

**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**

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**Appeal Number: 04A-UI-05769-ET
OC 05-02-04 R 03
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, 4th 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.

(Administrative Law Judge)

(Decision Dated & Mailed)

Section 96.5-2-a – Discharge/Misconduct
Section 96.3-7 – Recovery of Benefit Overpayment

STATEMENT OF THE CASE:

The employer filed a timely appeal from the May 17, 2004, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held by telephone conference call before Administrative Law Judge Julie Elder on June 15, 2004. The claimant participated in the hearing. Sue Weber, RN/DON, Dee Aldrich, LPN; Val Forrester, RN/Assistant DON; Jeff Wollum, Administrator; and Lynn Corbeil, Employer's Attorney, participated in the hearing on behalf of the employer. Employer's Exhibits One through Eight were admitted into evidence.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed as a full-time LPN/charge nurse for Care Initiatives from February 3, 2003 to May 3, 2004. On April 29, 2004, a resident went to the nurse's desk and said she had been given Tums, but it was not working and she was experiencing chest pain that was not going away. The claimant told the resident to return to her room and the resident stated she did not think she could make it back to her room so the claimant told her to sit in a chair in the hall and LPN Dee Aldrich would see her when she returned from break. The claimant did not take the resident's vital signs but did page Ms. Aldrich. Ms. Aldrich was at lunch in the building and was told she had a phone call but when she went to take the call no one was there so she returned to the floor and when she saw the resident she noticed she was sweating, having trouble breathing, clutching her chest and was slumped over her walker complaining of chest pain. Ms. Aldrich went to the phone and called 911 and told RN/Assistant DON Val Forrester to take the resident's vital signs. The emergency medical technicians responded and moved the resident to the hospital within 10 or 15 minutes of Ms. Aldrich's arrival. RN/DON Sue Weber spoke to the claimant briefly about the situation at the end of the day and notified her the employer was suspending her pending investigation of the incident. Ms. Weber interviewed the resident May 3, 2004, and she confirmed that she told the claimant she was experiencing chest pains but said she did not remember anything after the claimant sent her back to her room and she said she did not think she could make it. The employer met with the claimant May 3, 2004, and the claimant stated she did not take the resident's vital signs because she thought she was experiencing indigestion. The woman was not her resident so she was waiting for Ms. Aldrich but she was aware she was supposed to take vital signs if a resident complained of chest pains. The employer terminated the claimant's employment May 3, 2004. The claimant was also involved in several medication errors during her employment (Employer's Exhibit Five). On March 1, 2004, the claimant received a written warning for failure to give medication to a resident and failure to complete a medication error report (Employer's Exhibit Six). On March 5, 2004, the claimant received a written warning for presetting medications after oncoming staff found a loaded syringe of insulin in the cart that was not signed out, labeled or refrigerated. On April 23, 2004, the claimant received a final written warning and was suspended after a resident fell and the claimant did not complete an incident report as required (Employer's Exhibit Eight). The warning stated the claimant "will be honest about all issues especially nursing care and resident care" (Employer's Exhibit Eight).

The claimant has claimed and received unemployment insurance benefits after the separation from employment.

REASONING AND CONCLUSIONS OF LAW:

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

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 employer has the burden of proving disqualifying job misconduct. Cosper v. IDJS, 321 N.W.2d 6 (Iowa 1982). As an LPN and charge nurse, the claimant knew or should have known that if a resident complained of chest pain she needed to take the resident's vital signs and even if she thought the resident was experiencing indigestion she had a responsibility to respond immediately rather than waiting for another nurse to return from break. The claimant received previous warnings and a three-day suspension and those warnings and suspensions put the claimant on notice that a further incident could result in termination. The claimant's actions April 29, 2004, were not an isolated incident and her conduct demonstrated a willful disregard of the standards of behavior the employer has the right to expect of employees and shows an intentional and substantial disregard of the employer's interests and the employee's duties and obligations to the employer. Consequently, the administrative law judge concludes the employer has met its burden of proving disqualifying job misconduct. Cosper v. IDJS, 321 N.W.2d 6 (Iowa 1982). Benefits are denied.

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.

Because the claimant's separation was disqualifying, benefits were paid to which the claimant was not entitled. Those benefits must be recovered in accordance with the provisions of Iowa law.

DECISION:

The May 17, 2004, reference 01, 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 is overpaid benefits in the amount of \$1,866.00.

je/kjf