

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

TAMMY J CAPRON
Claimant

CARE INITIATIVES
Employer

APPEAL 15A-UI-09817-EC-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 08/02/15
Claimant: Respondent (2)

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Code § 96.3(7) – Overpayment
Iowa Admin. Code r. 871-24(10) – Employer Participation in Fact Finding

STATEMENT OF THE CASE:

The employer, Care Initiatives, filed an appeal from the August 19, 2015, (reference 01) unemployment insurance decision that allowed benefits based upon a termination for alleged misconduct. The parties were properly notified about the hearing. A telephone hearing was held on September 16, 2015. The claimant, Tammy Capron, participated and testified. The employer, Care Initiatives, participated through Treve Lumsden, the hearing representative; Tina Wendt, the administrator; and Judi Jenkins, the director of nursing. Ms. Wendt and Ms. Jenkins testified on behalf of the employer.

ISSUES:

Was the separation from employment a disqualifying discharge for misconduct?

Was the claimant overpaid benefits?

Should the claimant repay benefits and/or should the employer be charged due to its participation in fact finding?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds, in accordance with the relevant, credible evidence presented during this hearing: The claimant was employed full time as a licensed practical nurse (LPN) and charge nurse at the employer's nursing home and rehabilitation facility in Mechanicsville, Iowa, from July 11, 2014, until this employment ended on July 27, 2015, when her employment was terminated due to her failure to perform certain essential tasks. The claimant acknowledged this termination in a telephone call with Ms. Wendt and Ms. Jenkins.

This employer utilized a progressive discipline system. The claimant received a verbal warning on November 11, 2014, for excessive cell phone usage during work hours. The claimant received a written warning on June 5, 2015, for her failure to complete a TB (tuberculosis) test

on a resident and for lying about this omission; and for her failure to complete "skin sheets" for a resident on two separate occasions. The claimant received a final written warning on July 27, 2015, for her failure to provide proper daily care for a resident's pressure ulcer; and for her failure to complete "skin sheets" for a resident on two more separate occasions. According to Ms. Jenkins, the resident's pressure ulcer wound was infected, showing the seriousness of the claimant's failure to properly perform her job duties. According to Ms. Jenkins, the resident who was not tested for TB upon admission was later found to have TB via a chest x-ray. This resulting risk to other residents demonstrated the seriousness of the claimant's failure to properly perform her job duties. Furthermore, the claimant, a charge nurse in a nursing home and rehabilitation facility, knew or should have known the importance of the TB test, the daily wound care, and the skin sheets.

The claimant disagreed with the importance and necessity of these job functions, and offered reasons why she failed to perform them. She admitted that she did not complete the skin sheets.

The employer participated in the fact-finding process. This evidence is not disputed.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment due to disqualifying job-related misconduct. Benefits are not allowed.

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.

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).

Misconduct must be "substantial" to warrant a denial of job insurance benefits. *Newman v. Iowa Dep't of Job Serv.*, 351 N.W.2d 806 (Iowa Ct. App. 1984). Generally, continued refusal to follow reasonable instructions constitutes misconduct. *Gilliam v. Atlantic Bottling Co.*, 453 N.W.2d 230 (Iowa Ct. App. 1990). 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). Poor work performance is not misconduct in the absence of evidence of intent. *Miller v. Emp't Appeal Bd.*, 423 N.W.2d 211 (Iowa Ct. App. 1988).

The employer presented substantial and credible evidence that the claimant failed to perform essential job duties, in more than one important task, after she received warnings. This is evidence of deliberate conduct in violation of company policy, procedure, or prior warning. The employer's requirements for TB tests, skin sheets, and proper daily wound care were not unduly burdensome or unreasonable. A charge nurse in a nursing care or skilled care facility knows or should know the importance of these tasks.

The claimant did not agree with all of the employer's testimony regarding her failure to perform certain important tasks. She agreed that she did not complete skin sheets on at least one resident, but explained her reasons for this omission.

It is my duty, as the 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 appearance, 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).

I assessed the credibility of the witnesses who testified during the hearing, considering the applicable factors listed above, and using my own common sense and experience. I find the employer's version of events to be more credible than the claimant's recollection and explanation of those events.

The claimant's repeated failure to completely and accurately perform her job duties after having been warned is evidence of negligence or carelessness to such a degree of recurrence as to rise to the level of disqualifying job-related misconduct. See Iowa Admin. Code r. 871-24.32(1)a. Benefits are denied.

Iowa Code § 96.3(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 § 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 § 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 § 602.10101.

Because the claimant's separation was disqualifying, benefits were paid to which she was not entitled. As set forth above, the unemployment insurance law requires 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). In this case, the claimant received benefits but was not eligible for those benefits. Because the employer participated 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 August 19, 2015, (reference 01) unemployment insurance decision is reversed. The claimant was discharged from employment due to job-related misconduct. Benefits are withheld until such time as she has worked in and been paid wages for insured work equal to ten times her weekly benefit amount, provided she is otherwise eligible.

The claimant was overpaid unemployment insurance benefits, and is obligated to repay the agency those benefits. The agency shall take appropriate action to recoup those overpaid benefits.

The employer participated in the fact-finding interview. Its account shall not be charged.

Emily Gould Chafa
Administrative Law Judge

Decision Dated and Mailed

ec/css