IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

LYNNETTE GLYNN
Claimant

AREA RESIDENTIAL CARE INC
Employer

APPEAL NO. 09A-UI-01898-BT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 09/28/08 R: 04
Claimant: Respondent (2/R)

Iowa Code § 96.5-2-a - Discharge for Misconduct
Iowa Code § 96.3-7 - Overpayment

STATEMENT OF THE CASE:

Area Residential Care, Inc. (employer) appealed an unemployment insurance decision dated January 27, 2009, reference 03, which held that Lynnette Glynn (claimant) was eligible for unemployment insurance benefits. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on February 26, 2009. The claimant participated in the hearing. The employer participated through Teri Pitzen, Human Resources Director; Anne McGhee, Residential Services Director; and Deb Gamble, Human Resources Assistant. Employer's Exhibits One through Seven were admitted 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.

ISSUE:

The issue is whether the employer discharged the claimant for work-related misconduct?

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and having considered all of the evidence in the record, finds that: The claimant was employed as a part-time community living instructor from November 13, 2008 through November 18, 2008, when she was discharged for falsifying information, upon which she was hired. The job for which she applied has a requirement that the applicant must be able to perform "[l]ight to moderate physical work that requires occasional lifting of up to 50 pounds and regular lifting of 20 pounds." She filled out an employment application that did not specifically address this requirement but then proceeded to her first interview with Deb Gamble on October 21, 2008. Ms. Gamble asked the claimant if she was "able to do light to medium physical work requiring occasional lifting up to 50# and regular lifting of 20#? The claimant responded that she was able to do so. The interview went into why the claimant left her last position and she said it was because the job was very physical and she resigned because of lifting. The claimant told Ms. Gamble that she did not like the job because of, "pulling 200#, heavy lifting." The claimant said she had back and shoulder surgery and Ms. Gamble then specifically asked if lifting would be a problem and the claimant responded by stating that she was, "Ok now, no problem lifting." Based on the information provided by the

claimant in her first interview, she proceeded to a second interview with two other employer representatives.

Traci Reisen and Alberto Pecino participated in the second interview with the claimant, which was conducted on October 29, 2008. The claimant was questioned, "After reading the job description, what difficulties do you think you may have in this position and how do you feel you can overcome those difficulties?" Ms. Reisen wrote that the claimant said, "Occasional lifting of up to 50 lbs – wouldn't do it herself, would ask for assist." Mr. Pecino wrote, "Was reading occasional lifting of up to 50 lbs – could ask for assist." Mr. Pecino also wrote that the claimant took a deep breath. The claimant never stated that not only would she have difficulty with this job requirement, but she would be completely unable to perform this job duty due to a permanent lifting restriction of 45 pounds. Based on the information the claimant provided in this interview, both Ms. Reisen and Mr. Pecino recommended her for hire.

The employer prepared a written job offer to the claimant on November 7, 2008, which was conditional upon the claimant completing and submitting a pre-placement physical form to the agency from a health care provider. The claimant had her physical exam on November 10, 2008 and the physician documented the claimant was restricted from lifting over 45 pounds from the floor to waist. The claimant signed the conditional job offer on November 13, 2008, even though she was fully aware she could not complete the job duties and that her physical exam report would disqualify her from this position. The employer received the claimant's physical exam report on November 17, 2008, when it first learned of her lifting restriction. The employer discussed the matter with the claimant on November 18, 2008 and discharged her on November 19, 2008.

The claimant filed a claim for unemployment insurance benefits effective September 28, 2008 and has received benefits after the separation from employment.

REASONING AND CONCLUSIONS OF LAW:

The issue is whether the employer discharged the claimant for work-connected misconduct. 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.

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.

The employer has the burden to prove the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). The claimant was discharged for providing false information when applying for a job with the employer. Although the claimant's actual job application did not address lifting restrictions, she had two subsequent job interviews in which she intentionally omitted her permanent lifting restrictions. When a person willfully and deliberately makes a false statement on an employment application, such falsification shall be an act of misconduct in connection with the employer. The statement need not be written and an omission of a pertinent fact would have the same effect. The falsification must be such that it does or could result in endangering the health, safety, or morals of the applicant or others, or result in exposing the employer to legal liabilities or penalties, or result in placing the employer in jeopardy. 871 IAC 24.32(6). The Iowa Supreme Court has stated that a misrepresentation on a job application must be materially related to job performance to disqualify a claimant from receiving unemployment insurance benefits. Larson v. Employment Appeal Board, 474 N.W.2d 570, 571 (Iowa 1991). While this statement is *dicta,* since the court ultimately decided Larson was discharged for incompetence not her deceit on her application, the reasoning is persuasive. The court does not define materiality but cites Independent School Dist. v. Hansen, 412 N.W.2d 320, 323 (Minn. App. 1987), which states a misrepresentation is not material if a truthful answer would not have prevented the person from being hired.

In the case herein, the facts clearly show that the claimant would not have been hired if she had provided truthful and accurate information to the employer in the interview process. A requirement of the community living instructor position is that the person be able to lift 50 pounds occasionally and 20 pounds regularly. The claimant knew when she interviewed that she has a permanent 45-pound lifting restriction and her failure to disclose this pertinent information could have resulted in endangering her health and safety, as well as that of a resident. She contends she provided this information to the employer in her interviews, but the employer had no knowledge of her medical restriction until it received her physical exam report on November 17, 2008. Deb Gamble, who conducted the first employment interview, outright disputes the claimant's contention that she disclosed her lifting restriction and when specifically questioned about lifting, the claimant told Ms. Gamble that she was okay and had "no problem lifting." Ms. Gamble further testified that if the claimant had been truthful, she would not have proceeded to a second interview and would not have been hired. It is not even rational that the employer knew about her lifting restriction but hired her anyway, only to discharge her five days later. The employer has met its burden. Work-connected misconduct as defined by the unemployment insurance law has been established in this case and benefits are denied.

Iowa Code § 96.3(7) 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. The overpayment recovery law was updated in 2008. See Iowa Code § 96.3(7)(b). Under the revised law, a claimant will not be required to repay an overpayment of benefits if all of the following factors are met. First, the prior award of benefits must have been made in connection with a decision regarding the claimant's separation from a particular employment. Second, the claimant must not have engaged in fraud or willful misrepresentation to obtain the benefits or in connection with the Agency's initial decision to award benefits. Third, the employer must not have participated at the initial fact-finding proceeding that resulted in the initial decision to award benefits. If Workforce Development determines there has been an overpayment of benefits, the employer will not be charged for the benefits, regardless of whether the claimant is required to repay the benefits.

Because the claimant has been deemed ineligible for benefits, any benefits the claimant has received could constitute an overpayment. Accordingly, the administrative law judge will remand the matter to the Claims Division for determination of whether there has been an overpayment, the amount of the overpayment, and whether the claimant will have to repay the benefits.

DECISION:

The unemployment insurance decision dated January 27, 2009, reference 03, is reversed. The claimant is not eligible to receive unemployment insurance benefits, because she was discharged from work for misconduct. Benefits are withheld until 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 matter is remanded to the Claims Section for investigation and determination of the overpayment issue.

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Susan D. Ackerman
Administrative Law Judge

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Decision Dated and Mailed

sda/kjw