IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

LAURA K. EDLER
Claimant

PINNACLE HEALTH FACILITIES XVII L
Employer

APPEAL NO: 17A-UI-07435-JE-T

ADMINISTRATIVE LAW JUDGE DECISION

OC: 06/11/17
Claimant: Respondent (2)

Section 96.5-2-a – Discharge/Misconduct
Section 96.3-7 – Recovery of Benefit Overpayment

STATEMENT OF THE CASE:

The employer filed a timely appeal from the July 10, 2017, reference 01, decision that allowed benefits to the claimant. After due notice was issued, a hearing was held by telephone conference call before Administrative Law Judge, Julie Elder on August 23, 2017. Randy Sparks, Administrator and Kathy Bush, Regional Nurse Consultant, participated in the hearing on behalf of the employer. Employer's Exhibit One was admitted into evidence.

ISSUE:

The issue is whether the employer discharged the claimant for work-connected misconduct.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed as a full-time D.O.N. for Pinnacle Health Facilities XVII L from September 9, 2015 to May 8, 2017. She was discharged for diverting narcotic medications from residents.

On May 3, 2017, two nurses reported concerns about the claimant to Administrator Randy Sparks. He notified Regional Nurse Consultant, Kathy Bush who happened to be at the facility. They interviewed both of the nurses, separately, and were told they both felt the claimant was "possibly diverting medication for some time" but they were "not able to come up with anything definitive and did not have concrete evidence to support this opinion until May 3, 2017" (Employer's Exhibit One). Both nurses said the claimant was administering "an excessive amount of PRN" pain medication to Resident A, "a confused and disoriented resident" (Employer's Exhibit One). The nurses indicated Resident A was only receiving excessive amounts of the PRN medication when the claimant was working (Employer's Exhibit One). The nurses also told Mr. Sparks that a new card (prescription) of 30 hydrocodone came in for Resident A and both found that "odd as she still had a card of tablets left in the narcotic drawer" (Employer's Exhibit One). When they went to put the new card away they noted that the previous card and count sheet for Resident A's pain medication were both missing" (Employer's Exhibit One).

The nurses also both told the employer of a recent incident where Resident C had several teeth extracted at the VA Center and returned with a large bottle of hydrocodone (Employer's Exhibit One). Resident C, who is HIV positive, had blood on his clothes, his hands and on the bottle of hydrocodone (Employer's Exhibit One). The claimant took the bottle of hydrocodone, double bagged it and stated she was going to put it in the biohazard bags because the medication could not be used (Employer's Exhibit One). The claimant did not count the medication, make a count sheet and neither of the nurses observed the claimant put the medication in the biohazard container (Employer's Exhibit One). The claimant failed to follow the employer's policy on disposal of medication.

Ms. Bush contacted the pharmacy to update it on the situation with Resident A's medication and the pharmacist told her it would be "sending out a new card of oxycodone/acetaminophen 5/325 for (Resident B) on the evening delivery of May 3, 2017" and that medication may have been ordered too soon (Employer's Exhibit One). Resident B "also had another card of oxycodone and it was odd that a new card would have been ordered" (Employer's Exhibit A). Mr. Sparks could not tell who ordered that medication because there were no signatures. Mr. Sparks "was present during the morning medication count May 4, 2017, and observed the new cards of hydrocodone for Resident A and oxycodone for Resident B were not in the narcotic drawer and could not be located" (Employer's Exhibit One). The count sheets were also missing (Employer's Exhibit One). Mr. Sparks immediately interviewed the claimant who initially stated she did not have keys to the narcotic drawer to put the medications away the preceding evening (Employer's Exhibit One). The claimant was the only nurse on duty that night and all other non-narcotic medication was put away correctly indicating the claimant did have keys to the medication carts that evening (Employer's Exhibit One). The claimant stated she took Resident A's medication out of the cart and planned to discontinue it (Employer's One). She put the card on her desk and was going to put it in medications for destruction when she received the order to discontinue in the future (Employer's Exhibit One). The employer then questioned the claimant about Resident B's oxycodone and she had a visible reaction, "became very nervous, face flushed" and stated she did not have the keys to the medication carts the night before (Employer's Exhibit One). The claimant indicated she put Resident B's narcotic medication in the bottom drawer of another medication cart and retrieved it at that time for the employer (Employer's Exhibit One). The employer found the situation suspicious for potential diversion because the medication should have been "put away upon delivery" in the 300 hall medication cart rather than held by the claimant and placed at the bottom of another medication cart and again the claimant did have keys to the medication cart the evening of May 3, 2017 (Employer's Exhibit One).

