

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

VALERIE J NAAB
Claimant

APPEAL NO. 10A-UI-00093-H2T

**ADMINISTRATIVE LAW JUDGE
DECISION**

CARE INITIATIVES
Employer

OC: 12-06-09
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 December 24, 2009, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on February 11, 2010. The claimant did participate and was represented by Rich Cook, Attorney at Law. The employer did participate through Kristi Schubert, Administrator, Joan Stodden, Director of Nurses and Sandy Fitchett, Charge Nurse and was represented by Alyce Smolsky of Talx UC eXpress. Employer's Exhibits One through Three were entered and received.

ISSUE:

Was the claimant discharged for work-related misconduct?

Has the claimant been overpaid any unemployment insurance benefits?

FINDINGS OF FACT:

Having reviewed the testimony and all of the evidence in the record, the administrative law judge finds: Claimant was employed as a nurse, LPN full time beginning June 23, 1986 through October 23, 2009 when she was discharged.

On October 19 the claimant was walking past a room and heard a resident, BM, call out for help. She entered the room and found the resident was between her wheel chair and the bed. She lowered the resident to the floor and because she was unable to lift the resident herself she went to the dining room and had Debbie Niles return with her to the room to help her get BM back into her wheel chair and into the correct room.

While the claimant had been an employee of the facility for many years, it was only since 2006 when she obtained her nursing license that she worked in the capacity of a nurse. Prior to 2006 she worked in the business office.

As a nurse and as an employee of the facility the claimant had been trained that any fall or near fall would require an incident report be completed, a head to toe assessment of the resident be

completed and notification to the resident's family and physician. At hearing the claimant alleged that she did perform the required assessment, with the exception that she did not take the vital signs from the resident. However, at the time the claimant did the assessment she did not record in either the nursing notes or the incident report that she had performed the required assessment. The near fall occurred at roughly 6:30 p.m. and the claimant completed her nursing shift at 10:00 p.m. During the remainder of her shift, the claimant did not fill out the incident report, notify the resident's family or physician of the incident or notify the employer about what had occurred.

As part of their own internal policies and to comply with state regulations the employer is required to investigate all falls and even all near falls. In the past this employer has been fined eleven thousand dollars by the state for failure to investigate a near fall and so has worked diligently to insure that nursing employees follow the correct investigative procedures to comply with state regulation and avoid fines.

The claimant had been trained and knew what to do in case of a fall or near fall. On many prior occasions, one as recent as September 2009, the claimant had demonstrated an ability to correctly perform and document an assessment. She also had a demonstrated ability to correctly chart an incident and knew how to notify the physician and the family.

The certified nurse's aide who assisted the claimant on October 19 knew that an assessment and paperwork had to be completed by the claimant. Ms. Niles alleges that the claimant told her "this never happened" while they were lifting the resident back into her wheel chair. On October 20 Ms. Niles felt guilty and went to Sandy Fitchett to report the incident with BM on October 19. Ms. Fitchett reported what she had learned to the administrator, Kristi Schubert, who instructed her to call the claimant to come into the facility to fill out the paperwork. The claimant came to the facility on October 20 and filled out the necessary paperwork, including the late entry into resident BM's chart while Ms. Fitchett notified the resident's family and her physician.

Ms. Niles was disciplined for failing to report the incident on October 19 to management in a more timely manner.

On October 23 the claimant met with Ms. Schubert and admitted that her head to toe assessment was not complete as she did not check the resident's vitals. She also admitted that she had not filled out any paperwork until called by the employer to come into the facility to do so. The claimant did not follow the employer's clear, explicit and well known directives on what to do when a resident sustained a near fall.

The claimant has received unemployment benefits since filing a claim with an effective date of December 6, 2009.

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.

By lowering resident BM to the floor, it was clear the claimant knew or should have known that a near fall situation existed that required her to perform a head to toe assessment and to complete notification requirements and to fill out paperwork. Even the certified nurse's aide knew that the situation required an assessment by the claimant. The claimant admits she did make the assessment which also demonstrates that she too knew she should be completing the near fall paperwork along with the assessment. The claimant chose not to do so until ordered to do so by the employer. The claimant knew that an assessment was needed and could offer no credible explanation at hearing about why she did not do so. An employer need not wait until an employee's failure to follow proper procedures results in actual physical harm to a resident before imposing discipline. The claimant's failure to follow the proper procedures was conduct not in the employer's best interest and constitutes disqualifying 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. The matter of determining whether the overpayment should be recovered under Iowa Code § 96.3(7)b is remanded to the Agency.

DECISION:

The December 24, 2009, 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. The claimant is overpaid benefits in the amount of \$1,870.00.

Teresa K. Hillary
Administrative Law Judge

Decision Dated and Mailed

tkh/pjs