

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

NENA L CRAFTON
Claimant

APPEAL NO. 10A-UI-04957-H2T

**ADMINISTRATIVE LAW JUDGE
DECISION**

LONGHOUSE NORTSHIRE LTD
Employer

OC: 09-20-09
Claimant: Respondent (2R)

Iowa Code § 96.5(2)a – Discharge/Misconduct
Iowa Code § 96.3(7) – Recovery of Benefit Overpayment

STATEMENT OF THE CASE:

The employer filed a timely appeal from the March 26, 2010, reference 02, decision that allowed benefits. After due notice was issued, a hearing was held on May 13, 2010. The claimant did not participate as she did not answer the telephone when called to begin the hearing. The employer did participate through Kathy Petit, Director Nursing Services and Tim Christy, Administrator.

ISSUE:

Was the claimant discharged due to job related misconduct?

Has the claimant been overpaid any unemployment insurance benefits?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed as a certified nursing assistant part time beginning November 1, 2006 through March 8, 2010 when she was discharged.

The claimant was ill with a non-work-related respiratory illness and was off work for a period of time. On September 19, 2009 she presented work restrictions to her employer which prohibited her from any bending, standing or lifting. The employer was able to provide the claimant with two hours of work per day that met her non-work-related work restrictions. The claimant assisted with feeding residents. The employer offered the claimant FMLA leave but the claimant did not want to apply for it because she wanted to explore other options open to her such as social security disability benefits. The employer believed that the claimant wanted to be discharged so she could apply for benefits. In January the claimant asked the employer to lay her off so she could receive unemployment insurance benefits. The employer refused as they had work available for the claimant and were accommodating her work restrictions. The employer had accommodated the claimant's over forty days of missed work, her numerous hospitalizations and her work restrictions due to the non-work-related illness. At their meeting on March 8, the claimant told the employer she could no longer perform any of her duties as a

certified nurse's aide. When the claimant told the employer that she could not physically perform any of her job duties as a certified nurse's aide and that she would not apply for FMLA leave to protect her job, she was discharged.

The claimant has received unemployment benefits after the separation on a claim with an effective date of September 20, 2009.

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 § 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 had the option to apply for FMLA leave to protect her job but chose not to do so because she wanted to seek social security disability benefits. The employer was accommodating her work restrictions. The claimant did not believe she could work and would not provide any information to support an FMLA application and she would not continue working. Under such circumstances the employer has established that the claimant's failure to work under her work restrictions and her failure to seek FMLA is job connected misconduct sufficient to disqualify her from receipt of unemployment insurance benefits. Benefits are denied.

Iowa Code § 96.3-7, as amended in 2008, provides:

7. Recovery of overpayment of benefits.

a. 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.

b. (1) 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. However, provided the benefits were not received as the result of fraud or willful misrepresentation by the individual, benefits shall not be recovered from an individual if the employer did not participate in the initial determination to award benefits pursuant to section 96.6, subsection 2, and an overpayment occurred because of a subsequent reversal on appeal regarding the issue of the individual's separation from employment. The employer shall not be charged with the benefits.

(2) An accounting firm, agent, unemployment insurance accounting firm, or other entity that represents an employer in unemployment claim matters and demonstrates a continuous pattern of failing to participate in the initial determinations to award benefits, as determined and defined by rule by the department, shall be denied permission by the department to represent any employers in unemployment insurance matters. This subparagraph does not apply to attorneys or counselors admitted to practice in the courts of this state pursuant to section 602.10101.

Because the claimant's separation was disqualifying, benefits were paid to which the claimant was not entitled. 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 § 96.3(7). In this case, the claimant has received benefits but was not eligible for those benefits.

DECISION:

The March 26, 2010 (reference 02) decision is reversed. 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.

REMAND:

The matter of determining the amount of the potential overpayment and whether the overpayment should be recovered under Iowa Code § 96.3(7)b is remanded to the Agency.

Teresa K. Hillary
Administrative Law Judge

Decision Dated and Mailed

tkh/pjs