

## FINDINGS OF FACT:

Having heard the testimony of the witnesses and having examined all of the evidence in the record, the administrative law judge finds: Brooke Donaldson was employed by Good Samaritan from December 4, 2003 until August 21, 2005. She was a part-time certified nursing assistant (CNA).

Ms. Welch received several written warnings during the course of her employment about unsafe transfer procedures with residents. The final written warnings was given on August 10, 2005, when she transferred a resident by herself when the care plan called for a two-person transfer. She was given additional training on transfers by Staff Development Nurse Charlotte Gott on August 16, 2005, for several hours.

On August 17, 2005, the claimant was asked by another CNA to assist with a resident. The claimant did assist, but there is a note clearly posted above the resident's bed which states she was a three-person transfer. Ms. Donaldson toileted the resident and helped transfer her into bed with the other CNA close by but not assisting. When the resident was placed on the bed, her arm fell to the side and there was a popping sound from her shoulder and she exclaimed that it hurt. She complained of pain and both CNAs reported to the charge nurse. The resident was sent for x-rays, which revealed no damage.

The incident was reported to the director of nursing, the administrator, and Ms. Gott. The claimant was interviewed the next day, along with the other CNA and the resident. Ms. Donaldson was then suspended pending further investigation. She was also notified that her job could be in jeopardy depending on the results of the investigation. A review of all the statements from the interviews and the claimant's past disciplinary history was made by the administrator, DON, Ms. Gott, and Human Resources Manager Lori Welch. The claimant was discharged based on the final incident and her past history of improper resident transfer. She was notified in writing on August 24, 2005.

Brooke Donaldson has received unemployment benefits since filing a claim with an effective date of August 21, 2005.

## REASONING AND CONCLUSIONS OF LAW:

The issue is whether the claimant is disqualified. The judge concludes she is.

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 claimant had been advised her job was in jeopardy as a result of her failure to follow the required procedures to safely transfer residents. Improper transfers could result in injury to the residents, which is what occurred on the final incident. It is the responsibility of the employer to provide proper care for the residents in its facility and the claimant's conduct interfered with its ability to do so. This is not an isolated incident but an on-going course of conduct throughout her employment, about which she had been warned and even retrained in the hopes of improving her performance. She failed to follow correct procedure and do a three-person lift, and caused pain and distress to the resident. This is conduct not in the best interests of the employer and the claimant is disqualified.

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.

The claimant has received unemployment benefits to which she is not entitled. These must be recovered in accordance with the provisions of Iowa law.

DECISION:

The representative's decision of September 12, 2005, reference 01, is reversed. Brooke Donaldson is disqualified and benefits are withheld until she has earned ten times her weekly benefit amount provided she is otherwise eligible. She is overpaid in the amount of \$2,149.00.

bgh/kjw/kjw