

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

AMANDA L DEMPSEY
Claimant

APPEAL NO: 14A-UI-10935-DT

**ADMINISTRATIVE LAW JUDGE
DECISION**

CARE INITIATIVES
Employer

OC: 09/14/14
Claimant: Respondent (2)

Section 96.5-2-a – Discharge
Section 96.3-7 – Recovery of Overpayment of Benefits
871 IAC 24.10 – Employer Participation

STATEMENT OF THE CASE:

Care Initiatives (employer) appealed a representative's October 8, 2014 decision (reference 02) that concluded Amanda L. Dempsey (claimant) was qualified to receive unemployment insurance benefits after a separation from employment. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on November 10, 2014. The claimant participated in the hearing. Alyce Smolsky of Equifax/TALX Employer Services appeared on the employer's behalf and presented testimony from five witnesses, Kari Gerst, Brandi Giza, Vicki Butterbrodt, Maureen Prakash, and Terri Hemm. During the hearing, Employer's Exhibits One, Two, and Three were entered into evidence. Based on the evidence, the arguments of the parties, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUES:

Was the claimant discharged for work-connected misconduct? Was the claimant overpaid unemployment insurance benefits, and if so, is that overpayment subject to recovery based upon whether the employer participated in the fact-finding interview?

OUTCOME:

Reversed. Benefits denied. Overpayment subject to recovery.

FINDINGS OF FACT:

The claimant started working for the employer on November 9, 2012. She worked full time as a certified nursing aide (CNA) at the employer's Coralville, Iowa nursing and rehabilitation center, working on the 10:00 p.m. to 6:00 a.m. shift. Her last day of work was the shift that ended on the morning of September 11, 2014. The employer suspended her that day and discharged her on September 15, 2014. The stated reason for the discharge was being threatening towards another employee.

At shift change on the morning of September 11 the claimant was going around the unit with the oncoming CNA making status reports. The two CNAs had not gotten very far when a dispute arose between them, with the claimant understanding that the other CNA was being inappropriately critical of the claimant's care. The dispute was taken into the nurses' office and assistant director of nursing Butterbrodt attempted to mediate the matter, and then sent the two CNAs back to finish the status report round. The two had only gotten to about one other resident's room when the claimant stated to the other resident, within the hearing of CNA mentor Hemm, that she could take care of her residents, and she would "take care of you." Particularly in the context of comments the claimant had made earlier to indicate that she was not someone to "mess with," and that she had certain connections, the employer took this as a threat against the other CNA.

The claimant had previously been given warnings, including a final warning in May 2013 for an incident including offensive language and arguing with coworkers. As a result of the additional issue on September 11, the employer determined to discharge the claimant.

The claimant established a claim for unemployment insurance benefits effective September 14, 2014. A fact-finding interview was held with a Claims representative on October 7, 2014. Both the claimant and the employer, through a third party representative who was on the phone during the proceeding, participated in the fact-finding interview. The claimant has received unemployment insurance benefits after the separation in the amount of \$1,217.00.

REASONING AND CONCLUSIONS OF LAW:

A claimant is not qualified to receive unemployment insurance benefits if an employer has discharged the claimant for reasons constituting work-connected misconduct. Iowa Code § 96.5-2-a. Before a claimant can be denied unemployment insurance benefits, the employer has the burden to establish the claimant was discharged for work-connected misconduct. *Cosper v. IDJS*, 321 N.W.2d 6 (Iowa 1982); Iowa Code § 96.5-2-a.

In order to establish misconduct such as to disqualify a former employee from benefits an employer must establish the employee was responsible for a deliberate act or omission which was a material breach of the duties and obligations owed by the employee to the employer. Rule 871 IAC 24.32(1)a; *Huntoon v. Iowa Department of Job Service*, 275 N.W.2d 445 (Iowa 1979); *Henry v. Iowa Department of Job Service*, 391 N.W.2d 731, 735 (Iowa App. 1986). The conduct must show a 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. Rule 871 IAC 24.32(1)a; *Huntoon*, supra; *Henry*, supra. In contrast, 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. Rule 871 IAC 24.32(1)a; *Huntoon*, supra; *Newman v. Iowa Department of Job Service*, 351 N.W.2d 806 (Iowa App. 1984).

The claimant's making of a threatening remark towards a coworker, particularly after prior discipline for inappropriate interactions with coworkers, shows a willful or wanton disregard of the standard of behavior the employer has the right to expect from an employee, as well as an intentional and substantial disregard of the employer's interests and of the employee's duties

and obligations to the employer. The employer discharged the claimant for reasons amounting to work-connected misconduct.

The unemployment insurance law requires benefits be recovered from a claimant who receives benefits and is later denied benefits even if the claimant acted in good faith and was not at fault. However, a claimant will not have to repay an overpayment when an initial decision to award benefits on an employment separation issue is reversed on appeal if two conditions are met: (1) the claimant did not receive the benefits due to fraud or willful misrepresentation, and (2) the employer failed to participate in the initial proceeding that awarded benefits. In addition, if a claimant is not required to repay an overpayment because the employer failed to participate in the initial proceeding, the employer's account will be charged for the overpaid benefits. Iowa Code § 96.3-7-a,-b.

The claimant received benefits but has been denied benefits as a result of this decision. The claimant, therefore, was overpaid benefits. Because the employer participated in the fact-finding interview, the claimant is required to repay the overpayment and the employer will not be charged for benefits paid.

DECISION:

The representative's October 8, 2014 decision (reference 02) is reversed. The employer discharged the claimant for disqualifying reasons. The claimant is disqualified from receiving unemployment insurance benefits as of September 11, 2014. This disqualification continues until the claimant has been paid ten times her weekly benefit amount for insured work, provided she is otherwise eligible. The claimant is overpaid \$1,217.00, which is subject to recovery.

Lynette A. F. Donner
Administrative Law Judge

Decision Dated and Mailed

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