

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**NICOLE M ANDREE**  
Claimant

**APPEAL NO. 11A-UI-06168-H2T**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**S T L CARE COMPANY**  
Employer

**OC: 04-10-11**  
**Claimant: Respondent (2R)**

Iowa Code § 96.5(2)a – Discharge/Misconduct  
Iowa Code § 96.3(7) – Recovery of Benefit Overpayment

**STATEMENT OF THE CASE:**

The employer filed a timely appeal from the May 2, 2011, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on June 6, 2011. The claimant did participate. The employer did participate through Carla Matt, Human Resources Director and (representative) Gina Olexa, Program Director. Employer's Exhibit One was entered and received into the record.

**ISSUES:**

Was the claimant discharged due to job related misconduct?

Has the claimant been overpaid any unemployment insurance benefits?

**FINDINGS OF FACT:**

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed as a licensed practical nurse full time beginning February 17, 2003 through April 12, 2011 when she was discharged. The claimant passed medication to a patient on April 8, 9, and 10. In the drug cassette that came from the pharmacy each daily compartment held one Tegratol tablet, when in fact there should have been two tablets in each compartment. The pharmacy filled the cassette for a two-week period and labeled the cassette to indicate that every daily compartment had two Tegratol tablets in it. When another employee went to administer the patient's medication on April 11, the employer learned that the cassette only contained one Tegratol tablet in each daily compartment. The employer asked the claimant about the situation. The claimant never told the employer that the three days she administered the medication there were two tablets in the daily compartment. The claimant knew how to triple check to insure that the medication she was giving to the patient was correct. The claimant failed to properly check the medication to insure that the patient was being given the correct dosage. The claimant knew how to check the medication but did not do so. She was to perform a triple check. Check the medication administration record (MAR), the tag on the cassette and the cassette itself. Had the claimant simply performed the proper check she would have learned of the error. She had been warned previously for similar errors. On April 1,

2011 the claimant was given her final written warning putting her on notice that additional or future failure to follow proper medication protocols would result in her discharge. The claimant's allegations that there were two tablets in the cassette on each of the days she passed the medication is simply not believable based on how the pharmacy packs the cassettes.

The claimant has received unemployment benefits after the separation on a claim with an effective date of April 10, 2011.

### **REASONING AND CONCLUSIONS OF LAW:**

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment due to job-related misconduct.

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 Iowa Court of Appeals found substantial evidence of misconduct in testimony that the claimant worked slower than he was capable of working and would temporarily and briefly improve following oral reprimands. *Sellers v. EAB*, 531 N.W.2d 645 (Iowa App. 1995). Generally, continued refusal to follow reasonable instructions constitutes misconduct. *Gilliam v. Atlantic Bottling Company*, 453 N.W.2d 230 (Iowa App. 1990). The claimant did not properly pass the medication to a patient because she failed to follow the simple triple check to insure that the cassette was loaded correctly. The claimant had a history of medication errors and knew that her job was in jeopardy based on her previous errors. Claimant's repeated failure to

adequately and fully perform her job duties after having established the ability to do so and after repeated warnings is evidence of willful job related misconduct. Benefits are denied.

Iowa Code § 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.

Because the claimant's separation was disqualifying, benefits were paid to which the claimant was not entitled. The unemployment insurance law 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. However, the overpayment will not be recovered when it is based on a reversal on appeal of an initial determination to award benefits on an issue regarding the claimant's employment separation if: (1) the benefits were not received due to any fraud or willful misrepresentation by the claimant and (2) the employer did not participate in the initial proceeding to award benefits. The employer will not be charged for benefits whether or not the overpayment is recovered. Iowa Code § 96.3(7). In this case, the claimant has received benefits but was not eligible for those benefits.

**DECISION:**

The May 2, 2011 (reference 01) decision is reversed. The claimant was discharged from employment due to job-related misconduct. Benefits are withheld until such time as she has worked in and been paid wages for insured work equal to ten times her weekly benefit amount, provided she is otherwise eligible.

**REMAND:**

The matter of determining the amount of the potential overpayment and whether the overpayment should be recovered under Iowa Code § 96.3(7)b is remanded to the Agency.

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Teresa K. Hillary  
Administrative Law Judge

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Decision Dated and Mailed

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