

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

JUDY M FOGARTY
Claimant

APPEAL NO. 10A-UI-17668-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

CARE INITIATIVES
Employer

OC: 11/21/10
Claimant: Respondent (2-R)

Section 96.5(2)(a) – Discharge for Misconduct

STATEMENT OF THE CASE:

The employer filed a timely appeal from the December 15, 2010, reference 02, decision that allowed benefits. After due notice was issued, a hearing was held on February 11, 2011. The claimant participated. Tom Kuiper of TALX represented the employer and presented testimony through Tabitha Wilker, Sarah Thomas, Amanda Watts, and Troy Marker. Exhibits One through Nine were received into evidence. The hearing in this matter was consolidated with the hearing in Appeal Number 10A-UI-17667-JTT.

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: Judy Fogarty was employed by Care Initiatives as a full-time overnight charge nurse from April 2009 until November 23, 2010, when Sarah Thomas, Director of Nursing, and Tabitha Wilker, Administrator, discharged her for negligence and for intentional deviation from the employer's established protocols and/or established nursing practices.

The final incident that triggered the discharge occurred during the overnight shift that started on November 19, 2010. Ms. Fogarty was charged with caring for a resident who had just returned to the facility after being hospitalized. The resident was recovering from a hip fracture. Ms. Fogarty charted that the resident had slept throughout the night. Ms. Fogarty did not chart that she had given the resident any medication. There was a physician's order for Lortab or Tylenol as needed for pain. Ms. Fogarty was supposed to follow the physician's order. Ms. Fogarty provided the resident with Tylenol one or two times, but did not chart either medication. Ms. Fogarty concluded during the night that the Tylenol was not addressing the resident's pain. There was not a prescription filled for the resident's new Lortab dosage, but there was an E-Kit, an emergency medication kit, from which Ms. Fogarty could obtain the appropriate Lortab dosage so that the resident's pain could be properly managed pursuant to the doctor's order. Ms. Fogarty did not access the E-Kit. When the morning charge nurse,

Amanda Watts, R.N., arrived, she very quickly became aware that the resident was in pain because the resident was moaning. When Ms. Watts mentioned the E-Kit, Ms. Fogarty said she had forgotten about it. Even if Ms. Fogarty had not had access to the E-Kit, established procedure called for Ms. Fogarty to contact the doctor on call. Ms. Fogarty did not do that. Through Ms. Fogarty's action, or inaction, the resident's pain went improperly managed during her shift.

The final incident followed an incident on November 2, 2010, wherein Ms. Fogarty failed to chart a resident's fall. The resident suffered an abrasion to her nose. A Certified Nursing Assistant, Troy Marker, notified Ms. Fogarty of the fall before attempting to move the patient, pursuant to the established protocol. Ms. Fogarty told Mr. Marker that they needed to quickly return the resident to bed so that she would not have to complete paperwork in connection with the fall. The employer's established protocol required that Ms. Fogarty chart any resident fall. Ms. Fogarty did not chart anything regarding the fall, despite the fact that the resident had an abrasion on her nose. Later in the shift, Ms. Fogarty told Mr. Marker that the resident's fall would be their "little secret." Mr. Marker subsequently notified D.O.N. Thomas of the resident's fall.

In making the decision to discharge Ms. Fogarty, the employer considered other prior incidents. On June 8, 2010, Ms. Fogarty obtained a urine specimen and urinalysis for the wrong resident because she failed to review the resident's chart to see whether there was a doctor's order for urinalysis for that resident. The employer had to pay for the unnecessary urinalysis because it could not be billed to an insurance company in the absence of a doctor's order. On July 14 and 28, 2010, Ms. Fogarty failed to dispense a resident's osteoporosis medication. On at least two times between August 2 and September 6, 2010, Ms. Fogarty wrote in a bogus number for the resident census rather than do a proper head count. Ms. Fogarty was charged with accurately recording the census on shifts when she was the charge nurse.

The employer issued reprimands in connection all of the above matters. In connection with the November 2 undocumented fall, Ms. Thomas warned Ms. Fogarty that further conduct would result in discharge from the employment.

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 a pattern of carelessness, negligence, and intentional deviation from established work rules or nursing practices that indicated a willful disregard of the employer's interests and of the interests of the residents in Ms. Fogarty's care. In connection with the final incident, a resident recovering from a fractured hip had to spend a night in unnecessary pain because Ms. Fogarty neglected to take reasonable steps to manage his pain. In addition, Ms. Fogarty failed to properly chart the medications or care she had provided to the resident. Ms. Fogarty created a bogus charting record by charting that the resident slept through the night without incident. This incident followed another incident earlier in November when Ms. Fogarty intentionally failed to chart a resident's fall and encouraged a subordinate C.N.A. to withhold information from the employer. These very serious matters followed an already established pattern of negligence documented through prior reprimands.

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

Iowa Code section 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 section 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 would 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 Agency representative's December 15, 2010, reference 02, 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 employer's account will not be charged.

This matter is remanded 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.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/kjw