

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**JESSICA M NEHMAN**  
Claimant

**APPEAL NO. 07A-UI-04218-JTT**

**ADMINISTRATIVE LAW JUDGE  
AMENDED DECISION**

**USA HEALTHCARE - FORT DODGE LLC  
EXPO HEALTHCARE CTR**  
Employer

**OC: 03/18/07 R: 01  
Claimant: Respondent (2)**

Iowa Code section 96.5(2)(a) – Discharge for Misconduct  
Iowa Code section 96.3(7) – Recovery of Overpayment

**STATEMENT OF THE CASE:**

USA Healthcare filed a timely appeal from the April 16, 2007, reference 04, decision that allowed benefits. After due notice was issued, a hearing was held on May 10, 2007 Claimant Jessica Nehman participated. Karie Kesterson, Director of Nursing, represented the employer. The administrative law judge took official notice of the Agency's record of benefits disbursed to the claimant and received Employer's Exhibits 1 through 10, and 12 in the evidence

**ISSUE:**

Whether the claimant was discharged for misconduct in connection with the employment that disqualifies her for unemployment insurance benefits.

Whether the claimant has been overpaid benefits.

**FINDINGS OF FACT:**

Having reviewed all of the evidence in the record, the administrative law judge finds: Jessica Nehman was employed by USA Healthcare as a full-time Certified Nursing Assistant (CNA) from November 2006 until March 16, 2007, when Director of Nursing Karie Kesterson and the facility's administrator discharged Ms. Nehman. Ms. Nehman was assigned to the evening shift, 2:00 p.m. to 10:30 p.m.

The final incident that prompted the discharge occurred on March 14, 2007. There were five certified nursing assistants on duty. Ms. Nehman and another CNA were jointly responsible for 24 residents. A female resident assigned to Ms. Nehman and the CNA fell out of a wheelchair onto the floor. The resident was supposed to have a safety alarm on her wheel chair. Two CNAs returning from a break discovered the resident and alerted the supervising nurse, Verbena Ascherl, R.N. At some point before 8:30 p.m., Ms. Nehman went into the resident's room and asked her if she is ready to go to bed. The resident indicated she was not ready. At approximately 8:30 p.m., Ms. Nehman and her coworker went back to the resident's room and told the resident they would be back to put her in her bed. Shortly thereafter, Ms. Nehman

learned that the resident had fallen. The female resident who fell on March 14 had been identified as a fall risk and was supposed to have an alarm on her bed, her chair, and in her bathroom. During the same shift, another resident identified as a fall risk transferred himself after Ms. Nehman or her coworker neglected to attach a required safety alarm. The supervising nurse faulted Ms. Nehman for not putting the fall risk patients to bed first. The nurse also noted that Ms. Nehman and her coworker had not picked up the dirty laundry as required. At the end of the shift, Ms. Nehman neglected to sign off on notes the supervising nurse prepared as part of the daily compliance rounds. Ms. Nehman knew she was required to sign off on the notes at the end of her shift before she left the facility.

On March 7, a week earlier, the employer had reviewed the fall risk assessment and safety protocols with the CNA staff, and Ms. Nehman had attended.

On January 23, 2007, Director of Nursing Kesterson had placed Ms. Nehman on a 30-day probation period. The reprimand was based on Ms. Nehman being out of uniform without permission, avoiding work by making unnecessary trips away from her assigned residence hallway, receiving too many personal calls at work, and other matters. On January 18, Ms. Kesterson had issued a reprimand to Ms. Nehman for neglecting to give a resident his shower at an appropriate time. Ms. Nehman had awakened the resident for his shower at 10:00 p.m., after the resident had been sound asleep. Ms. Nehman had forgotten to give the shower earlier. Ms. Nehman had also been reprimanded in connection with a January 18 incident wherein Ms. Nehman failed to follow a nurse's directive that she clean up a resident suffering from diarrhea. Ms. Nehman had avoided the assigned task and the nurse's repeated directive by busying herself with other residents with less pressing needs in the hope that a coworker would complete the unpleasant task.

Ms. Nehman established a claim for benefits that was effective March 18, 2007 and has received benefits totaling \$1,432.00.

#### **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 or negligence on the part of Ms. Nehman in the performance of her assigned duties. The evidence indicates that Ms. Nehman had received appropriate training in proper use of available safety equipment and the need to attend to residents identified as fall risks first at predictable times when residents needed to be transferred. The evidence indicates that on March 14, Ms. Nehman was negligent or careless in performing several of her work responsibilities. This set of incidents followed multiple other incidents of similar carelessness, negligence, or intentional work avoidance. The evidence does demonstrate negligence and/or carelessness so recurrent as to indicate a willful and wanton disregard of the employer's interests and the interests of the residents in Ms. Nehman's care. At the hearing, the administrative law judge found Ms. Nehman quick to make excuses about her failure to fulfill fairly basic aspects of her work responsibilities, as well as more important aspects of her work. This readiness to eschew responsibility, weakened Ms. Nehman's credibility.

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

Iowa Code section 96.3-7 provides:

7. Recovery of overpayment of benefits. 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.

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.

Because this Nehman has received benefits for which she has been deemed ineligible, those benefits now constitute an overpayment that Ms. Nehman must repay to Iowa Workforce Development. Ms. Nehman is overpaid \$1,432.00.

**DECISION:**

The Agency representative's April 16, 2007, reference 04, 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 claimant is overpaid \$1,432.00.

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James E. Timberland  
Administrative Law Judge

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Decision Dated and Mailed

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