

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

ASHLEY A NOVAK
Claimant

APPEAL NO. 14A-UI-03185-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

GOOD SAMARITAN SOCIETY INC
Employer

OC: 02/23/14
Claimant: Respondent (2)

Iowa Code Section 96.5(2)(a) – Discharge for Misconduct
Iowa Code Section 96.3(7) – Overpayment of Benefits

STATEMENT OF THE CASE:

The employer filed a timely appeal from the March 13, 2014, reference 01, decision that allowed benefits to the claimant provided the claimant was otherwise eligible and that held the employer's account could be charged for benefits. After due notice was issued, a hearing was held on April 15, 2014. Claimant Ashley Novak participated. K.D. Kalber represented the employer and presented additional testimony through Paula Clarke, Staci Nielsen, and Patricia Johnson. The administrative law judge took official notice of the agency's record of benefits disbursed to the claimant and received Exhibits One, Two, Three and Five through 11 into evidence. The administrative law judge took official notice of the documents submitted for and generated in connection with the fact-finding interview, but did so only for the purpose of determining whether the employer participated in the fact-finding interview.

ISSUES:

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

Whether the claimant has been overpaid benefits.

Whether the claimant must repay benefits.

Whether the employer's account may be charged for benefits.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Ashley Novak was employed by Good Samaritan Society, Inc., as a certified nursing assistant from 2008 until February 24, 2014, when Paula Clarke, Director of Nursing, and Staci Nielsen, Recruitment Specialist, discharged her from the employment. Ms. Clarke was Ms. Novak's supervisor.

The final incident that triggered the discharge occurred on February 24, 2014, when Patricia Johnson, R.N., observed Ms. Novak sitting on a resident's bed with her cell phone in her hand. Ms. Novak had the phone between her knees and was holding the phone in both hands as if she was texting at the time. Ms. Johnson said, "No," and shook her head to indicate to Ms. Novak that her conduct was not acceptable. When the employer subsequently questioned Ms. Novak about why she had been using her phone, Ms. Novak asserted that she had only been checking the time. Ms. Novak's manner of handling the phone on February 24, 2014 was inconsistent with someone just using the phone to check the time and was indicative instead of texting or other active use of the phone. The employer had a written policy that prohibited employees from using cell phones in resident care areas. The purpose of the policy was, in part, to preserve the resident's right of privacy. The policy was contained in the employee handbook that had most recently been provided to Ms. Novak in May 2013. Ms. Novak had previously been counseled twice for prohibited use of her cell phone in the workplace. On October 25, 2013, Ms. Novak received a written reprimand for using her cell phone in a resident care area.

Prior to the cell phone incident on February 24, 2014, the next most recent conduct that factored in the discharge involved two events on February 21, 2014. On that morning, Ms. Novak spent about 16 minutes chatting with the scheduler about picking up shifts and about Ms. Novak's recent vacation. The chatting took place at a time when Ms. Novak was supposed to be assisting with getting residents up and to breakfast and at a time when one of the residents assigned to Ms. Novak had his or her call light to request assistance. The resident had to wait almost six minutes for someone to respond to the call light because Ms. Novak was busy chatting with the scheduler. Half an hour later, Ms. Novak took an unauthorized extended break in her car. Ms. Novak was allowed a paid 10-minute break, but was absent from the building for 21 minutes.

The next most recent incident that factored in the discharge occurred on December 30, 2013, when Ms. Novak transferred a resident with a mechanical hoist and used the wrong sized sling. The sling size to be used when transferring the resident was documented in resident's care plan. A hard copy of the care plan was kept at the nurses' desk and a computer copy was available at a computer kiosk near the resident's room. Ms. Novak knew she was supposed to review the care plan for such information. Ms. Novak elected to skip review of the care plan and instead used the sling that was already attached to the hoist. Ms. Novak used a large sling when the resident's care plan called for use of a medium sling. Use of the wrong sized sling placed the resident at risk of a fall during the transfer.

