

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

NANCY K GLOVER

Claimant

APPEAL NO. 09A-UI-15652-ST

**ADMINISTRATIVE LAW JUDGE
DECISION**

GOOD SAMARITAN SOCIETY INC

Employer

**Original Claim: 08/30/09
Claimant: Respondent (2-R)**

Section 96.5-2-a - Discharge
871 IAC 24.32(1) – Definition of Misconduct
Section 96.3-7 – Recovery of Overpayment

STATEMENT OF THE CASE:

The employer appealed a department decision dated October 9, 2009, reference 01, that held the claimant was not discharged for misconduct on September 3, 2009, and that allowed benefits. A telephone hearing was held on November 19, 2009. The claimant participated. Dana Reese, Administrator, and Dee Snow, D.O.N., participated for the employer. Employer Exhibit One was received as evidence.

ISSUE:

Whether the claimant was discharged for misconduct in connection with employment.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony of the witnesses and having considered the evidence in the record, finds: The claimant began employment as a full-time C.N.A. on February 3, 2006, and last worked for the employer on September 3, 2009. The claimant received the disciplinary policies of the employer in a handbook on January 8, 2008. The policy provides for progressive discipline from warnings to termination for policy violations.

The claimant received written warnings for violation of the policy regarding the mechanical lift and transfer of residents on June 19, 2007 and January 15, 2008. The claimant received a final warning for violation of the employer (and HIPPA) patient confidentiality policy on September 16, 2008.

The employer received a written report from another C.N.A. that claimant failed to have a second person, co-worker, aid her in the transfer of a resident throughout the procedure on August 30 and properly secure the resident (by buckling) to the mechanical lift. The Administrator and D.O.N. confronted the claimant about the incident on September 3. The claimant could not recall whether she had a second person assist her, and she had at least one of the buckles secured. During the hearing, claimant admitted that no one assisted her in lifting

the resident from the toilet to clean his bottom. The employer discharged the claimant for violation of the transfer policy in light of prior warnings.

The claimant has received benefits on her current claim.

REASONING AND CONCLUSIONS OF LAW:

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.

The administrative law judge concludes the employer has established that the claimant was discharged for misconduct in connection with employment on September 3, 2009, for repeated violation of the employer's lift/transfer policy.

The employer had previously (twice) warned the claimant about the proper use of the mechanical lift and having a second person aid her in the transfer. The claimant admitted lifting the resident from the toilet without a second person, and the policy does not state this is an exception to policy. The claimant also acknowledged that only one buckle may have been secured. While the most recent incident may not constitute job-disqualifying misconduct, it does when considered in light of two prior warnings for the same policy violation.

Iowa Code section 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.

Since the claimant has received benefits on her claim, the issue of overpayment is remanded to claims for determination.

DECISION:

The representative's decision dated October 9, 2009, reference 01, is reversed. The claimant was discharged for misconduct in connection with employment on September 3, 2009. Benefits are denied until the claimant re-qualifies by working in and being paid wages for insured work equal to ten times her weekly benefit amount, provided the claimant is otherwise eligible. The overpayment issue is remanded.

Randy L. Stephenson
Administrative Law Judge

Decision Dated and Mailed

rls/kjw