

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

TERI D FORTMANN
Claimant

APPEAL NO. 13A-UI-08796-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

IOWA PHYSICIANS CLINIC MEDICAL
Employer

OC: 06/30/13
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 July 22, 2013, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on September 4, 2013. Claimant Teri Fortmann participated. Lisa Lehmkuhl represented the employer and presented additional testimony through Gayle Wiegman. Exhibits One through Twelve 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: Teri Fortmann, R.N., was employed by Iowa Health Physicians and Clinics as a full-time clinical nurse from 2011 until June 24, 2013, when the employer discharged her from the employment. Lisa Lehmkuhl, Clinic Administrator, was Ms. Fortmann's immediate supervisor. Ms. Fortmann worked in a family medical clinic. Ms. Fortmann was assigned to assist one of the health care providers in the clinic, Dr. Janda. Ms. Fortmann's duties included escorting patients to and from exam room and otherwise preparing patients to see Dr. Janda. Ms. Fortmann's duties included facilitating patient referrals to other clinics or services and assisting in the clinic's lab.

The final events that triggered the discharge took place on June 20, 2013. On June 19, Ms. Fortmann was the only nurse assigned to assist Dr. Janda, one of the health care providers at the clinic. Dr. Janda ordinarily had more than one nurse assisting him. Prior to the shift, Ms. Fortmann had been under the impression that that there would be a float nurse also assisting Dr. Janda on June 19. Ms. Fortmann learned on the morning of June 19 that she would be the only nurse assisting Dr. Janda. During the shift, Ms. Fortmann told Dr. Janda that she was the only nurse assisting him and that, for that reason, she could not guarantee Dr. Janda would always be able to find her during the shift. During the shift, Ms. Fortmann spoke to other staff and patients about being the only nurse assisting Dr. Janda that day. During the shift, Ms. Lehmkuhl pulled Ms. Fortmann aside and told her to discontinue mentioning that she was Dr. Janda's only nurse and to display a positive attitude.

On June 20, 2013, Ms. Fortmann planned to leave on a vacation at the end of her short shift. Ms. Fortmann was scheduled to work until noon. At 10:30 a.m., Ms. Lehmkuhl directed Ms. Fortmann to complete some urgent tasks before she left that day. Those tasks included scheduling a patient for medical tests. Ms. Fortmann had documented that task as "done" on June 19, with a note that indicated she would take care of the scheduling on June 20. However, Ms. Lehmkuhl discovered on June 21 that Ms. Fortmann had left work on June 20 without completing the task and had instead left a note for the nurse who would be covering for her, indicating that the tests needed to be scheduled. When Ms. Lehmkuhl spoke to Ms. Fortmann at 10:30 a.m. on June 20, she had specifically authorized Ms. Fortmann to stay beyond noon if she needed to do that to get the urgent tasks accomplished. The employer's electronic task routing system categorized tasks as "urgent" or "routine." Though Ms. Fortmann knew Ms. Lehmkuhl wanted her to complete tasks beyond those marked "urgent" in the employer's task management system, Ms. Fortmann elected to complete only those tasks marked "urgent" in the task management system before she left at noon. Ms. Lehmkuhl later learned from one of the clinic physicians that immediately after Ms. Lehmkuhl had spoken to Ms. Fortmann at 10:30 a.m. on June 20 morning, Ms. Fortmann had announced that there was no way she was staying past noon that day.

On June 20, Ms. Fortmann erroneously faxed a patient's lab results and instructions to increase a medication to the wrong nursing home. Ms. Fortmann had not read and used the correct fax number and had erroneously used another fax number associated with another nursing home. The numbers were listed on the same sheet of paper. The nursing home that received the lab results alerted the clinic to the error and the employer then sent the results to the right nursing home. Sending the results to the wrong nursing home constituted a breach of the patient's confidentiality and delayed implementation of the doctor's order to increase a medication.

