

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

ROBYN WHEELER
Claimant

APPEAL NO. 13A-UI-11616-BT

**ADMINISTRATIVE LAW JUDGE
DECISION**

BETHANY MANOR INC
Employer

OC: 09/15/13
Claimant: Respondent (2)

Iowa Code § 96.5(2)(a) - Discharge for Misconduct
Iowa Code § 96.3-7 - Overpayment

STATEMENT OF THE CASE:

Bethany Manor, Inc. (employer) appealed an unemployment insurance decision dated October 7, 2013, reference 01, which held that Robyn Wheeler (claimant) was eligible for unemployment insurance benefits. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on November 7, 2013. The claimant participated in the hearing with Attorney Jon Foley. The employer participated through Supervisor Anna Christensen, Human Resources Manager Cheryl Baker and Attorney Sarah Franklin. Employer's Exhibits One through Three were admitted into evidence.

ISSUES:

The issues are whether the claimant is disqualified for benefits, whether she was overpaid unemployment insurance benefits, whether she is responsible for repaying the overpayment and whether the employer's account is subject to charge.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds that: The claimant was employed as a full-time charge nurse/registered nurse from May 16, 2013 through September 13, 2013 when she was discharged for violation of two zero tolerance safety policies. All direct care staff members must wear gait belts when assisting ambulation and transfers of residents. There is zero tolerance for violation of this policy due to the potential for serious injury to staff and residents and an employee will be terminated when a gait belt is not used. The claimant signed for receipt of this policy on May 24, 2013. Additionally, residents who have alarms are not to be left alone on the toilet and the claimant signed for receipt of that policy on the same date. The claimant violated these two policies on September 11, 2013 by leaving an alarmed resident alone on the toilet and by assisting a resident without the use of a gait belt when it was required.

The claimant filed a claim for unemployment insurance benefits effective October 7, 2013 and has received benefits after the separation from employment in the amount of \$2,040.00.

REASONING AND CONCLUSIONS OF LAW:

The issue is whether the employer discharged the claimant for work-connected misconduct. A claimant is not qualified to receive unemployment insurance benefits if an employer has discharged the claimant for reasons constituting work-connected misconduct. Iowa Code § 96.5-2-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. 871 IAC 24.32(1).

The employer has the burden to prove the discharged employee is disqualified for benefits for misconduct. *Sallis v. Employment Appeal Bd.*, 437 N.W.2d 895, 896 (Iowa 1989). The claimant was discharged on September 13, 2013 for violation of mandatory safety policies. She admits violating the policies but explained that her actions were justified due to an emergency since there was no one there to help. She also claimed that she felt comfortable leaving the dementia resident alone on the toilet because the resident agreed to call for help before trying to get up.

If a dementia patient was capable of logical reasoning, she would not be in the dementia unit. Furthermore, the claimant was the charge nurse and she allowed a certified nursing assistant leave to get supplies when there were other options she could have taken which would not have left her short-handed. Considering the environment in which the claimant worked, a resident falling was not out of the ordinary and it was up to the claimant to ensure that all the residents were safe. A charge nurse is not only expected to follow the employer's policies but is held to an even higher standard of care. Consequently, the claimant's conduct is sufficient to constitute disqualifying misconduct. Benefits are denied.

Because the claimant has been deemed ineligible for benefits, any benefits she has received could constitute an overpayment. The unemployment insurance law requires benefits be recovered from a claimant who receives benefits from an initial decision and is later denied benefits from an appeal decision, even though the claimant acted in good faith and was not otherwise at fault. In some cases, the claimant might not have to repay the overpayment if both of the following conditions are met: 1) there was no fraud or willful misrepresentation by the claimant; and 2) the employer failed to participate in the fact-finding interview. If the overpayment is waived due to the employer's failure to participate, that employer's account continues to be subject to charge for the overpaid amount. See Iowa Code § 96.3-7.

In the case herein, the benefits were not received due to fraud or willful misrepresentation and the employer witness did not personally participate in the fact-finding interview. However, the employer representative sent in detailed written documentation which contained factual information regarding the reasons for the discharge. In accordance with the Agency definition of participation, the employer participated in the fact-finding interview and its account is not subject to charge. See 871 IAC 24.10. Consequently, a waiver cannot be considered and the claimant is responsible for repaying the overpayment amount of \$2,040.00.

DECISION:

The unemployment insurance decision dated October 7, 2013, reference 01, is reversed. The claimant is not eligible to receive unemployment insurance benefits because she was discharged from work for misconduct. Benefits are withheld 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 claimant is overpaid benefits in the amount of \$2,040.00

Susan D. Ackerman
Administrative Law Judge

Decision Dated and Mailed

sda/css