IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

SARAH BROPHY Claimant **COLONIAL MANOR OF ELMA INC** Employer	**APPEAL 21A-UI-15462-SN-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 08/30/20** **Claimant: Respondent (1)**

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Admin. Code r. 871-24.32(1)a – Discharge for Misconduct
Iowa Code § 96.3(7) – Recovery of Benefit Overpayment
Iowa Admin. Code r. 871-24.10 – Recovery of Benefit Overpayment
PL 116-136, Sec. 2104 – Federal Pandemic Unemployment Compensation

STATEMENT OF THE CASE:

The employer, Colonial Manor of Elma Inc., filed an appeal from the July 2, 2021, (reference 01) unemployment insurance decision that granted benefits based upon based on the conclusion that she was discharged but misconduct was not shown. The parties were properly notified of the hearing. A telephone hearing was held on August 31, 2021. The claimant participated and testified. She was represented by Nathaniel W. Schwickerath. The employer participated through Administrator Jenny Johnson and Certified Nursing Assistant Jenn Smith. Exhibits 1, 2, 3, and A were received into the record.

ISSUES:

Was the claimant discharged for disqualifying job-related misconduct?

Was the claimant overpaid regular unemployment insurance benefits? If so, was the claimant excused from repaying those benefits due to the employer's non-participation at fact-finding?

Was the claimant overpaid Federal Pandemic Unemployment Compensation benefits?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds:

The claimant worked as a full-time assisted living manager / human resources director from October 28, 2000, until August 31, 2020, when she was discharged. The claimant reported directly to Administrator Jenny Johnson. The claimant also performed registered nurse functions for the employer.

The employer has a personal guidebook that outlines its various policies. Within that guidebook is a code of conduct. The code of conduct requires all staff to act in the best interest of patients

that staff provide care for. The claimant was aware of the code of conduct because she received a copy of the personal guidebook at the time of hire in 2000.

As an assisted living facility, the employer is subject to regulation by the Department of Inspections and Appeals (DIA). There are specific provisions in the Iowa administrative code that specify how the employer complies. Of pertinent part, the Iowa Administrative Code outlines the following requirements.

- Iowa Admin. Code r. 67-9(4) states the program's registered nurse shall ensure certified and non-certified staff communicate in writing occurrences that differences in the tenant's normal health, functional and cognitive status.

- Iowa Admin. Code r. 69-26(4) states, inter alia, that tenants shall have an individualized service plan that outlines their needs, the services provided and their service providers.

- Iowa Admin. Code r. 69-27(1) states that if a tenant does not receive care, but there is an observed change in the tenant's condition, then a nurse review needs to be conducted. It further states that every 90 days or after improvement or after a significant change in a tenant's condition, a nurse shall make sure medications are consistent with medication orders.

In order to comply with these and other regulations, the employer was regularly audited by employees of ABCM Corporation. These were not disciplinary meetings because the consultant was not empowered to impose discipline on the claimant.

On March 6, 2019, the claimant received an exit report from an audit conducted. On the exit report, the claimant was instructed to bill each tenant for the three meals they received each day.

On October 15, 2019, the claimant received an exit report from an audit conducted. On the exit report, the claimant was told that she must bill tenants for each meal served. This was important because the employer could only bill tenants for services that were being documented in the plan of car. The exit report also stated that progress notes should reflect a doctor's orders.

On April 20, 2020, Tasha Steevy-Johnson, told the claimant the instruction regarding billing tenants for each meal served would only apply to new tenants going forward.

On May 28, 2020, the claimant received a verbal counseling regarding leaving the premises without informing anyone. The employer provided a copy of this verbal counseling. (Exhibit 2)

On August 22, 2020, ABCM Corporation Auditor Crystal Schriber discovered several issues with the claimant's performance. Ms. Schriber discovered the claimant was not billing any tenants for their evening meal. She also found physician's orders were not documented or followed. Finally, the claimant had not been conducting necessary change assessments. After Ms. Schriber discovered these issues, Ms. Johnson asked the claimant to come in on her day off and add documentation that was missing from a tenant's charts regarding reports of back pain from August 4, 2020 to August 22, 2020. Specifically, Ms. Johnson told the claimant that all communication with tenants had to be documented.

On August 31, 2020, Ms. Johnson and ABCM Corporation Auditor Crystal Schriber decided to terminate the claimant's employment. The claimant's termination notice gives the following

rationale for her termination, “Service plans, billing and documentation is not the correct reflection of tenants’ needs. Physician orders [sic] not followed or documented. All of the same concerns on October 15, 2019 are still of concern. Significant change assessments not completed. Tenant on isolation for 13 days [sic] not full 14 days. Several complaints to [the] admin[istrator] [and] corp[orate] related to the AL Manager.” The employer provided a copy of the claimant’s termination notice.

