

IOWA WORKFORCE DEVELOPMENT
Unemployment Insurance Appeals Section
1000 East Grand—Des Moines, Iowa 50319
DECISION OF THE ADMINISTRATIVE LAW JUDGE
68-0157 (7-97) – 3091078 - EI

ANDREA K MEYER
900 GRAND AVE APT 8
MARION IA 52302-5866

CAREGIVERS IOWA INC
PROFESSIONAL HOME HEALTH
SERVICES
4080 – 1ST AVE NE STE 110
CEDAR RAPIDS IA 52402

AMENDED

Appeal Number: 06A-UI-03547-JTT
OC: 02/26/06 R: 03
Claimant: Respondent (2)

This Decision Shall Become Final, unless within fifteen (15) days from the date below, you or any interested party appeal to the Employment Appeal Board by submitting either a signed letter or a signed written Notice of Appeal, directly to the **Employment Appeal Board, 4th Floor—Lucas Building, Des Moines, Iowa 50319**.

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

STATE CLEARLY

1. The name, address and social security number of the claimant.
2. A reference to the decision from which the appeal is taken.
3. That an appeal from such decision is being made and such appeal is signed.
4. The grounds upon which such appeal is based.

YOU MAY REPRESENT yourself in this appeal or you may obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds. It is important that you file your claim as directed, while this appeal is pending, to protect your continuing right to benefits.

(Administrative Law Judge)

(Decision Dated & Mailed)

Section 96.5(2)(a) – Discharge for Misconduct
Section 96.3(7) – Recovery of Overpayment

STATEMENT OF THE CASE:

Professional Home Health Services filed a timely appeal from the March 23, 2006, reference 02, decision that allowed benefits. After due notice was issued, a hearing was held on May 3, 2006. Claimant participated. Human Resources Director Jennie Fisher represented the employer and presented additional testimony through Administrator Linda Thacker and Scheduler Jackie Smith. Exhibits One through Eight and A through C were received into evidence.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Andrea Meyer was employed by Professional Home Health Services as a full-time home health aid from June 15, 2004 until March 9, 2006, when Administrator Linda Thacker discharged her.

The final incident that prompted the discharge occurred on March 8-9, 2006. Ms. Meyer was assigned to provide overnight care to a seriously ill cancer patient in the person's home. The client was a mentally alert elderly female. The client had returned home from hospice and required 24 hour care. This was the client's first day home and Ms. Meyer's first shift with the client. The client lived alone in a very small one bedroom apartment. Ms. Meyer received proper instructions regarding client. These instructions included keeping the volume of the television low, and assisting the client to the restroom as needed. During the course of the night, the client twice called out to Ms. Meyer for assistance, but received no response. The television was turned up so loud that the client was concerned her neighbors would be disturbed by the noise. The client had to make her way to the restroom unassisted. In order to get to or from the restroom, the client had to walk out into the hall, in clear site of the living room area of the apartment, where Ms. Meyer was posted. In the morning, the client came out into the living room and discovered Ms. Meyer sleeping. Ms. Meyer had apparently been sleeping throughout the overnight shift. The client called the nursing company to report that Ms. Meyer had slept through the night instead of assisting the client.

On March 1, 2006, Ms. Meyer had been reprimanded for failing to provide appropriate care to a pediatric client. The child was a quadriplegic and frequently had to be lifted and transferred in the course of receiving cares. The child is unable to bathe himself. Ms. Meyer was routinely assigned to care for this client. On March 1, Ms. Meyer informed the client's mother that she would be unable to bathe the client due to her wrist. Ms. Meyer had suffered a wrist sprain on January 12, had immediately returned to light duty, and had returned to full-duty without restrictions on January 30. At the time Ms. Meyer had returned on light duty and to her full-duties, Scheduler Jackie Smith reviewed Ms. Meyer's assigned cases with Ms. Meyer to make certain she was capable of performing the necessary cares. Ms. Meyer cared for this pediatric client before and after her sprained wrist and provided cares to the client without incident up to March 1.

On September 28, 2005, Ms. Meyer had been reprimanded for failing to timely turn in her charting notes. Notes due on September 14 and 15 were not submitted to the employer until September 20, and this prevented the employer from having an up-to-date client chart during the interim.

Approximately one month after her discharge, Ms. Meyer was seen in the ear, nose and throat clinic at the University of Iowa Hospitals and Clinics for an ear infection and, at that time, exhibited moderate hearing loss associated with the infection. On March 8, when Ms. Thacker had reviewed the client's needs with Ms. Meyer in preparation for Ms. Meyer's overnight shift, Ms. Meyer had made no mention of impaired hearing or illness of any sort.

Ms. Meyer established a claim for benefits and has received benefits totaling \$1,368.00.

REASONING AND CONCLUSIONS OF LAW:

The question is whether the evidence in the record establishes that Ms. Meyer was discharged for misconduct in connection with the employment. It does. 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 employer has the burden of proof in this matter. See Iowa Code section 96.6(2). Misconduct must be substantial in order to justify a denial of unemployment benefits. Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of unemployment benefits. See Lee v. Employment Appeal Board, 616 N.W.2d 661 (Iowa 2000). The focus is on deliberate, intentional, or culpable acts by the employee. See Gimbel v. Employment Appeal Board, 489 N.W.2d 36, 39 (Iowa Ct. App. 1992).

While past acts and warnings can be used to determine the magnitude of the current act of misconduct, a discharge for misconduct cannot be based on such past act(s). The termination of employment must be based on a current act. See 871 IAC 24.32(8). In determining whether the conduct that prompted the discharge constituted a "current act," the administrative law

judge considers the date on which the conduct came to the attention of the employer and the date on which the employer notified the claimant that the conduct subjected the claimant to possible discharge. See also Greene v. EAB, 426 N.W.2d 659, 662 (Iowa App. 1988).

Allegations of misconduct or dishonesty without additional evidence shall not be sufficient to result in disqualification. If the employer is unwilling to furnish available evidence to corroborate the allegation, misconduct cannot be established. See 871 IAC 24.32(4). When it is in a party's power to produce more direct and satisfactory evidence than is actually produced, it may fairly be inferred that the more direct evidence will expose deficiencies in that party's case. See Crosser v. Iowa Dept. of Public Safety, 240 N.W.2d 682 (Iowa 1976).

The weight of the evidence in the record establishes that on March 8-9 Ms. Meyer was grossly negligent in caring for a seriously ill client. In light of the client's complaint, as well as the nature and circumstances of the complaint, Ms. Meyer's assertions that she appropriately assisted the client and otherwise behaved appropriately while in the client's home are not credible. The evidence in the record demonstrates recurrent negligence that amount to a willful and wanton disregard of the interests of the employer and the interests of the clients to whom Ms. Meyer was assigned.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Ms. Meyer was discharged for misconduct. Accordingly, Ms. Meyer is disqualified for benefits 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 employer's account shall not be charged for benefits paid to Ms. Meyer.

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 \$1,368.00 in benefits Ms. Meyer received constitutes an overpayment that Ms. Meyer must repay to Iowa Workforce Development.

DECISION:

The Agency representative's decision dated March 23, 2006, reference 02, is reversed. The claimant was discharged for misconduct. The claimant is disqualified for unemployment benefits until she has worked in and been paid wages for insured work equal to ten times her weekly benefit allowance, provided she meets all other eligibility requirements. The claimant is overpaid \$1,368.00.

jt/kkf/pjs