

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**DEBRA L TAMMINGA**  
Claimant

**APPEAL NO. 12A-UI-02782-HT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**CARE INITIATIVES**  
Employer

**OC: 01/22/12**  
**Claimant: Respondent (2-R)**

Section 96.5(2)a – Discharge

**STATEMENT OF THE CASE:**

The employer, Care Initiatives, filed an appeal from a decision dated March 12, 2012, reference 01. The decision allowed benefits to the claimant, Debra Tamminga. After due notice was issued, a hearing was held by telephone conference call on April 4, 2012. The claimant participated on her own behalf. The employer participated by Administrator Jalissa Simmons, DON Heather Reed and was represented by TALX in the person of David Williams

**ISSUE:**

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

**FINDINGS OF FACT:**

Debra Tamminga was employed by Care Initiatives from March 17, 2006 until January 19, 2012 as a full-time LPN. She was issued a verbal warning May 15, 2011, for giving the wrong medication to a resident which resulted in the resident being hospitalized. On August 30, 2011, she was given a written warning for not notifying the doctor or family, or the facility dietary department when a resident developed a serious skin condition. In addition, she did not fill out an incident report and did not document the situation in the nurse's notes. On November 16, 2011, she was given a final written warning and three-day suspension for failing to properly document that a resident had suffered a fall.

On January 16, 2012, a resident had declined to go to lunch, stating he was "still full" from breakfast. This resident has a hernia and a gastric reflux condition and the lack of appetite could have been signs of a flare up of these problems. Standards of care call for the nurse to do a full assessment in that case and Ms. Tamminga failed to do so, only noting in the record the refusal to go to lunch because he was full. The next day the resident had to be hospitalized due to a flare up of his existing medical condition.

Director of Nursing Heather Reed reviewed the resident's medical records and found the appreciated note from Ms. Tamminga. The issue was not so much her failure to do the assessment but that she did not document in an incident report, the nurse's notes or the

progress notes the reason the resident had refused to go to lunch, that he stated he was not hungry or in any pain or discomfort and was eating cookies with no apparent distress. That would have been sufficient to explain and justify the lack of an assessment. But because it was not documented, the written record would not justify a failure to do an assessment.

Ms. Reed reviewed the claimant's prior disciplinary history and consulted with Administrator Jalissa Simmons. The decision was made to discharge her for another failure to properly document and Ms. Tamminga was notified of the discharge on January 19, 2012.

Debra Tamminga has received unemployment benefits since filing a claim with an effective date of January 22, 2012.

### **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 claimant had been advised her job was in jeopardy as a result of the three warnings she received for failing to comply with necessary protocols on documentation. In spite of the warnings she did not properly document this final incident of the resident who refused lunch. It was his right to refuse a meal but her failure to assess this person, who had medical issues of an intestinal nature, needed to be properly documented.

Without written documentation, the claimant's reason for not doing the assessment appears as negligence or deliberate failure to follow the standards of care. All she would have had to do in order to protect herself and the nursing facility from accusations of negligence was to note that the resident stated he was in no pain and was eating heartily. Documenting the situations with the residents is a substantial duty of the nursing staff and failure to do so exposes the employer to criminal and civil liability. Ms. Tamminga's failure to perform her basic job duties is a violation of the duties and responsibilities the employer has the right to expect of an employee and conduct not in the best interests of the employer. She is disqualified.

Iowa Code section 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.

The claimant has received unemployment benefits to which she is not entitled. The question of whether the claimant must repay these benefits is remanded to the UIS division.

**DECISION:**

The representative's decision of March 12, 2012, reference 01, is reversed. Debra Tamminga is disqualified and benefits are withheld until she has earned ten times her weekly benefit amount in insured work, provided she is otherwise eligible. The issue of whether the claimant must repay the unemployment benefits is remanded to UIS division for determination.

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Bonny G. Hendricksmeier  
Administrative Law Judge

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Decision Dated and Mailed

bgh/css