

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

MARY PADEN

Claimant

APPEAL NO: 13A-UI-02722-BT

**ADMINISTRATIVE LAW JUDGE
DECISION**

BARTELS LUTHERAN HOME INC

Employer

OC: 02/03/13

Claimant: Respondent (2/R)

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

Iowa Code § 96.3-7 - Overpayment

STATEMENT OF THE CASE:

Bartels Lutheran Home, Inc. (employer) appealed an unemployment insurance decision dated February 28, 2013, reference 01, which held that Mary Paden (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 April 3, 2013. The claimant participated in the hearing. The employer participated through Cindy Guyer, Health Services Manager and Carol Brown, Human Resources Coordinator. Employer's Exhibits One through Ten were admitted into evidence. Based on the evidence, the arguments of the parties, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUE:

The issue is whether the claimant was discharged for misconduct sufficient to warrant a denial of unemployment benefits.

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 licensed practical nurse from October 2, 1997 through January 25, 2013 and was most recently working as a full-time charge nurse. She was discharged pursuant to the employer's progressive disciplinary policy. The employer's disciplinary policy is categorized into Group I, II, and III offenses. Violations of a Group I offense will result in a verbal warning, a written warning, a suspension and termination. A violation of a Group II offense will result in a written warning, a suspension and termination and violation of a Group III offense results in immediate termination.

The claimant was counseled on November 23, 2011 regarding the importance of noting orders correctly. She was re-educated on January 10, 2012 for failing to perform the requirements of the job. The claimant signed that she received two speech therapy recommendations for two different residents but failed to fax the physician orders for either resident, failed to address the C.N.A. sheets and the Care Plans, and failed to place the recommendations for the staff to

follow the monitoring guidelines the Speech Therapist recommended. Her lack of actions placed both residents at risk for aspiration.

The employer issued her a Group II written warning on January 25, 2012 for failure to perform the requirements of the job. The claimant failed to document on January 17, 2013 that she had provided a resident's necessary wound care even though she had treated the wound. A Group I verbal warning was issued on December 13, 2012 for unintentional failure to observe written or oral instructions. The claimant left an opened medication bubble pack with a dose of Cephalexin 500 mg on the top of her cart while she passed medication in a different wing.

A Group II three-day suspension was issued on January 7, 2013 for failure to follow prescribed resident safety measures and/or care plan or violation of Resident Bill of Rights. On December 26, 2012, a resident's Coumadin dosage was changed per doctor's orders and a sticker with "Directions Change, Refer to Chart" was placed on the medication bubble pack. The claimant gave the resident the wrong dosage later that day and the next which had the potential to cause grievous harm to the resident.

The claimant received a third Group II discipline on January 25, 2013 which resulted in her termination. The discipline was issued for conduct detrimental to company operations which results in negative public relations, patient care or residents' rights. The final warning resulted from incidents on January 14, 15, 16 and 17. On January 14, 2013, the daughter of a resident asked the claimant how her mother was doing. The resident was terminal and the daughter wanted to make sure her mother was as comfortable as possible. Even though the claimant was the charge nurse, she told the daughter she needed to speak with the nurse on B wing.

On January 15, 2013, the daughter of a different resident, who had recently returned from the hospital where she was sent for aspiration, found her mother's untouched food tray at the nurse's station. She questioned the claimant as to why the tray had not been delivered or administered to her mother but received no response. The daughter then asked if she could take the tray to feed her mother in her room and the claimant responded "ok" without looking at her. On January 16, 2013, the daughter returned that evening to again find her mother was not in the dining hall. She questioned the claimant about it and the claimant said, "I never said that she COULDN'T eat in the dining room tonight." After that, the claimant turned her back on the daughter and started to walk away. The daughter subsequently complained about the claimant's lack of concern for her mother and her dismissive manner.

The claimant left medications unlocked and unattended on January 17, 2013. This was her second Group II violation which would have resulted in termination by itself but since it occurred during an on-going investigation, the Group III offenses were the primary reason for termination.

The claimant filed a claim for unemployment insurance benefits effective February 3, 2013 and has received benefits after the separation from employment.

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.

Iowa Code § 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 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 January 25, 2013 pursuant to the employer's progressive disciplinary policy. She had been previously warned and since she was a charge nurse, the claimant was well aware of the employer's disciplinary policy. The claimant denies walking away from the resident's daughter on January 16, 2013 but did admit turning her back to the daughter. She contends she was calling support staff to move the resident but it was not necessary to turn her back on the daughter to do that. Additionally, the claimant felt it important to tell the daughter that she did not say the resident could not eat in the dining room. However, this was not the issue and was really of no concern to the daughter. Her main concern was to deny accountability when it should have been for the resident's welfare. The claimant's conduct shows a willful or wanton disregard of the standard of behavior the employer has the right to expect from an employee, as well as an intentional and substantial disregard of the employer's interests and of the employee's duties and obligations to the employer. Work-connected misconduct as defined by the unemployment insurance law has been established in this case and benefits are denied.

Iowa Code § 96.3(7) 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. The overpayment recovery law was updated in 2008.

See Iowa Code § 96.3(7)(b). Under the revised law, a claimant will not be required to repay an overpayment of benefits if all of the following factors are met. First, the prior award of benefits must have been made in connection with a decision regarding the claimant's separation from a particular employment. Second, the claimant must not have engaged in fraud or willful misrepresentation to obtain the benefits or in connection with the Agency's initial decision to award benefits. Third, the employer must not have participated at the initial fact-finding proceeding that resulted in the initial decision to award benefits. If Workforce Development determines there has been an overpayment of benefits, the employer will not be charged for the benefits, regardless of whether the claimant is required to repay the benefits.

Because the claimant has been deemed ineligible for benefits, any benefits the claimant has received could constitute an overpayment. Accordingly, the administrative law judge will remand the matter to the Claims Division for determination of whether there has been an overpayment, the amount of the overpayment, and whether the claimant will have to repay the benefits.

DECISION:

The unemployment insurance decision dated February 28, 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 matter is remanded to the Claims Section for investigation and determination of the overpayment issue.

Susan D. Ackerman
Administrative Law Judge

Decision Dated and Mailed

sda/pjs