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

DEBORAH A MCHENRY
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COLONIAL MANOR OF ELMA INC
407 – 9TH ST
ELMA IA 50628-8217

Appeal Number: 06A-UI-04309-RT
OC: 03/26/06 R: 03
Claimant: Respondent (1)

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 of Benefits

STATEMENT OF THE CASE:

The employer, Colonial Manor of Elma, Inc., filed a timely appeal from an unemployment insurance decision dated April 13, 2006, reference 01, allowing unemployment insurance benefits to the claimant, Deborah A. McHenry. After due notice was issued, a telephone hearing was held on May 8, 2006, with the claimant participating. Debra Vondersitt, Administrator, and Janice Howe, Director of Nursing, participated in the hearing for employer. Employer's Exhibits One and Two and Claimant's Exhibits A and B were admitted into evidence. The administrative law judge takes official notice of Iowa Workforce Development Department unemployment insurance records for the claimant.

By fax received by the Appeals Section on May 2, 2006, the claimant requested a subpoena of two witnesses. Because the administrative law judge was not in the office on May 2, 2006, he did not receive the subpoena request until May 3, 2006. The administrative law judge determined that there was not sufficient time to issue the subpoenas and have them timely delivered by the U. S. Postal Service by the time for the hearing. The administrative law judge informed the claimant at the hearing of this and further informed the claimant that if the testimony of either or both witnesses was necessary for a resolution in this matter that he could recess the hearing, issue the subpoenas, and reconvene the hearing and take the testimony of the crucial witnesses. Upon the completion of the hearing, the administrative law judge concluded that the testimony of these witnesses was not necessary and the claimant agreed.

FINDINGS OF FACT:

Having heard the testimony of the witnesses and having examined all of the evidence in the record, including Employer's Exhibits One and Two and Claimant's Exhibits A and B, the administrative law judge finds: The claimant was employed by the employer as a full-time licensed practical nurse (LPN) and charge nurse from September 14, 2005, until she was discharged on March 16, 2006. The claimant was discharged for rudeness to residents and staff and lack of compassion to the residents and insubordination. The incident that allegedly triggered the claimant's discharge was on March 8, 2006. On that day Resident A requested Tylenol from the claimant. Because the claimant was doing rounds and dealing with another resident she could not immediately deliver the Tylenol. The claimant delivered the Tylenol in about 20 minutes. The Tylenol was in a medicine cup and the medicine cup never left the claimant's hand but she thrust it at Resident A who took the medicine. Resident A complained about the claimant's behavior as did the family of Resident A. The family of Resident A was not present during this incident. The claimant was not discharged until March 16, 2006 when she left in the middle of a meeting. At that time the claimant was given no reason for her discharge but later was mailed a counseling form as shown at Employer's Exhibit One outlining the reason for the claimant's discharge.

The claimant received a suspension pursuant to a staff counseling, also shown at Employer's Exhibit One, when she had a confrontation with Resident B on January 23, 2006. On that day Resident B requested a bag of popcorn but the claimant in some way refused. Resident B had already had multiple snacks that day and the claimant, at the time of the request for the popcorn, was sharing information with the on-coming staff because it was at the end of one shift and the start of another shift. The claimant did show a picture of Resident B to the resident showing her weight but at Resident B's request. The claimant informed Resident B that if she did not stop eating and lose weight she would not be allowed to go home. The claimant was also suspended for telling Resident C to sit down and shut up but the claimant did not tell Resident C that. The suspension also included an occasion when Resident D requested a pain pill and the claimant stated that she would have to wait five minutes for it. The resident obtained the pain pill from someone else and the claimant informed the resident that she told her she would get it. The claimant received a written warning on October 28, 2005 as shown also at Employer's Exhibit One for an incident occurring on October 27, 2005 when the claimant allowed Resident E to sit on a bedpan all night and develop sores. Three staff members were equally responsible for the situation but the claimant was the supervisor on duty at the time. The claimant was warned for a lack supervision. The employer has policies as shown at Employer's Exhibit Two prohibiting violation of resident rights and insubordination and failing to accept supervision and direction.

On the day of the claimant's discharge, the claimant refused to discuss the matter with the employer because she had to leave work right away. The claimant did offer to come back later that day as testified to by the claimant and supported by Claimant's Exhibit B, but the claimant was discharged. Claimant's Exhibit A, a statement by a co-worker, supports the claimant's version of the incident occurring on March 8, 2006. Pursuant to her claim for unemployment insurance benefits filed effective March 26, 2006, the claimant has received unemployment insurance benefits in the amount of $1,944.00 as follows: $324.00 per week for six weeks from the benefit week ending April 1, 2006 to the benefit week ending May 6, 2006. Of that amount, $1,435.00 was offset against an overpayment from 2000. The overpayment balance is now zero.

REASONING AND CONCLUSIONS OF LAW:

The questions presented by this appeal are as follows:

1. Whether the claimant's separation from employment was a disqualifying event. It was not.

2. Whether the claimant is overpaid unemployment insurance benefits. She is not.

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).

871 IAC 24.32(8) provides:

> (8) Past acts of misconduct. While past acts and warnings can be used to determine the magnitude of a current act of misconduct, a discharge for misconduct cannot be based on such past act or acts. The termination of employment must be based on a current act.

