

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

NANCY R ALBERTS
Claimant

APPEAL NO 10A-UI-00515-VST

**ADMINISTRATIVE LAW JUDGE
DECISION**

CARE INITIATIVES
Employer

OC: 12/06/09
Claimant: Respondent (2R)

Section 96.5-2-A – Misconduct
Section 96.3-7 – Overpayment of Benefits

STATEMENT OF THE CASE:

Employer filed an appeal from a decision of a representative dated January 5, 2010, reference 01, which held claimant eligible for unemployment insurance benefits. After due notice, a telephone conference hearing was scheduled for and held on February 18, 2010. Claimant participated. Employer participated by Jenny West, Director of Nursing, and Chelsey Spears, Certified Nursing Assistant/Certified Medication Assistant. The employer was represented by Lynn Corbeil, Attorney at Law and Hearing Representative from TALX. The record consists of the testimony of Jenny West; the testimony of Chelsey Spears; the testimony of Nancy Alberts; and Employer's Exhibits 1-5.

ISSUE:

Whether the claimant was discharged for misconduct.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony of the witness and having considered all of the evidence in the record, makes the following findings of fact:

The employer is a nursing and rehabilitation facility located in State Center, Iowa. The claimant was hired on January 3, 2008, as an LPN/charge nurse. She worked from 6:00 p.m. to 6:00 a.m. She was the only nurse in the building when she was on duty during these night hours. The claimant was responsible for dispensing medications and administering treatments and for supervision of the staff, such as certified nursing assistants. The claimant was terminated on July 31, 2009.

The incident that led to the claimant's termination occurred on or about July 20, 2009. A resident had a prn order for milk of magnesia. The claimant did not know that the resident had been having loose stools for approximately five days. The resident had an excoriated bottom as well. The claimant had taken a bottle of milk of magnesia into the room and the resident told the claimant she did not want to take the medicine. The claimant told the resident that she was going to take the medicine right now. The resident was crying. The spoon with the milk of

magnesia got all over the resident's face and the claimant used the spoon to scoop the medicine off the claimant's face and put it in her mouth. The resident choked and as a result developed aspiration pneumonia and was hospitalized.

The incident was witnessed by Chelsey Spears. No management was on duty at the time and so Ms. Spears reported it when management was present. The claimant was off work. When she came back to work on July 31, 2009, she had a meeting with the Director of Nursing Jenny West and the former administrator. The decision was made to terminate the claimant since she had had previous medication errors and had been given a written warning for that as well as an interaction she had had with a resident's wife. The employer believed that the claimant had violated the resident's rights when she forced her to take the milk of magnesia, which is a violation of the employer's policy.

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.

Misconduct that disqualifies an individual from receiving unemployment insurance benefits occurs when there are deliberate acts or omissions that constitute a material breach of the duty a worker owes to the employer. The employer in this case, a nursing home, could reasonably expect that its employees would adhere to policies designed to insure proper patient care and respect of patient rights. The employer has the burden of proof to show misconduct.

After carefully considering all of the evidence in this case, the administrative law judge concludes that the employer has proven misconduct. The claimant recommended and dispensed milk of magnesia to a patient who was suffering from loose stools and had an excoriated bottom. The claimant conceded that she had not checked all the records on the resident but was going by her memory that the resident had been suffering from constipation in the past. Had she checked the records, she would have realized that a laxative was not needed. The witnesses do not agree on whether the resident asked for the milk of magnesia or what she reported as her symptoms. The witnesses also do not agree on how much force was used to administer the medication. What can be said for certain is that the resident was given the medication in such a manner that she choked and had to be hospitalized for aspiration pneumonia.

The misconduct in this case is the claimant's failure to check fully the resident's medical records before suggesting and giving the claimant the milk of magnesia. This omission on the claimant's part constitutes a material breach of the duty she owed to her employer. Accordingly, benefits are denied.

The next issue is overpayment of benefits. 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.

This matter is remanded to the Claims Section for a determination of the overpayment issue.

DECISION:

The decision of the representative dated January 5, 2010, reference 01, is reversed. Unemployment insurance benefits shall be withheld until claimant has worked in and been paid wages for insured work equal to ten times claimant's weekly benefit amount, provided claimant is otherwise eligible. This matter is remanded to the Claims Section for a determination of the overpayment issue.

Vicki L. Seeck
Administrative Law Judge

Decision Dated and Mailed

vls/css