

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

KIMBERLY E WHITNEY
Claimant

APPEAL NO: 07A-UI-11005-DWT

**ADMINISTRATIVE LAW JUDGE
DECISION**

ASSISTED LIVING CONCEPTS INC
Employer

**OC: 10-28097 R: 01
Claimant: Respondent (2)**

Section 96.5-2-a – Discharge
Section 96.3-7 – Recovery of Overpayment of Benefits

STATEMENT OF THE CASE:

Assisted Living Concepts, Inc. (employer) appealed a representative's November 16, 2007 decision (reference 01) that concluded Kimberly E. Whitney (claimant) was qualified to receive unemployment insurance benefits, and the employer's account was subject to charge because the claimant had been discharged for nondisqualifying reasons. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on December 12, 2007. The claimant failed to respond to the hearing notice by contacting the Appeals Section prior to the hearing and providing the phone number at which she could be contacted to participate in the hearing. As a result, no one represented the claimant. Stephanie Snyder, the administrator, and Lisa Fylstra, the wellness director, appeared on the employer's behalf. 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.

ISSUES:

Did the employer discharge the claimant for work-connected misconduct?

Has the claimant been overpaid any unemployment insurance benefits?

FINDINGS OF FACT:

The claimant started working for the employer on May 26, 2006. The claimant worked as a personal service attendance and was also certified to pass medication. The employer's written policy states when an employee will be discharged after having three med errors.

Prior to Snyder becoming the administrator in late May 2007 and Fylstra's employment in August 2007, the claimant received warnings on September 7, 2006, February 26, 2007 and April 19, 2007 for med errors. The claimant's prior supervisor and the previous administrator did not discharge the claimant even though the employer's policy indicates the claimant should have been discharged in mid-April 2007.

On October 23, 2007, Fylstra worked with and observed the claimant as she distributed medications. Fylstra first noticed the claimant did not check the meds she gave residents to the list of medications a resident was authorized to receive. When Fylstra talked to the claimant about this, the claimant indicated she had everyone's medications memorized. Fylstra told the claimant she was required to check and double check medications before she actually gave the medication to residents.

Fylstra also noticed that the claimant did not lock the medication cart when she left it in the hallway to give meds to residents in their rooms. A state regulation requires med carts to be locked. Fylstra talked to the claimant about this and told her she had to lock the med cart when she left it in the hall. Even though Fylstra gave the claimant a specific instruction, the claimant did not lock the med cart after Fylstra told her to. Fylstra considered the claimant's refusal to lock the med cart after she had been told to do as a med error. Fylstra reported this incident to Snyder. The employer discharged the claimant on October 26, 2007, for having four medication errors and for refusing to follow Fylstra's October 23, 2007 instructions.

The claimant established a claim for unemployment insurance benefits during the week of October 28, 2007. She filed a claim for benefits for the week ending November 3, 2007. She received \$218.00 in benefits for this week.

REASONING AND CONCLUSIONS OF LAW:

A claimant is not qualified to receive unemployment insurance benefits if an employer discharges her for reasons constituting work-connected misconduct. Iowa Code section 96.5-2-a. For unemployment insurance purposes, misconduct amounts to a deliberate act and a material breach of the duties and obligations arising out of a worker's contract of employment. Misconduct is a deliberate violation or disregard of the standard of behavior the employer has a right to expect from employees or is an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to the employer. Inefficiency, unsatisfactory conduct, unsatisfactory performance due to inability or incapacity, inadvertence or ordinary negligence in isolated incidents, or good faith errors in judgment or discretion are not deemed to constitute work-connected misconduct. 871 IAC 24.32(1)(a).

While past acts and warnings can be used to determine the magnitude of a current act of misconduct, a discharge for misconduct cannot be based on such past act or acts. The termination of employment must be based on a current act. 871 IAC 24.32(8).

The facts presented during the hearing establish that the claimant intentionally failed to follow her supervisor's reasonable instruction to lock the med cart when the claimant left the cart in the hallway to give a resident medication. This conduct by itself amounts to an intentional and substantial disregard of the employer's interests and the type of behavior the employer has a right to expect from an employee. The employer discharged the claimant for work-connected misconduct. As of October 28, 2007, the claimant is not qualified to receive unemployment insurance benefits.

If an individual receives benefits she is not legally entitled to receive, the Department shall recover the benefits even if the individual acted in good faith and is not at fault in receiving the overpayment. Iowa Code section 96.3-7. The claimant is not legally entitled to receive benefits for the week ending November 3, 2007, and has been overpaid \$218.00 in benefits she received for this week.

DECISION:

The representative's November 16, 2007 decision (reference 01) is reversed. The employer discharged the claimant for reasons that constitute work-connected misconduct. The claimant is disqualified from receiving unemployment insurance benefits as of October 28, 2007. This disqualification continues until she 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 has been overpaid and must repay a total of \$218.00 in benefits she received for the week ending November 3, 2007.

Debra L. Wise
Administrative Law Judge

Decision Dated and Mailed

dlw/pjs