

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

MYNA J DAVIS

Claimant

APPEAL NO. 09A-UI-09628-HT

**ADMINISTRATIVE LAW JUDGE
DECISION**

CARE INITIATIVES

Employer

OC: 05/03/09

Claimant: Respondent (2-R)

Section 96.5(2)a – Discharge

STATEMENT OF THE CASE:

The employer, Care Initiatives, filed an appeal from a decision dated June 24, 2009, reference 01. The decision allowed benefits to the claimant, Myna Davis. After due notice was issued, a hearing was held by telephone conference call on July 21, 2009. The claimant participated on her own behalf. The employer participated by Administrator Luann Modlin, Director of Nursing (DON) Ruth Van Gelder, and was represented by TALX in the person of Jennifer Coe. Exhibits One, Two, and Three admitted into the record.

The claimant elected to use a cell phone contrary to the recommendation against it on the notice of the hearing. At the beginning of the hearing the administrative law judge notified the claimant if her cell phone disconnected during the hearing she would not be called back until she contacted the Appeals Section to indicate she had either found another phone to use or her cell phone was working again.

At 11:52 a.m. the claimant's phone disconnected. The record was closed at that time with the consent of the employer. The claimant called back at 11:55 a.m. and was informed the record had been closed.

ISSUE:

The issue is whether the claimant was discharged for misconduct sufficient to warrant a denial of unemployment benefits.

FINDINGS OF FACT:

Myna Davis was employed by Care Initiatives from November 10, 1975 until May 4, 2009 as a full-time Medicare Coordinator and MDS assessor. It was her job to do assessments of new residents pertaining to many different factors. This information would be entered into the employer's data base and a care plan generated.

In July 2008 the Iowa Department of Inspections and Appeals found discrepancies in the files of some of the residents, all of which had been done by Ms. Davis. She was issued a written warning July 30, 2008, which notified the care plans must be updated daily with changes to

reflect current resident plan of care. It also advised her further disciplinary action, up to and including termination, would result if there any subsequent violations.

In April 2009, a corporate nurse consultant did an audit of the residents' files for an internal review. The report was sent to the employer around May 1, 2009, and noted 21 of 30 files reviewed showed missing or mismatched care plans, inaccurate, untimely and incomplete assessments and care plans, all of which were, again, done by the claimant. The decision was made to discharge her and she was notified on May 4, 2009.

The claimant had been made aware of her job duties in a written job description she signed on September 11, 2008. Failure to accurately and completely assess the residents could lead to the resident not getting the full or appropriate care needed. The employer could have been fined or otherwise sanctioned by the governing authority for not having the files up to date or complete.

Myna Davis has received unemployment benefits since filing a claim with an effective date of May 3, 2009.

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 claimant had been advised her job was in jeopardy as a result of her failure to do the resident assessments in a timely and accurate manner. In addition, her exact job duties were set out in a job description she received shortly after that warning.

In spite of the warning the claimant did not carry out her job duties as required, leaving the residents' files with inaccurate and incomplete information. This negatively impacted the care plans developed for each of the residents. The employer's obligation is to provide health and life care for dependent residents. The claimant's failure to perform her job duties as required is conduct not in the best interests of the employer and a violation of the duties and responsibilities the employer has the right to expect of an employee. The claimant is disqualified.

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.

The claimant has received unemployment benefits to which she is not entitled. The question of whether the claimant must repay these benefits is remanded to the UIS division.

DECISION:

The representative's decision of June 24, 2009, reference 01, is reversed. Myna Davis is disqualified and benefits are withheld until she has earned ten times her weekly benefit amount,

provided she is otherwise eligible. The issue of whether the claimant must repay the unemployment benefits is remanded to UIS division for determination.

Bonny G. Hendricksmeier
Administrative Law Judge

Decision Dated and Mailed

bgh/css