

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

JESSICA L VAN FLEET
Claimant

APPEAL NO. 07A-UI-00663-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

CARE INITIATIVES
Employer

**OC: 12/24/06 R: 03
Claimant: Respondent (2)**

Iowa Code section 96.5(2)(a) – Discharge for Misconduct
Iowa Code section 96.3(7) – Recovery of Benefits

STATEMENT OF THE CASE:

Care Initiatives filed a timely appeal from the January 16, 2007, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on February 20, 2007. Claimant Jessica Van Fleet participated personally and was represented by Attorney Alan Wilson. Attorney Lynn Corbeil of Johnson & Associates/TALX UC eXpress represented the employer and presented testimony through Director of Nursing Lori Pearson, Certified Nursing Assistant Vickie Grimes, Volunteer Barbara Jennings, and Social Worker Denise Conway. The administrative law judge took official notice of the Agency's record of payments to the claimant and received Employer's Exhibits One through Seven and Nine through 13 in to evidence.

ISSUE:

Whether the claimant was discharged for misconduct in connection with the employment that disqualifies the claimant for unemployment insurance benefits.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Jessica Van Fleet was employed by Care Initiatives as a full-time Certified Nursing Assistant (C.N.A.) from September 14, 2004 until October 25, 2006, when Director of Nursing Lori Pearson discharged her for abusing an elderly resident.

On October 24, 2006, Ms. Van Fleet went to the dining room of the nursing care facility for the purpose of transporting a resident from the dining room. The resident suffers from dementia. The resident was confined to a "geri chair" or recliner due to a hip injury. Another C.N.A. and a volunteer were in the dining room in the vicinity of Ms. Van Fleet and the resident in question. Ms. Van Fleet was behind the resident's chair when the resident attempted to slap Ms. Van Fleet. The employer's established protocol required Ms. Van Fleet to seek assistance from other staff and/or momentarily step away from the resident if the resident became aggressive. Ms. Van Fleet was aware of the protocol. However, in response to the resident's attempts to hit her, Ms. Van Fleet used both hands to grab the resident's cheeks and pinched and twisted them hard. The resident told Ms. Van Fleet to stop and recommenced her attempts to hit Ms. Van

Fleet. Ms. Van Fleet proceeded to hold down the resident's hands or wrists. The employer's established protocol prohibited staff from restraining residents unless necessary to prevent the resident from causing harm to the resident. Ms. Van Fleet was aware of this protocol. The resident was not at risk of harm at the time Ms. Van Fleet squeezed the resident's cheeks or held down the resident's hands or wrists.

C.N.A. Vickie Grimes witnessed Ms. Van Fleet's assaultive behavior and submitted a written report to Director of Nursing Lori Pearson the same day. Ms. Pearson interviewed Ms. Grimes and other staff on duty at the time of the incident. Volunteer Barbara Jennings had also witnessed Ms. Van Fleet's assaultive behavior. Ms. Pearson concluded her investigation by interviewing Ms. Van Fleet. Ms. Van Fleet denied pinching or squeezing the resident's cheeks. Ms. Pearson discharged Ms. Van Fleet pursuant to the employer's written policy concerning resident abuse. Ms. Van Fleet was aware of the policy. Ms. Van Fleet had received additional training and certification regarding dependent adult abuse.

Ms. Van Fleet established a claim for benefits that was effective December 24, 2006 and received benefits totaling \$1,009.00.

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 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).

The greater weight of the evidence in the record establishes that on October 24, 2006, Ms. Van Fleet knowingly and willfully engaged in an act of dependent adult abuse against a resident under her care. Ms. Van Fleet assaulted a female resident by forcefully squeezing and twisting the resident's cheeks. Ms. Van Fleet's conduct was not in self-defense. Ms. Van Fleet's conduct was in violation of the employer's well established protocols. Ms. Van Fleet's conduct was in willful and wanton disregard of her duties to the resident in her care and the interests of the employer and violated standards of conduct the employer reasonably expected of its employees.

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

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. Van Fleet has received benefits for which she has been deemed ineligible, those benefits constitute an overpayment that Ms. Van Fleet must repay to Iowa Workforce Development. Ms. Van Fleet is overpaid \$1,009.00.

DECISION:

The Agency representative's January 16, 2007, reference 01, decision is reversed. The claimant was discharged for misconduct. The claimant is disqualified for unemployment benefits until she has worked in and 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. The claimant is overpaid \$1,009.00.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/pjs