware the residents did not have their medication.

The employer has presented substantial and credible evidence that claimant failed to administer medication to eight residents during her shift. Failure to administer medication to residents on time creates a serious health risk for those residents. Claimant's failure to properly administer medication was contrary to the best interests of the employer and the safety of its residents. This is misconduct even without prior warning. Benefits are denied.

Iowa Code section 96.3(7)a-b, 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) (a) 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 employer shall not be relieved of charges if benefits are paid because the employer or an agent of the employer failed to respond timely or adequately to the department's request for information relating to the payment of benefits. This prohibition against relief of charges shall apply to both contributory and reimbursable employers.

(b) 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.

(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.

Iowa Admin. Code r. 871-24.10 provides:

Employer and employer representative participation in fact-finding interviews.

(1) "Participate," as the term is used for employers in the context of the initial determination to award benefits pursuant to Iowa Code section 96.6, subsection 2, means submitting detailed factual information of the quantity and quality that if unrebutted would be sufficient to result in a decision favorable to the employer. The most

effective means to participate is to provide live testimony at the interview from a witness with firsthand knowledge of the events leading to the separation. If no live testimony is provided, the employer must provide the name and telephone number of an employee with firsthand information who may be contacted, if necessary, for rebuttal. A party may also participate by providing detailed written statements or documents that provide detailed factual information of the events leading to separation. At a minimum, the information provided by the employer or the employer's representative must identify the dates and particular circumstances of the incident or incidents, including, in the case of discharge, the act or omissions of the claimant or, in the event of a voluntary separation, the stated reason for the quit. The specific rule or policy must be submitted if the claimant was discharged for violating such rule or policy. In the case of discharge for attendance violations, the information must include the circumstances of all incidents the employer or the employer's representative contends meet the definition of unexcused absences as set forth in 871—subrule 24.32(7). On the other hand, written or oral statements or general conclusions without supporting detailed factual information and information submitted after the fact-finding decision has been issued are not considered participation within the meaning of the statute.

(2) "A continuous pattern of nonparticipation in the initial determination to award benefits," pursuant to Iowa Code section 96.6, subsection 2, as the term is used for an entity representing employers, means on 25 or more occasions in a calendar quarter beginning with the first calendar quarter of 2009, the entity files appeals after failing to participate. Appeals filed but withdrawn before the day of the contested case hearing will not be considered in determining if a continuous pattern of nonparticipation exists. The division administrator shall notify the employer's representative in writing after each such appeal.

(3) If the division administrator finds that an entity representing employers as defined in Iowa Code section 96.6, subsection 2, has engaged in a continuous pattern of nonparticipation, the division administrator shall suspend said representative for a period of up to six months on the first occasion, up to one year on the second occasion and up to ten years on the third or subsequent occasion. Suspension by the division administrator constitutes final agency action and may be appealed pursuant to Iowa Code section 17A.19.

(4) "Fraud or willful misrepresentation by the individual," as the term is used for claimants in the context of the initial determination to award benefits pursuant to Iowa Code section 96.6, subsection 2, means providing knowingly false statements or knowingly false denials of material facts for the purpose of obtaining unemployment insurance benefits. Statements or denials may be either oral or written by the claimant. Inadvertent misstatements or mistakes made in good faith are not considered fraud or willful misrepresentation.

This rule is intended to implement Iowa Code section 96.3(7)"b" as amended by 2008 Iowa Acts, Senate File 2160.

Because the claimant's separation was disqualifying, benefits were paid to which she was not entitled. 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 if it is determined that they did participate in the fact-finding interview. Iowa Code § 96.3(7), Iowa Admin. Code r. 871-24.10. In this case, the claimant has received benefits but was not eligible for those benefits. Since the employer did participate in the fact-finding interview the claimant is obligated to repay to the agency the benefits she received and the employer's account shall not be charged.

DECISION:

The April 28, 2017, (reference 01) unemployment insurance decision is reversed. Claimant was discharged from employment due to job-related misconduct. Benefits are withheld until such time as claimant has worked in and been paid wages for insured work equal to ten times her weekly benefit amount, provided she is otherwise eligible.

Claimant has been overpaid unemployment insurance benefits in the amount of \$2,682.00 and is obligated to repay the agency those benefits. The employer did participate in the fact-finding interview and its account shall not be charged.

Jeremy Peterson
Administrative Law Judge

Decision Dated and Mailed

jp/rvs