The claimant testified she was shocked by her termination. She had not received any disciplinary warnings prior to being terminated. In fact Ms. Johnson could not even clearly articulate why she was being terminated.

On September 3, 2020, Ms. Johnson sent the claimant a text message stating that she had been thinking about the claimant and her separation from the company. Ms. Johnson added she hoped the claimant understood “hands were died and so both of her ankles.” Ms. Johnson then encouraged the claimant to file for unemployment. The claimant provided a copy of this text message. (Exhibit A)

The following section outlines the findings of fact necessary for the overpayment issue:

The administrative record KFFV shows the parties were sent a notice of fact finding on June 17, 2021 for a fact finding interview occurring on June 30, 2017. Respondent participated through Director of Nursing Larina Heing and CNA Jenn Smith. The claimant was on the line.

The claimant filed an original claim for benefits on August 30, 2020. The claimant filed for and received benefits for twenty-six weeks from the week ending September 5, 2020 to the week ending February 27, 2021. The claimant received Federal Pandemic Unemployment Compensation benefits from the week ending January 9, 2021 to the week ending March 2, 2021.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes claimant was discharged from employment for no disqualifying reason. Since the claimant is entitled to benefits, the overpayment issues are moot.

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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. *Huntoon v. Iowa Department of Job Service*, 275 N.W.2d 445, 448 (Iowa 1979).

The employer has the burden of proof in establishing disqualifying job misconduct. *Cosper v. Iowa Dep't of Job Serv.*, 321 N.W.2d 6 (Iowa 1982). The issue is not whether the employer made a correct decision in separating claimant, but whether the claimant is entitled to unemployment insurance benefits. *Infante v. Iowa Dep't of Job Serv.*, 364 N.W.2d 262 (Iowa Ct. App. 1984). Misconduct must be "substantial" to warrant a denial of job insurance benefits. *Newman v. Iowa Dep't of Job Serv.*, 351 N.W.2d 806 (Iowa Ct. App. 1984).

In an at-will employment environment an employer may discharge an employee for any number of reasons or no reason at all if it is not contrary to public policy, but if it fails to meet its burden of proof to establish job related misconduct as the reason for the separation, it incurs potential liability for unemployment insurance benefits related to that separation. A determination as to whether an employee's act is misconduct does not rest solely on the interpretation or application of the employer's policy or rule. A violation is not necessarily disqualifying misconduct even if the employer was fully within its rights to impose discipline up to or including discharge for the incident under its policy.

The conduct for which claimant was either ordinary negligence or due to instructions by a former administrator that clashed with instructions given in the audits in 2019. To the extent that the circumstances surrounding each accident were not similar enough to establish a pattern of misbehavior, the employer has only shown that claimant was negligent. "[M]ere negligence is not enough to constitute misconduct." *Lee v. Employment Appeal Board*, 616 N.W.2d 661, 666 (Iowa 2000). A claimant will not be disqualified if the employer shows only "inadvertencies or ordinary negligence in isolated instances." 871 IAC 24.32(1)(a). When looking at an alleged pattern of negligence, previous incidents are considered when deciding whether a "degree of recurrence" indicates culpability. Claimant was careless, but the carelessness does not indicate "such degree of recurrence as to manifest equal culpability, wrongful intent or evil design" such that it could accurately be called misconduct. Iowa Admin. Code r. 871-24.32(1)(a); *Greenwell v. Emp't Appeal Bd.*, No. 15-0154 (Iowa Ct. App. Mar. 23, 2016).

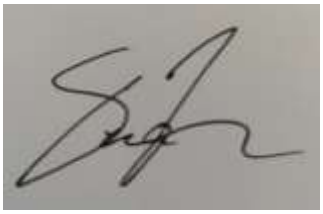
Ordinary negligence is all that is proven here. Because the employer has failed to establish disqualifying misconduct, benefits are allowed, provided claimant is otherwise eligible. The claimant credibly testified she believed she was following instructions from a past administrator

in grandfathering in existing tenants to the arrangement regarding meal billing. She also was not aware of the other deficiencies in her performance until just prior to her termination.

An employee is entitled to fair warning that the employer will no longer tolerate certain performance and conduct. Without fair warning, an employee has no reasonable way of knowing that there are changes that need be made in order to preserve the employment. If an employer expects an employee to conform to certain expectations or face discharge, appropriate (preferably written), detailed, and reasonable notice should be given. Training or general notice to staff about a policy is not considered a disciplinary warning. Inasmuch as employer had not previously warned claimant about the issues leading to the separation, it has not met the burden of proof to establish that claimant acted deliberately or with recurrent negligence in violation of company policy, procedure, or prior warning.

DECISION:

The July 2, 2021, (reference 01) unemployment insurance decision is affirmed. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided she is otherwise eligible. Any benefits claimed and withheld on this basis shall be paid. Since the claimant is entitled to benefits, the overpayment issues are moot.



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September 16, 2021
Decision Dated and Mailed

smn/ol