When Ms. Fortmann returned on June 24, 2013, Ms. Lehmkuhl met with Ms. Fortmann and discharged her for failing to perform essential functions and for insubordination.

In making the decision to discharge Ms. Fortmann from the employment, Ms. Lehmkuhl considered prior reprimands issued to Ms. Fortmann. On February 15, 2012, Ms. Lehmkuhl had issued a written reprimand to Ms. Fortmann for a February 12, 2012 failure to follow the absence reporting policy. The policy required that Ms. Fortmann report her need to be absent at least two hours prior to the scheduled start of her shift. Ms. Lehmkuhl had provided Ms. Fortmann with her home number for that purpose. Ms. Fortmann was aware of the policy. On February 12, Ms. Fortmann instead called the clinic at the scheduled start of her shift to report her need to be absent due to illness. On March 27, 2012, Ms. Fortmann failed to follow the appropriate safeguard steps to ensure that she was administering the correct combination vaccine to a patient and instead administered a combination vaccine that omitted vaccine for hepatitis B. The patient's mother discovered the error. Ms. Fortmann knew how to ensure that she was administering the correct vaccine. On January 3, 2013, Ms. Lehmkuhl verbally counseled Ms. Fortmann for intentionally representing on December 31, 2012 that she was caught up at the time she requested to leave work early. After Ms. Lehmkuhl approved the departure, she discovered that Ms. Fortmann had assigned tasks dating back to August that Ms. Fortmann had not yet completed. On January 17, 2013, Ms. Lehmkuhl reprimanded Ms. Fortmann for trying to return to work on January 16, 2013 without a medical release after an extended absence and then obtaining a release from one of the clinic providers who was not the provider who had treated her.

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) alone. 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).

Allegations of misconduct or dishonesty without additional evidence shall not be sufficient to result in disqualification. If the employer is unwilling to furnish available evidence to corroborate the allegation, misconduct cannot be established. See 871 IAC 24.32(4). When it is in a party's

power to produce more direct and satisfactory evidence than is actually produced, it may fairly be inferred that the more direct evidence will expose deficiencies in that party's case. See Crosser v. Iowa Dept. of Public Safety, 240 N.W.2d 682 (Iowa 1976).

The weight of the evidence in the record is sufficient to establish a pattern of conduct indicating a willful and wanton disregard of the employer's interests in providing appropriate medical care to patients. The evidence indicates that Ms. Fortmann elected to leave work promptly at noon on June 20, 2013, rather than complete the tasks that had been assigned to her that day. Ms. Fortmann left without notifying Ms. Lehmkuhl that she had not completed all of the tasks that Ms. Lehmkuhl had indicated needed to be done before Ms. Fortmann left. These included not scheduling a patient for important medical tests after Ms. Fortmann had documented on June 19 that she would take care of these matters on June 20. Ms. Lehmkuhl was more interested in starting her vacation than appropriately assisting with providing appropriate patient care. Ms. Fortmann indicated as much in the utterance overheard by one of the providers that morning. That same day, Ms. Fortmann breached the confidentiality of a patient and hindered patient care by sending lab results and a doctor's order to the wrong fax number. Of course, mistakes can be made, but the evidence indicates that Ms. Fortmann's misplaced priorities likely contributed to the error that day.

The evidence establishes carelessness and/or negligent in connection with multiple prior incidents. These included the March 2012 failure to follow appropriate safeguard steps to insure a patient was appropriately vaccinated for hepatitis B and the December 31, 2012 intentional misrepresentation that work was caught up to get time off when in fact the work was not caught up.

The evidence is sufficient to establish that Ms. Fortmann was discharged for misconduct. Accordingly, Ms. Fortmann 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.

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.

DECISION:

The agency representative's July 22, 2013, reference 01, decision is reversed. The claimant was discharged for misconduct. The claimant is disqualified for unemployment benefits until she has worked in and 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 adjudication of the overpayment issue.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/css