The parties agree, and the administrative law judge concludes, that the claimant was discharged on March 16, 2006. In order to be disqualified to receive unemployment insurance benefits pursuant to a discharge, the claimant must have been discharged for a current act of disqualifying misconduct. It is well established that the employer has the burden to prove a current act of disqualifying misconduct. See Iowa Code section 96.6(2) and Cosper v. Iowa Department of Job Service, 321 N.W.2d 6, 11 (Iowa 1982) and its progeny. Although it is a close question, the administrative law judge concludes that the employer has failed to meet its burden of proof to demonstrate by a preponderance of the evidence that the claimant was discharged for a current act of disqualifying misconduct. The act giving rise to the claimant's discharge occurred on March 8, 2006.

The employer's first witness, Debra Vondersitt, Administrator, testified that on March 8, 2006 the claimant "threw" medicine at Resident A. However, the employer's other witness, Janice Howe, Director of Nursing, testified that the claimant did not physically throw the medicine but shoved it at Resident A. Neither was present during the incident and testified from what Resident A and the family of Resident A told them. However, the family of Resident A was not present either. Resident A informed the employer that she had to wait an hour and a half for her medicine. However, even the employer's witnesses testified that it was only 20 minutes that Resident A had to wait for her medicine. The claimant testified that she was busy doing rounds and dealing with another resident and it took her a few minutes to deliver the medicine but that she did deliver the medicine and Resident A took the medicine. Ms. Howe testified that the claimant did pass the medicine to Resident A in a medicine cup and the medicine cup never left the claimant's hand (therefore it was not thrown) but that the claimant did so in a sharp and snappy manner. The claimant's version of this incident is supported by a statement by a co-worker as shown at Claimant's Exhibit A. Because of the employer's initial overstatement that the claimant threw the medicine at Resident A and because of the supporting statement by a co-worker, the administrative law judge is constrained to conclude here that the testimony of the claimant is more credible than that of the employer's witnesses. Neither of the employer's witnesses were present and testified only from what they learned from Resident A. Resident A informed them that she had to wait an hour and a half but even the employer's witnesses conceded it was 20 minutes. It appears that Resident A was embellishing her story. The administrative law judge in no way condones any particularly rude or inappropriate behavior by a caregiver to an elderly person who is subject to the care of the caregiver but the administrative law judge must conclude here that there is not a preponderance of the evidence that the claimant's actions on March 8, 2006 that triggered her discharge rise to the level of disqualifying misconduct. There is not a preponderance of the evidence the claimant's actions on that occasion were deliberate acts constituting a material breach of her duties and obligations arising out of her worker's contract of employment or that they evince a willful or wanton disregard of the employer's interests or that they are carelessness or negligence in such a degree of recurrence as to establish disqualifying misconduct. At most, the claimant's

behaviors were mere inefficiency, unsatisfactory conduct and failure in good performance as a result of inability or incapacity or ordinary negligence in isolated instances and are not misconduct.

It is true that the claimant received a suspension on January 30, 2006 for various behaviors as set out in the Findings of Fact and also a written warning on October 28, 2005. The claimant had explanations for those incidents but they do not completely exonerate the claimant from inappropriate behavior. The administrative law judge concludes that the claimant was to some extent inappropriate with the residents which gave rise to the suspension and the written warning. However, all of those acts giving rise to the suspension and the warning occurred one and one-half months before the claimant's discharge. A discharge for those acts at this time would be a discharge for past acts and a discharge for disqualifying misconduct cannot be based on past acts. It is true that past acts and warnings can be used to determine the magnitude of a current act of misconduct but the administrative law judge concludes that those actions, and the suspension and warning thereto, do not establish that the claimant's actions on March 8, 2006 rise to the level of disqualifying misconduct. This is a close question. However, the administrative law judge is constrained to conclude that most of the testimony of the employer's witnesses was not as credible as that of the claimant for the reasons set out above and because the employer's witnesses testified almost entirely from hearsay. The claimant testified from direct knowledge and had a witness statement at Claimant's Exhibit A in support of the claimant's version of at least the incident on March 8, 2006. The administrative law judge concludes that there is not a preponderance of the evidence that the claimant's actions taken together were carelessness or negligence in such a degree of recurrence as to establish disqualifying misconduct.

In summary, and for all the reasons set out above, although it is a close question, the administrative law judge concludes that the claimant was discharged but not for a current act of disqualifying misconduct. Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of unemployment insurance benefits, and misconduct, to support a disqualification from unemployment insurance benefits, must be substantial in nature, including the evidence therefore. Fairfield Toyota, Inc. v. Bruegge, 449 N.W.2d 395, 398 (Iowa App. 1989). The administrative law judge is constrained to conclude that there is insufficient evidence of substantial current misconduct on the part of the claimant to warrant her disqualification to receive unemployment insurance benefits. Unemployment insurance benefits are allowed to the claimant, provided she is otherwise eligible.

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.
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> 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 administrative law judge concludes that the claimant has received unemployment insurance benefits in the amount of $1,944.00 since separating from the employer herein on or about March 16, 2006 and filing for such benefits effective March 26, 2006. The administrative law judge further concludes that the claimant is entitled to these benefits and is not overpaid such benefits.

DECISION:

The representative's decision of April 13, 2006, reference 01, is affirmed. The claimant, Deborah A. McHenry, is entitled to receive unemployment insurance benefits, provided she is otherwise eligible, because she was discharged but not for a current act of disqualifying misconduct. As a result of this decision, the claimant is not overpaid any unemployment insurance benefits arising out of her separation from the employer herein.

cs/pjs