

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

SANDRA F GREEN
Claimant

APPEAL NO. 11A-UI-13829-LT

**ADMINISTRATIVE LAW JUDGE
DECISION**

CARE INITIATIVES
Employer

OC: 09/18/11
Claimant: Respondent (2-R)

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Code § 96.3(7) – Recovery of Benefit Overpayment

STATEMENT OF THE CASE:

The employer filed an appeal from the October 10, 2011 (reference 01) decision that allowed benefits. After due notice was issued, a hearing was held by telephone conference call on November 14, 2011. Claimant participated. Employer participated through DON Lori Pearson, nurse manager Carla McIntosh, RN staff nurse Deb West, and Administrator Tara Tuttle and was represented by David Williams of TALX.

ISSUE:

The issue is whether claimant was discharged for reasons related to job misconduct sufficient to warrant a denial of benefits. The administrative law judge took judicial notice of the administrative record and whether she is overpaid benefits as a result.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed full time as a LPN and was separated from employment on September 19, 2011. On September 16 claimant was sitting by West at the nurses' desk but did not notice she had her headset on and said, "Will you stop that and shut up?" She said she wanted to go home but the computer was frozen. West told her to restart the computer or she would be sitting there forever. Claimant left the desk so West restarted the computer. Claimant returned, saw that the computer had been restarted, and slammed the chart she was holding so loudly that West jumped in spite of her poor hearing. That caused five or six charts to fall off the desk and they did not make that much noise. West turned and saw the claimant holding a red, eight by eleven, three inch thick chart. A family member at the desk also jumped and there were other staff and residents in the area. McIntosh saw claimant walk by and heard the chart slam on the desk. McIntosh said, "Sandra, what are you doing?!" Green said in a sarcastic tone, "I'm sorry, I dropped it." McIntosh told her she could not have made that much noise accidentally and reminded her that there were nurses, residents and a family member in the area. West, who was wearing one of her two hearing aids, only heard McIntosh say, "Sandra!" and could not hear the rest of the conversation other than in muffled tones. McIntosh reported the incident to Pearson. Claimant called Pearson and asked if she was going to be fired and said she

slammed the chart because she thought West restarted the frozen computer deliberately to make her stay late. On August 31, 2011 the employer warned her after she was overheard by staff and family members being rude to a CNA by speaking loudly and not letting the CNA finish speaking. In her October 2010 Pearson told her in her performance review to work on not being so defensive.

The claimant has received unemployment benefits after the separation on a claim with an effective date of September 18, 2011.

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 § 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.

Given that West has difficulty hearing, was wearing only one of her two hearing aids, and jumped because of being startled by the slamming chart noise, and the other charts that fell did not make that much noise, indicate that claimant's denial of intentional slamming of the chart is not credible. Claimant's deliberate and startling noise-making with the chart because she was upset with West for having restarted the computer after having been warned about similar conduct is evidence of a disregard of the employer's and coworkers' interests so as to rise to the level of disqualifying job related misconduct. Benefits are denied.

Iowa Code § 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.

Because the claimant's separation was disqualifying, benefits were paid to which the claimant 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 whether or not the overpayment is recovered. Iowa Code § 96.3(7). In this case, the claimant has received benefits but was not eligible for those benefits.

DECISION:

The October 10, 2011 (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.

REMAND: The matter of determining the amount of the potential overpayment and whether the overpayment should be recovered under Iowa Code § 96.3(7)b is remanded to the Agency.

Dévon M. Lewis
Administrative Law Judge

Decision Dated and Mailed

dml/css