

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

BEVERLY J LEHMAN
Claimant

APPEAL NO. 10A-UI-07931-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

OREWILER, WILDA COTTON, ANDREA
STUART MEDICAL CLINIC
Employer

OC: 10/25/09
Claimant: Respondent (2-R)

Iowa Code Section 96.5(2)(a) – Discharge for Misconduct

STATEMENT OF THE CASE:

The employer filed a timely appeal from the May 24, 2010, reference 03, decision that allowed benefits. After due notice was issued, a hearing was held on July 19, 2010. Claimant Beverly Lehman participated. Wilda Orewiler, Physician Assistant and Owner, represented the employer.

ISSUE:

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

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Beverly Lehman, L.P.N., was employed by Stuart Medical Clinic as a full-time Licensed Practical Nurse from November 2009 until April 30, 2010, when Wilda Orewiler, Wilda Orewiler, Physician Assistant and Owner, discharged her for ongoing carelessness in the performance of her duties. Ms. Orewiler was Ms. Lehman's immediate supervisor.

The final incident that triggered the discharge was the employer's discovery on April 27, 2010, that Ms. Lehman had left open a leaded box used in processing x-rays. The box was to be closed unless an x-ray film was being removed. The final incident followed several other incidents of carelessness. On April 26, 2010, Ms. Orewiler found a post-it note Ms. Lehman had left inside a patient's chart regarding an April 22, 2010 request from a patient who had been having problems with a medication. Ms. Lehman placed the note in the chart without bringing the matter to Ms. Orewiler's attention. On April 23, Ms. Orewiler discovered that Ms. Lehman had deviated from standard medical documentation practices when she tried to correct an error by scribbling over the initial entry. On April 22, Ms. Orewiler found a note Ms. Lehman had stuck in a patient's chart regarding the pharmacy to which the patient wanted his/her prescription directed. Ms. Lehman had failed to bring the information to Ms. Orewiler's attention so that she could address it in a timely manner. On April 20, Ms. Orewiler found an incomplete note Ms. Lehman had left in a patient's chart concerning a medical concern raised by the

patient. On April 16, Ms. Lehman had left a note for the receptionist, rather than leaving the note for Ms. Orewiler, concerning a patient's inquiry about a medication. On April 13, Ms. Orewiler was called away from a conference because Ms. Lehman had scheduled an ultrasound for a patient, but failed to complete the proper order. On April 9, Ms. Orewiler learned that Ms. Lehman was not properly timing strep-throat screens. The instructions were clearly posted on the wall of the clinic. Ms. Orewiler found additional instances where Ms. Lehman had demonstrated a lack of care in performing her tasks.

Ms. Lehman entered the employment with more than two decades of nursing experience performing similar work.

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 weight of the evidence does demonstrate recurrent, ongoing carelessness that indicated a willful disregard of the employer's interests. These culminated in Ms. Lehman's failure to close the x-ray box on April 27, 2010. The weight of the evidence indicates that Ms. Lehman entered the employment with substantial experience performing similar work, was able to perform the work in a competent manner, but did not perform the work in a competent manner. The weight of the evidence indicates that Ms. Lehman was careless or negligent in performing her duties on an almost daily basis. Ms. Lehman's carelessness cannot be explained any idiosyncrasies in Stuart Medical Clinic operations. The weight of the evidence indicates instead that Ms. Lehman regularly failed to follow standard operating procedures that would apply in any medical clinic.

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

Iowa Code section 96.3(7) 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. The overpayment recovery law was updated in 2008. See Iowa Code section 96.3(7)(b). Under the revised law, a claimant will not be required to repay an overpayment of benefits if all of the following factors are met. First, the prior award of benefits must have been made in connection with a decision regarding the claimant's separation from a particular employment. Second, the claimant must not have engaged in fraud or willful misrepresentation to obtain the benefits or in connection with the Agency's initial decision to award benefits. Third, the employer must not have participated at the initial fact-finding proceeding that resulted in the initial decision to award benefits. If Workforce Development determines there has been an overpayment of benefits, the employer will not be charged for the benefits, regardless of whether the claimant is required to repay the benefits.

Because the claimant has been deemed ineligible for benefits, any benefits the claimant has received would constitute an overpayment. Accordingly, the administrative law judge will remand the matter to the Claims Division for determination of whether there has been an overpayment, the amount of the overpayment, and whether the claimant will have to repay the benefits.

DECISION:

The Agency representative's May 24, 2010, reference 03, 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 employer's account will not be charged.

This matter is remanded to the Claims Division for determination of whether there has been an overpayment, the amount of the overpayment, and whether the claimant will have to repay the benefits.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

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