

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

PAM PIETEREK
Claimant

APPEAL NO. 11A-UI-11334-NT

**ADMINISTRATIVE LAW JUDGE
DECISION**

**HEARTLAND EMPLOYMENT
SERVICES LLC**
Employer

**OC: 07/24/11
Claimant: Respondent (2-R)**

Section 96.5-2-a – Discharge
Section 96.3-7 – Benefit Overpayment

STATEMENT OF THE CASE:

Heartland Employment Services LLC, doing business as Manor Care, filed a timely appeal from a representative's decision dated August 19, 2011, reference 01, which held the claimant eligible to receive unemployment insurance benefits. After due notice was issued, a telephone hearing was held on September 21, 2011. The claimant participated. The employer participated by Ms. Marnie Robbins, human resource director.

ISSUE:

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

FINDINGS OF FACT:

Having considered the evidence in the record, the administrative law judge finds: Pam Pieterек was employed by Heartland Employment Services, doing business as Manor Care, from April 26, 2010, until July 19, 2011, when she was discharged for violation of a company rule. Ms. Pieterек was employed as a full-time certified nursing assistant and was paid by the hour.

A decision was made to terminate the claimant based upon an incident that took place on July 14, 2011. On that date, the claimant was observed failing to follow nursing requirements by using a mechanical lift (hoyer lift) to transfer a patient. The matter was reported by another CNA who was working on the floor and recognized Ms. Pieterек's actions as being a violation of the facility's lifting policies.

Employees are expected to follow the resident's information sheet that is provided in the room of each resident. The resident in question was required to be transferred by a mechanical lift, and those instructions were included on the information sheet for the resident in question. Because the claimant had been specifically warned in the past for failure to follow lifting instructions and had received two other warnings for failure to follow policy, a decision was made to terminate Ms. Pieterек from employment. At the time of the investigation to discharge,

Ms. Pieterek did not indicate that she had received contrary instructions from any other source. It is the claimant's position that she had been informed by an unnamed person in the therapy department that a different type of lift was going to be implemented for the resident in question in the future. It is the claimant's further position that the "notebook" left at nursing stations indicated that an alternate lifting method was authorized for the resident in question.

REASONING AND CONCLUSIONS OF LAW:

The question before the administrative law judge is whether the evidence in the record establishes misconduct sufficient to warrant the denial of unemployment insurance benefits. It does.

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 may not necessarily be serious enough to warrant the 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 App. 1992).

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 upon such past acts. The termination of employment must be based upon a current act. See 871 IAC 24.32(8).

The evidence in the record establishes that the claimant was aware that she was required to follow nursing requirements set forth in each resident's information sheet. The claimant had been specifically warned in the past for failure to follow the required lifting procedures and requirements with residents. On the day in question, Ms. Pieterek did not follow the instructions on the resident's nursing sheet by using a mechanical lift to transfer the patient but instead engaged in transferring a patient without the required mechanical lift, jeopardizing not only the patient but the claimant's safety as well. When Ms. Pieterek requested the assistance of another CNA to assist in the unauthorized lifting, the other CNA refused and reported the matter. At the time of the investigation to discharge, Ms. Pieterek did not indicate that there were any extenuating circumstances or contrary instructions given regarding the lifting of this resident.

Based upon the importance of the employer's rule and the previous warning served against Ms. Pieterek, the administrative law judge concludes that the claimant's failure to follow the written instructions for this particular resident showed a disregard of the employer's interest and standards of behavior that the employer had reasonable right to expect of its employees under the provisions of the Employment Security Law. Unemployment insurance benefits are withheld.

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 issue of whether the claimant must repay unemployment insurance benefits is remanded to the Unemployment Insurance Services Division for a determination.

DECISION:

The representative's decision dated August 19, 2011, reference 01, is reversed. The claimant was disqualified. Unemployment insurance benefits are withheld until the claimant has worked in and been paid wages for insured work equal to ten times her weekly benefit amount, provided she meets all other eligibility requirements of Iowa law. The issue of whether the claimant must repay unemployment insurance benefits is remanded to the Unemployment Insurance Services Division for a determination.

Terence P. Nice
Administrative Law Judge

Decision Dated and Mailed

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