Ms. Bush then contacted the Polk City Police Department and an officer was sent to the facility to take statements from the two nurses who brought the situation to the employer's attention. She then contacted Medicare/Medicaid Fraud Investigator Kyle Paxton who "specializes in drug diversions" (Employer's Exhibit One). The claimant submitted to an observed drug screen which tested positive for opiates. The claimant provided a prescription for hydrocodone (Employer's Exhibit One).

The employer suspended the claimant pending further investigation May 4, 2017. When conducting the investigation, the employer learned the claimant falsified her employment application (Employer's Exhibit One). The employer discovered through Mr. Paxton that the claimant was discharged from Grundy Care Center for drug diversion but she stated on her application she voluntarily left that position because she "no longer desired D.O.N. position" (Employer's Exhibit One). She left blank the question on her application regarding whether her license had "ever been subject to disciplinary action (such as suspension or revocation)?" (Employer's Exhibit One). There was action taken against her license for drug diversion when

she worked at Cedar Valley Hospice (Employer's Exhibit One). The claimant indicated on her application she left her employment there because she "needed a break from working in hospice care" when in fact her employment at Cedar Valley Hospice was terminated (Employer's Exhibit One).

The claimant was arrested in Polk County for the situation involving this employer and was arrested in Grundy County for suspicion of drug diversion at the Grundy Care Center. The employer terminated the claimant's employment May 8, 2017.

The claimant has claimed and received unemployment insurance benefits in the amount of $3,840.00 for the eight weeks ending August 5, 2017.

The employer did not participate in the fact-finding interview.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment for disqualifying job misconduct.

Iowa Code section 96.5(2)a provides:

> An individual shall be disqualified for benefits, regardless of the source of the individual's wage credits:
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> 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 disqualification shall continue 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.

Iowa Admin. Code r. 871-24.32(1)a provides:

> Discharge for misconduct.
>
> (1) Definition.
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> 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 Dep't of Job Serv.,* 275 N.W.2d 445, 448 (Iowa 1979).

The employer has the burden of proving disqualifying misconduct. *Cosper v. Iowa Department of Job Service*, 321 N.W.2d 6 (Iowa 1982). A claimant is not qualified to receive unemployment insurance benefits if an employer has discharged him for reasons constituting work-connected misconduct. Iowa Code section 96.5-2-a. Misconduct that disqualifies an individual from receiving unemployment insurance benefits occurs when there are deliberate acts or omissions that constitute a material breach of the worker's duties and obligations to the employer. See 871 IAC 24.32(1).

The claimant ordered another card of hydrocodone for Resident A before it was needed and did not place the medication or the count sheet in the narcotic drawer of the medication cart May 3, 2017. When Ms. Bush spoke with the pharmacy about that prescription May 3, 2017, she was told of a medication card of oxycodone that was ordered for Resident B before it was needed. That prescription was also missing from the medication cart May 3 and May 4, 2017. When the employer questioned the claimant about it she produced Resident A's hydrocodone from her desk and Resident B's oxycodone from the bottom of another medication cart where it did not belong. Contrary to what the claimant originally told the employer, she did have the keys to the medication carts May 3, 2017.

The claimant failed to follow the employer's narcotics policies. While the evidence does not establish that she removed these medications from the facility, she failed to place both medications properly in the medication cart May 3, 2017. Although the claimant initially stated she put one prescription on her desk and the other in a different medication cart because she did not have keys to the medication carts, that statement was false as the non-narcotic medications were placed in the correct medication carts proving the claimant, as the only nurse on duty, did have the keys to the carts. The claimant's actions led the employer to believe she planned to divert the two medications in question because both were ordered while the residents still had medication from the previous prescriptions on hand and the claimant put one on her desk and one in the wrong place in a different medication cart where she could have conceivably retrieved it for personal use at a later time.

The employer must account for every narcotic tablet in the facility and has strict rules and procedures in place to do so. At best the claimant failed to follow those policies placing the facility in danger of suffering consequences from the state.

Under these circumstances, the administrative law judge concludes the claimant's conduct demonstrated a willful disregard of the standards of behavior the employer has the right to expect of employees and shows an intentional and substantial disregard of the employer's interests and the employee's duties and obligations to the employer. The employer has met its burden of proving disqualifying job misconduct. *Cosper v. IDJS*, 321 N.W.2d 6 (Iowa 1982). Therefore, benefits are denied.

