

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

TINA L REED
Claimant

APPEAL NO. 14R-UI-08060-NT

**ADMINISTRATIVE LAW JUDGE
DECISION**

TAPESTRY SENIOR LIVING OF MARION
Employer

OC: 02/23/14
Claimant: Respondent (2)

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

STATEMENT OF THE CASE:

The employer filed a timely appeal from the representative's decision dated May 20, 2014, reference 03, that allowed benefits without disqualification. A telephone conference hearing was held on June 17, 2014. Claimant did not participate. The employer participated by Diana Niemier, Melissa Bertling and Laura White-Mohseni. Employer's Exhibits One through Six were admitted into evidence. On June 25, 2014, a decision was entered by the administrative law judge reversing the May 20, 2014, reference 03, decision. The claimant appealed to the Employment Appeal Board. The Employment Appeal Board concluded the claimant did not participate in the initial hearing through no fault of her own and remanded the matter for a new hearing and appealable decision. Pursuant to the Employment Appeal Board's remand, a telephone hearing was scheduled for and held on August 27, 2014. Notices of hearing were sent to the parties in advance. Ms. Reed participated in the hearing. The employer participated by Ms. Diana Niemier, Executive Director/Director of Health Care; Ms. Melissa Bertling, R.N., and Ms. Laura White-Mohseni, LPN. Employer's Exhibits One through Six were received into evidence.

ISSUE:

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

FINDINGS OF FACT:

Having considered the evidence in the record, the administrative law judge finds: Tina Reed was employed by Tapestry Senior Living of Marion from April 1, 2014 until April 29, 2014 when she was discharged from employment. Ms. Reed was employed as a full-time medication manager and residential care employee. The claimant worked the third shift and was paid by the hour.

Ms. Reed was discharged on April 29, 2014 based upon the employer's reasonable belief that Ms. Reed had made a medication error by failing to provide required medication to a resident at 5:00 a.m. on April 17, 2014 and that the claimant had violated the employer's "code of conduct" by later making an entry in the facility's medication logs, to make it appear that the medication error had not taken place. The employer also cited discourteous behavior towards other staff and discussing personal information as additional reasons for Ms. Reed's discharge.

On April 17, 2014, the claimant failed to give a resident her Fosamax medication at 5:00 a.m., the time set for the medication to be dispensed. The following day, April 18, 2014, another employee notified the medication manager that the resident in question had not received the April 17, 2014 medication. Ms. Reed did not notify the nursing staff or administrative staff of the error she had made by failing to give the resident the medication and also did not request information on how to proceed if she had failed to dispense the medication at the proper time.

Ms. Reed maintained to her employer that she had in fact dispensed the medication and an investigation followed. As a result of the investigation, the employer concluded that the claimant had written her initials over those of the employee who had actually later given the resident her Fosamax in an apparent effort to make it appear that the claimant had in fact dispensed the medication properly. After reviewing the matter further, the employer concluded that the claimant had not used the appropriate color of ink on the medication log for the shift that the claimant was working. The employer uses different colors of ink on the medication report for various shifts for the purpose of tracking entries on company documents made by different work shifts. The employer concluded that Ms. Reed had falsified the documentation in an effort to make it appear that she had properly dispensed the medication in question. The employer considered the claimant's act to be falsification of a medical document and discharged Ms. Reed from her employment.

It is the claimant's position that although she had "forgot" to dispense the medication at 5:00 a.m. on April 17, 2014, she had subsequently remembered to do so and later made an entry into the medication log to verify that she had dispensed the medication to the resident. The claimant further asserts that another residential care employee had counted the medications with the claimant and verified that the number of medications left showed that the prescriptions had properly been dispensed and that the other hourly worker had also suggested that the claimant place her name over the name of the employee who had later provided the medication to the resident after the claimant had failed to do so. Ms. Reed also denies engaging in any other disqualifying misconduct while employed by Tapestry Senior Living of Marion.

REASONING AND CONCLUSIONS OF LAW:

The question before the administrative law judge is whether the evidence in the record establishes misconduct on the part of the claimant sufficient to warrant the denial of unemployment insurance benefits. It does.

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.

Iowa Admin. Code r. 871-24.32(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 Dep't of Job Serv.*, 275 N.W.2d 445, 448 (Iowa 1979).

The employer has the burden of proof to establish disqualifying misconduct. See Iowa Code section 96.6(2). Misconduct must be substantial in order to justify a denial of unemployment insurance benefits. Misconduct that may be serious enough to warrant the discharge of an employee may not necessarily be serious enough to warrant the denial of unemployment insurance 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. of Appeals 1992).

In the case at hand, Ms. Reed was not discharged because she had made an error by failing to dispense the required medication to a resident during the early morning hours of April 17, 2014. The claimant was discharged after the employer reasonably concluded that the claimant had not followed protocol by immediately reporting the error to management so that management was aware of the error and could provide instructions about how to proceed. The claimant was discharged because in addition to failing to properly notify management of her error, the employer reasonably concluded that Ms. Reed had taken steps to cover up her error falsifying the resident's medication record.

Although the administrative law judge is aware of the claimant's blanket denial of wrongdoing, the administrative law judge concludes that the employer has sustained its burden of proof in this matter. The employer's witnesses testified with specificity of the events leading to Ms. Reed's discharge and testified with specificity as to the reasonableness of their conclusion that the claimant had not followed protocol and had falsified a medical record in this matter. The

administrative law judge concludes that the evidence establishes that the claimant was discharged for misconduct in connection with her work and is disqualified from receiving unemployment insurance benefits until she has worked in and been paid wages for insured work equal to ten times her weekly benefit amount and is otherwise eligible.

Because the claimant has been deemed ineligible for benefits, any benefits the claimant has received could constitute an overpayment. The administrative record reflects that the claimant has received unemployment insurance benefits in the amount of \$877.00 since filing a claim with the effective date of February 23, 2014. The administrative record also establishes that the employer did participate in the fact finding.

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.

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.

Because the claimant's separation was disqualifying, benefits were paid to which she 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. In this case the claimant has received benefits but was not eligible for those benefits. Since the employer did participate in the fact finding, the claimant is obligated to repay the agency the benefits she received and the employer's account shall not be charged.

DECISION:

The May 20, 2014, reference 03, decision is reversed. Claimant was discharged for misconduct in connection with her work. Benefits are withheld until such time as the claimant has worked in and been paid wages for insured work equal to ten times her weekly benefit amount, provided that she is otherwise eligible. The claimant has received benefits she was not eligible to receive in the amount of \$877.00. Because the employer participated in the fact finding, the claimant is liable to repay the amount of the overpayment and the employer's account shall not be charged.

Terence P. Nice
Administrative Law Judge

Decision Dated and Mailed

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