

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

CAROL A OVERBEY
Claimant

APPEAL NO: 06A-UI-08262-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

GRANDVIEW HEIGHTS INC
Employer

**OC: 07/09/06 R: 02
Claimant: Respondent (2)**

Section 96.5(2)(a) – Discharge for Misconduct
Section 96.3(7) – Recovery of Overpayment

STATEMENT OF THE CASE:

Grandview Heights filed a timely appeal from the August 7, 2006, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on August 31, 2006. Human Resources Manager Craig Koonce represented the employer and presented additional evidence through Administrator Tom Hoskins, Director of Nursing Laurie Kramer, Certified Medical Assistant Kent Cooper and Licensed Practical Nurse Marlene Reeder. The claimant did not participate in the hearing. Prior to the hearing, the claimant indicated that she would not participate but wanted her statement to the fact-finder to be considered. Based on the claimant's request, the administrative law judge took official notice of the Agency's administrative file, a copy of which was provided to both parties prior to the hearing. In addition, the claimant provided a short statement, which was received into evidence as Exhibit A.

ISSUE:

Whether the claimant was discharged for intentional misconduct that disqualifies her for unemployment insurance benefits. She was.

Whether the claimant was discharged for recurrent negligence and/or carelessness that rose to the level of substantial misconduct that disqualifies her for benefits. She was.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Carol Overbey was employed by Grandview Heights nursing home as a full-time licensed practical nurse/charge nurse from April 19, 2006 until July 10, 2006, when Human Resources Manager Craig Koonce, Administrator Tom Hoskins, and Director of Nursing Laurie Kramer discharged her for falsifying medical records. Ms. Overbey's immediate supervisor was Unit Manager Amanda Hayward, R.N.

The final incident that prompted the discharge came to the attention of Ms. Hayward on July 8. On the morning of July 7, Ms. Hayward had misplaced the facility's only pulse-oximeter in

resident MB's room. A pulse-oximeter is an important medical tool used to measure a patient's heart rate and the oxygen saturation of the patient's blood. The pulse-oximeter had slipped out of Ms. Hayward's pocket while she was assisting at the foot of the resident's bed. Resident MB was transported from the facility within an hour. Accordingly, there was no need for the nursing staff to enter MB's room until MB was returned to the facility. The device, which is half the size of a deck of cards, landed in an inconspicuous place, where it remained until Ms. Hayward located it there the next morning. On the morning of July 8, the overnight nursing staff reported to Ms. Hayward that the pulse oximeter had been unavailable during the overnight shift. This information was what prompted Ms. Hayward to review her most recent use of the device the previous day and locate the device in the resident's room. Ms. Hayward had to move furniture to find the device.

Despite the fact that the pulse-oximeter was not available during the entire evening shift on July 7, Ms. Overbey recorded on resident RW's treatment record that at 2:50 p.m. she used the device to measure RW's oxygen saturation and that it was at 86 percent. This conjured number was based on a doctor's statement a few minutes earlier that "normal" for RW was at or above 85-86 percent. A normal blood oxygen saturation level is above 90 percent. At the time she recorded the bogus blood oxygen measurement, Ms. Overbey knew that resident RW suffered from respiratory problems that placed his health and life at risk. At 2:35 p.m., Ms. Overbey had recorded that she spoke with a doctor regarding RW, that the doctor had indicated that there was no need to measure RW's oxygen saturation every shift, and that the doctor had indicated that an oxygen saturation as low as 85-86 percent was normal for RW. Ms. Overbey's record of the communication failed to indicate whether she had provided the doctor with a current oxygen saturation measurement during the communication. The most recent measurement was from July 5, when RW's oxygen saturation was 84 percent.

After Ms. Hayward located the pulse-oximeter and determined it had been unavailable since she had misplaced it, Ms. Hayward commenced an investigation. Ms. Overbey provided a changing story as to where she had located the pulse-oximeter at the time she used it. Certified Medical Assistant Kent Cooper told Ms. Hayward that he had seen Ms. Overbey use the device, but based this assertion on his knowledge of Ms. Overbey's normal routine, rather than firsthand observations of what had actually taken place on July 7. One other licensed practical nurse on the evening had recorded that she, too, had used the pulse-oximeter to assess a resident in her care. Prior to Ms. Overbey's discharge, the other licensed practical nurse admitted that she had not in fact used the pulse-oximeter and that it had in fact been unavailable during the entire evening shift.

The final incident concerning the false documentation followed a prior incident of false documentation that had occurred in May. At that time, Ms. Overbey had gone back and changed medical records regarding prescription medication she had given to a resident. Established nursing practices prohibited Ms. Overbey from making such changes to the medical record. The final incident had also followed prior incidents of negligence on the part of Ms. Overbey. These included the May charting incident, in response to which the employer issued a reprimand. In addition, Ms. Overbey had failed to take any action concerning resident RW's oxygen saturation reading on July 3 that measured a critically low 74 percent.

Ms. Overbey established a claim for benefits that was effective July 9, 2006, and has received benefits.

REASONING AND CONCLUSIONS OF LAW:

The question is whether the evidence in the record establishes that Ms. Overbey was discharged for misconduct in connection with the employment. 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 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). The termination of employment must be based on a current act. See 871 IAC 24.32(8).

The greater weight of the evidence in the record establishes that Ms. Overbey intentionally misrepresented and documented on July 7 that she had taken a critical measure of a resident's health when she had not in fact done so. Ms. Overbey thereby placed the resident's health and life at risk. This intentional act constituted substantial misconduct in connection with the employment. This act and prior incidents involved negligence that was sufficiently recurrent as

to evidence a willful and wanton disregard of the interests of the employers, and of the residents in Ms. Overbey's care, and to establish recurrent violations of the employer's reasonable standards of conduct. The administrative law judge finds unreliable the confused, evolving and vacillating testimony provided by Mr. Cooper. In addition to being internally inconsistent, Mr. Cooper's testimony was contrary to the overwhelming weight of the evidence.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Ms. Overbey was discharged for misconduct. Accordingly, Ms. Overbey 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 paid to Ms. Overbey.

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.

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.

Because Ms. Overbey had received benefits for which she has been deemed ineligible, those benefits constitute an overpayment that Ms. Overbey must repay to Iowa Workforce Development. Ms. Overbey is overpaid \$1,588.00.

DECISION:

The Agency representative's August 7, 2006, reference 01, decision is reversed. The claimant was discharged for misconduct. The claimant is disqualified for unemployment benefits until she has worked in and been 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 for benefits paid to the claimant. The claimant is overpaid \$1,588.00.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/kjw