Ms. Novak established a claim for unemployment insurance benefits that was effective February 23, 2014. Her weekly benefit amount was set at \$446.00. Ms. Novak has received \$3,459.00 in benefits for the eight-week period of February 23, 2014, through April 19, 2014.

The employer participated in the fact-finding interview that led to the March 13, 2014, reference 01, decision that allowed benefits to the claimant provided the claimant was otherwise eligible and that held the employer's account could be charged for benefits. Paula Clarke and Staci Nielsen each provided an oral statement to the claims deputy.

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).

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). In determining whether the conduct that prompted the discharge constituted a "current act," the administrative law judge considers the date on which the conduct came to the attention of the employer and the date on which the employer notified the claimant that the conduct subjected the claimant to possible discharge. See also Greene v. EAB, 426 N.W.2d 659, 662 (Iowa App. 1988).

Allegations of misconduct or dishonesty without additional evidence shall not be sufficient to result in disqualification. If the employer is unwilling to furnish available evidence to corroborate the allegation, misconduct cannot be established. See 871 IAC 24.32(4). When it is in a party's power to produce more direct and satisfactory evidence than is actually produced, it may fairly be inferred that the more direct evidence will expose deficiencies in that party's case. See Crosser v. Iowa Dept. of Public Safety, 240 N.W.2d 682 (Iowa 1976).

The evidence in the record establishes that Ms. Novak knowingly and intentionally violated the employer's cell phone policy on February 24, 2014. The weight of the evidence indicates that Ms. Johnson witnessed Ms. Novak actively using her cell phone in a restricted area. Ms. Novak had not left the cell phone in the car. Ms. Novak was not merely checking the time. In light of the prior reprimand for similar conduct, Ms. Novak's use of her cell phone on February 24, 2014 was by itself sufficient misconduct in connection with the employment to disqualify her for unemployment insurance benefits. Ms. Novak engaged in a pattern of carelessness and negligence that indicated a willful and wanton disregard of the standards of conduct that the employer reasonably expected of her and other employees. On November 21, Ms. Novak elected to ignore her duties during a busy part of the day and instead spend 16 minutes chatting with a coworker. During that time that Ms. Novak neglected her duties, a resident's call light was on. Had Ms. Novak been in her assigned work area, she would have seen the call light and the resident would likely have received a more timely response. On that same morning, Ms. Novak neglected her duties for another 11 minutes while she took an unauthorized extended break. At the end of December 2013, Ms. Novak had neglected to review a resident's care plan and had transferred the resident with the wrong sized sling attached to the mechanical hoist. The pattern of negligence and carelessness also establishes misconduct in connection with the employment.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Ms. Novak was discharged for misconduct. Accordingly, Ms. Novak 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 unemployment insurance law requires benefits be recovered from a claimant who receives benefits and is later denied benefits even if the claimant acted in good faith and was not at fault. However, a claimant will not have to repay an overpayment when an initial decision to award benefits on an employment separation issue is reversed on appeal if two conditions are met: (1) the claimant did not receive the benefits due to fraud or willful misrepresentation, and (2) the employer failed to participate in the initial proceeding that awarded benefits. In addition, if a claimant is not required to repay an overpayment because the employer failed to participate in the initial proceeding, the employer's account will be charged for the overpaid benefits. Iowa Code § 96.3-7-a, -b.

The claimant received benefits but has been denied benefits as a result of this decision. The claimant, therefore, was overpaid \$3,459.00 in benefits for the eight-week period of February 23, 2014, through April 19, 2014. Because the employer participated in the fact-finding interview, the claimant is required to repay the overpayment and the employer will not be charged for benefits paid.

DECISION:

The claims deputy's March 13, 2014, 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 claimant was overpaid \$3,459.00 in benefits for the eight-week period of February 23, 2014, through April 19, 2014. Because the employer participated in the fact-finding interview, the claimant is required to repay the overpayment and the employer will not be charged for benefits paid.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/pjs