

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

DIANA K RISTINE
Claimant

APPEAL NO. 09A-UI-07147-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

RES-CARE IOWA INC
Employer

**Original Claim: 04/05/09
Claimant: Respondent (2-R)**

Iowa Code section 96.5(2)(a) – Discharge for Misconduct

STATEMENT OF THE CASE:

The employer filed a timely appeal from the May 1, 2009, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on June 19, 2009. Claimant Diana Ristine participated. Karen Smithson, Human Resources Assistant, represented the employer and presented additional testimony through Linda Thacker, Administrator, and Jennie Fisher, Executive Director. Exhibits One and Two were received into evidence.

ISSUE:

Whether the claimant was discharged for misconduct in connection with the employment that disqualifies the claimant for unemployment insurance benefits.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Diana Ristine was employed by Res-Care Iowa, Inc., as a part-time Licensed Practical Nurse and home health aide from February 29, 2009 until March 25, 2009, when Linda Thacker, Administrator, suspended her from the employment. Ms. Thacker was Ms. Ristine's immediate supervisor. Jennie Fisher, Executive Director, subsequently discharged Ms. Ristine from the employment.

The matter that prompted the discharge came to the employer's attention on March 24, 2009, when a client, N.S., spoke to Marilee Geiser, R.N., about things Ms. Ristine had told him about another Res-Care client. Ms. Geiser has since passed away. N.S. told Ms. Geiser that he thought Ms. Ristine would be looking for more work because a client named Tony had a woman strip in front of Ms. Ristine, had sex with the woman, the woman had herpes, and a person could not get rid of herpes. Ms. Geiser passed this information along to Ms. Thacker.

The employer's confidentiality policy and applicable HIPAA laws prohibited Ms. Ristine from sharing a client's confidential health information. Ms. Ristine had been trained in and was aware of both policies. The employer's policies also prohibited Ms. Ristine from discussing her personal problems, religion, and politics.

On March 25, Ms. Thacker interviewed Ms. Ristine. Ms. Ristine admitted telling N.S. that Tony had a girlfriend that was going to stay the weekend in his apartment, admitted telling N.S. that the girlfriend had a disease, and admitted telling N.S. that she was concerned getting the disease and passing it along. Ms. Ristine admitted to sharing with N.S. that Tony and the girlfriend would watch pornography, that the girlfriend would eventually begin to disrobe in front of Ms. Ristine, and that the client and the girlfriend would then become physical in front of her. At the end of the interview, Ms. Thacker suspended Ms. Ristine from the employment pending the outcome of further investigation into her conduct. Ms. Thacker told Ms. Ristine that the investigation could lead to her being discharged from the employment.

After Ms. Thacker suspended Ms. Ristine from the employment, Ms. Ristine went to N.S.'s home. Ms. Ristine told N.S. she had been suspended after a meeting at the office and would probably be fired because someone had shared with the employer the things Ms. Ristine had told N.S. about the other client. Ms. Ristine told N.S. that someone from the office would be coming to speak with him. On March 26, Ms. Geiser spoke with N.S. and he reported the March 25 contact with Ms. Ristine.

Ms. Ristine had gone to Ms. Thacker about the other client weeks before she shared information with N.S. The other client had indeed subjected Ms. Ristine to offensive, abusive behavior that went well beyond what Ms. Ristine shared with N.S.

Ms. Ristine felt justified in speaking with N.S. about the matter because she and N.S. were both devout Christians.

Ms. Ristine crossed other boundaries with N.S., which included storing his food at her home.

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 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).

The evidence establishes a current act. The conduct came to the employer's attention on March 24. The employer suspended Ms. Ristine on March 25 and told her at that time she faced possible discharge from the employment.

The weight of the evidence indicates that Ms. Ristine knowingly violated the employer's policies regarding confidentiality of information gained from service to a client, inappropriate sharing of information with a client, and engaging in prohibited discussions with a client. Ms. Ristine was fully aware that her conduct violated the employer's policies at the time she engaged in it. Ms. Ristine's assertion that she spoke to N.S. because she was afraid to speak to the employer about the matter is not credible in light of Ms. Ristine's testimony that she had spoken to the employer weeks earlier about the same client and had learned that the client's inappropriate conduct was a concern to the employer and other staff. Ms. Ristine's willful and wanton disregard of the employer's interests and intentional violation of reasonable standards of conduct is highlighted by Ms. Ristine's trip to N.S.'s home right after the employer suspended her for engaging in inappropriate conversation with N.S. Ms. Ristine offers her religious faith as an excuse for the inappropriate conversation, but that factor does not mitigate the inappropriateness of the conduct.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Ms. Ristine was discharged for misconduct. Accordingly, Ms. Ristine 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. Ristine.

Iowa Code section 96.3(7) 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. The overpayment recovery law was updated in 2008. See Iowa Code section 96.3(7)(b). Under the revised law, a claimant will not be required to repay an overpayment of benefits if all of the following factors are met. First, the prior award of benefits must have been made in connection with a decision regarding the

claimant's separation from a particular employment. Second, the claimant must not have engaged in fraud or willful misrepresentation to obtain the benefits or in connection with the Agency's initial decision to award benefits. Third, the employer must not have participated at the initial fact-finding proceeding that resulted in the initial decision to award benefits. If Workforce Development determines there has been an overpayment of benefits, the employer will not be charged for the benefits, regardless of whether the claimant is required to repay the benefits.

Because the claimant has been deemed ineligible for benefits, any benefits the claimant has received would constitute an overpayment. Accordingly, the administrative law judge will remand the matter to the Claims Division for determination of whether there has been an overpayment, the amount of the overpayment, and whether the claimant will have to repay the benefits.

DECISION:

The Agency representative's May 1, 2009, reference 01, decision 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 employer's account will not be charged.

This matter is remanded to the Claims Division for determination of whether there has been an overpayment, the amount of the overpayment, and whether the claimant will have to repay the benefits.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/kjw