

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

ASHLEY LEE
Claimant

APPEAL NO: 12A-UI-14849-ET

**ADMINISTRATIVE LAW JUDGE
DECISION**

THE NEW HOMESTEAD
Employer

OC: 11/04/12
Claimant: Appellant (1R)

Section 96.5-2-a – Discharge/Misconduct
Section 96.3-7 – Recovery of Benefit Overpayment

STATEMENT OF THE CASE:

The claimant filed a timely appeal from the December 12, 2012, reference 02, decision that denied benefits to the claimant. After due notice was issued, a hearing was held by telephone conference call before Administrative Law Judge Julie Elder on February 27, 2013. The claimant participated in the hearing with Attorney Martin Ozga. Maradith Janssen, Administrator; Cindy Simpson, Human Resources & Payroll; and Lori Caltrider, DON; participated in the hearing on behalf of the employer. Employer's Exhibits One through Ten were admitted into evidence.

ISSUE:

The issue is whether the employer discharged the claimant for work-connected misconduct.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed as a full-time LPN for The New Homestead from November 2, 2009 to November 7, 2012. She was discharged for failing to follow the employer's policies and procedures.

On March 28, 2012, the claimant received a performance improvement action plan after a resident's call light was on 17 minutes before being answered (Employer's Exhibit Nine). On April 3, 2012, she received a performance improvement action plan for failing to document a treatment she completed March 5, 2012 (Employer's Exhibit Eight). On June 7, 2012, she received a performance improvement action plan for "excessive failure to use the time clock system when clocking in for work and taking breaks. Oral reminder that three to five incidents in a month are excessive" (Employer's Exhibit Seven). On July 25, 2012, she received a reeducation after a resident and his family complained that the claimant was rude when dealing with the resident. (Employer's Exhibit Six). The employer told the claimant to "be more personable and talk to residents about the tasks you are trying to perform with them"

(Employer's Exhibit Six). On September 4, 2012, the claimant received reeducation because she failed to complete a resident's re-admittance paperwork after the resident returned from the hospital (Employer's Exhibit Five). The claimant did not chart the doctor's orders for the resident (Employer's Exhibit Five). On September 10, 2012, the claimant received reeducation for violating the employer's policy by using and carrying her cell phone on the floor while working and not on lunch or break (Employer's Exhibit Four). On October 19, 2012, the claimant received a coaching after she failed to document that a resident's doctor was notified because the resident's blood pressure was high (Employer's Exhibit Three). She also failed to document on the medication administration record (MAR) that the medications for apartment five were administered (Employer's Exhibit Three). On October 25, 2012, the claimant failed to carry the assisted living pager because it was locked in the medication room, which was the second violation of that nature within two weeks (Employer's Exhibit One). On October 28, 2012, the claimant displayed inappropriate and unprofessional behavior when training a new nurse because she refused to talk to the new nurse, making her very uncomfortable (Employer's Exhibit One). On October 29, 2012, the claimant received reeducation after a doctor sent a fax regarding placing a barrier on an abdominal fold and the need to monitor the area and the claimant failed to place the orders on the hot charting or treatment administration record (TAR) for further monitoring as required by the order (Employer's Exhibit Two). Between November 18, 2009 and May 19, 2011, the claimant received five performance improvement action plans and three coaching forms for various violations of the employer's policies and procedures (Employer's Exhibit Ten).

The employer hired Lori Caltrider as the new DON November 1, 2012. Prior to being named DON, Ms. Caltrider was a charge nurse for the employer and then assistant DON for the employer for three years before becoming DON. After the situation involving the new nurse trainee October 28, 2012, the employer reviewed the claimant's disciplinary record and noticed a pattern of failing to properly document, rudeness/unprofessionalism, failing to carry the assisted living pager, and generally not consistently following the employer's policies and procedures. The claimant would show improvement after being disciplined but would then revert to her previous behavior. Consequently, the employer terminated the claimant's employment November 7, 2012.

The claimant claimed and received unemployment insurance benefits from the week ending November 10 through December 8, 2012.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment due to job-related misconduct.

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 claimant was reeducated, coached, warned and placed on performance improvement action plans on at least 17 occasions between November 18, 2009 and October 29, 2012, with nine of those occurring during the last nine months of her employment. While she would show improvement in the areas she was counseled on for short periods of time, indicating an understanding and ability to do the job to the employer's standards and expectations, she inevitably slid back into her unacceptable behaviors. The employer's industry is heavily regulated and the employer must comply with state rules and regulations. The claimant's repetitive policy violations showed a disregard for those standards and placed the employer in jeopardy of being fined or, worst case scenario, losing its license. Finally, while the claimant was not formally told her job was in jeopardy, she admitted being aware of that fact when she used that as an excuse for treating the nurse she was training disrespectfully and unprofessionally. Under these circumstances, the administrative law judge concludes the claimant's conduct demonstrated a willful disregard of the standards of behavior the employer has the right to expect of employees and shows an intentional and substantial disregard of the employer's interests and the employee's duties and obligations to the employer. The employer has met its burden of proving disqualifying job misconduct. Cosper v. IDJS, 321 N.W.2d 6 (Iowa 1982). Therefore, benefits must be denied.

The unemployment insurance law provides that benefits must be recovered from a claimant who receives benefits and is later determined to be ineligible for benefits, even though the claimant acted in good faith and was not otherwise at fault. However, the overpayment will not be recovered when it is based on a reversal on appeal of an initial determination to award benefits on an issue regarding the claimant's employment separation if: (1) the benefits were not received due to any fraud or willful misrepresentation by the claimant and (2) the employer did not participate in the initial proceeding to award benefits. The employer will not be charged for benefits whether or not the overpayment is recovered. Iowa Code section 96.3-7. In this case, the claimant has received benefits but was not eligible for those benefits. The matter of determining the amount of the overpayment and whether the overpayment should be recovered under Iowa Code section 96.3-7-b is remanded to the Agency.

DECISION:

The December 12, 2012, reference 02, decision is affirmed. The claimant was discharged from employment due to job-related misconduct. Benefits are withheld until such time as 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 has received benefits but was not eligible for those benefits. The matter of determining the amount of the overpayment and whether the overpayment should be recovered under Iowa Code section 96.3-7-b is remanded to the Agency.

Julie Elder
Administrative Law Judge

Decision Dated and Mailed

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