Iowa Admin. Code r. 871-24.10 provides:

> Employer and employer representative participation in fact-finding interviews.
>
> (1) "Participate," as the term is used for employers in the context of the initial determination to award benefits pursuant to Iowa Code section 96.6, subsection 2, means submitting detailed factual information of the quantity and quality that if unrebutted would be sufficient to result in a decision favorable to the employer. The most

effective means to participate is to provide live testimony at the interview from a witness with firsthand knowledge of the events leading to the separation. If no live testimony is provided, the employer must provide the name and telephone number of an employee with firsthand information who may be contacted, if necessary, for rebuttal. A party may also participate by providing detailed written statements or documents that provide detailed factual information of the events leading to separation. At a minimum, the information provided by the employer or the employer's representative must identify the dates and particular circumstances of the incident or incidents, including, in the case of discharge, the act or omissions of the claimant or, in the event of a voluntary separation, the stated reason for the quit. The specific rule or policy must be submitted if the claimant was discharged for violating such rule or policy. In the case of discharge for attendance violations, the information must include the circumstances of all incidents the employer or the employer's representative contends meet the definition of unexcused absences as set forth in 871—subrule 24.32(7). On the other hand, written or oral statements or general conclusions without supporting detailed factual information and information submitted after the fact-finding decision has been issued are not considered participation within the meaning of the statute.

(2) "A continuous pattern of nonparticipation in the initial determination to award benefits," pursuant to Iowa Code section 96.6, subsection 2, as the term is used for an entity representing employers, means on 25 or more occasions in a calendar quarter beginning with the first calendar quarter of 2009, the entity files appeals after failing to participate. Appeals filed but withdrawn before the day of the contested case hearing will not be considered in determining if a continuous pattern of nonparticipation exists. The division administrator shall notify the employer's representative in writing after each such appeal.

(3) If the division administrator finds that an entity representing employers as defined in Iowa Code section 96.6, subsection 2, has engaged in a continuous pattern of nonparticipation, the division administrator shall suspend said representative for a period of up to six months on the first occasion, up to one year on the second occasion and up to ten years on the third or subsequent occasion. Suspension by the division administrator constitutes final agency action and may be appealed pursuant to Iowa Code section 17A.19.

(4) "Fraud or willful misrepresentation by the individual," as the term is used for claimants in the context of the initial determination to award benefits pursuant to Iowa Code section 96.6, subsection 2, means providing knowingly false statements or knowingly false denials of material facts for the purpose of obtaining unemployment insurance benefits. Statements or denials may be either oral or written by the claimant. Inadvertent misstatements or mistakes made in good faith are not considered fraud or willful misrepresentation.

This rule is intended to implement Iowa Code section 96.3(7)"b" as amended by 2008 Iowa Acts, Senate File 2160.

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 section 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 benefits.

Because the claimant did not receive benefits due to fraud or willful misrepresentation and employer failed to participate in the finding interview, the claimant is not required to repay the overpayment and the employer remains subject to charge for the overpaid benefits.

871 IAC 24.10 provides that if the employer chooses not to personally participate in the fact-finding interview, it must provide the name and telephone number of an employee with first-hand information who may be contacted, if necessary, for rebuttal. The only number provided was for a Thomas & Company employee, Courtney Currie, and when called for rebuttal by the fact-finder she was not available. Providing Ms. Currie's name and telephone number does not meet the requirement because she is not an employee with first-hand information. Additionally, if an employer chooses to participate through written documentation it "at a minimum must identify the dates and particular circumstances of the incident or incidents." 871 IAC 24.10. The written documentation supplied by the employer does not meet that standard and cannot be considered participation within the meaning of the law.

Consequently, the claimant's overpayment of benefits must be waived as to the claimant and her overpayment, in the amount of $3,840.00 for the eight weeks ending August 5, 2017, shall be charged to the employer's account.

DECISION:

The July 10, 2017, reference 01, 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. The claimant has received benefits but was not eligible for those benefits. The employer did not participate in the fact-finding interview within the meaning of the law. Therefore, the claimant's overpayment of benefits, in the amount of $3,840.00 for the eight weeks ending August 5, 2017, shall be charged to the employer's account.

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Julie Elder
Administrative Law Judge

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Decision Dated and Mailed

je/scn