

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**ASHLEY R LEWISTON**  
Claimant

**APPEAL NO: 10A-UI-10103-ST**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**CAREAGE OF CLARION**  
Employer

**OC: 06/13/10  
Claimant: Respondent (2-R)**

Section 96.5-2-a – Discharge  
871 IAC 24.32(1) – Definition of Misconduct  
Section 96.3-7 – Recovery of Overpayment

**STATEMENT OF THE CASE:**

The employer appealed a department decision dated July 12, 2010, reference 01, that held the claimant was not discharged for misconduct on June 9, 2010, and benefits are allowed. A telephone hearing was held on September 1, 2010. The claimant participated. Maria Fulk, Office Manager, and Naomi Rothman, D.O.N., participated for the employer.

**ISSUES:**

Whether the claimant was discharged for misconduct in connection with employment.

Whether the claimant is overpaid benefits.

**FINDINGS OF FACT:**

The administrative law judge having heard the testimony of the witnesses, and having considered the evidence in the record, finds: The claimant began employment as a part-time C.N.A. on November 20, 2009, and last worked for the employer on June 8, 2010. The claimant received the employer policies in an employee handbook. It is policy that an employee report to the employer within three days any conviction of a criminal offense involving drugs or alcohol.

The claimant was convicted in Wright County, Iowa district court of possession of a controlled substance (marijuana) on May 21, 2010. She was placed on probation, ordered to pay a fine with a minimal incarceration, and she lost her driver's license privilege for six months. The claimant did not report the conviction to the employer.

After the conviction was reported to the employer by employees, the employer investigated the matter and confirmed it. When confronted by the employer, the claimant admitted the conviction and stated she was too busy to report it. The employer discharged the claimant on June 9, 2010 for violation of company policy by failing to report the conviction. The employer has zero tolerance for this issue with a primary concern being resident safety.

The claimant has received unemployment benefits on her current claim.

**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 administrative law judge concludes the employer has established claimant was discharged for misconduct in connection with employment on June 9, 2010, for violation of company policy.

The employer established the standard of behavior for the claimant when it issued the employee policy that required the reporting of the criminal conviction within 3 days. Although the drug possession charge was not directly related to claimant's work at the facility, the employer has a vested interest in protecting its residents. Resident safety and care are primary employer concerns, such that it is reasonable the employer be put on notice about any drug or alcohol employee related conviction. Claimant's failure to report her conviction within three days is a serious policy violation and it constitutes job disqualify misconduct.

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.

Since the claimant has received unemployment benefits on this claim, the overpayment issue is remanded to claims for a determination.

**DECISION:**

The department decision dated July 12, 2010, reference 01, is reversed. The claimant was discharged for misconduct on June 9, 2010. Benefits are denied until the claimant requalifies by working in and being paid wages for insured work equal to ten times her weekly benefit amount, provided the claimant is otherwise eligible. The overpayment issue is remanded.

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Randy L. Stephenson  
Administrative Law Judge

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Decision Dated and Mailed

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