

**IOWA WORKFORCE DEVELOPMENT
Unemployment Insurance Appeals Section
1000 East Grand—Des Moines, Iowa 50319
DECISION OF THE ADMINISTRATIVE LAW JUDGE
68-0157 (7-97) – 3091078 - EI**

**LISA K WISER
62988 VICTORIA RD
GRISWOLD IA 51535**

**CONTINUUM HEALTH CARE SERVICES
PO BOX 193
ANKENY IA 50021-1624**

**Appeal Number: 04O-UI-05991-HT
OC: 01/25/04 R: 02
Claimant: Respondent (2)**

This Decision Shall Become Final, unless within fifteen (15) days from the date below, you or any interested party appeal to the Employment Appeal Board by submitting either a signed letter or a signed written Notice of Appeal, directly to the **Employment Appeal Board, 4th Floor—Lucas Building, Des Moines, Iowa 50319**.

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

STATE CLEARLY

1. The name, address and social security number of the claimant.
2. A reference to the decision from which the appeal is taken.
3. That an appeal from such decision is being made and such appeal is signed.
4. The grounds upon which such appeal is based.

YOU MAY REPRESENT yourself in this appeal or you may obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds. It is important that you file your claim as directed, while this appeal is pending, to protect your continuing right to benefits.

(Administrative Law Judge)

(Decision Dated & Mailed)

Section 96.5-2-a – Discharge
Section 96.3-7 – Overpayment

STATEMENT OF THE CASE:

The employer, Continuum Health Care Services (Continuum), filed an appeal from a decision dated February 20, 2004, reference 01. The decision allowed benefits to the claimant, Lisa Wisner. After due notice was issued, a hearing was held by telephone conference call on June 22, 2004. The claimant participated on her own behalf. The employer participated by President Tim Mortenson. Exhibit One was admitted into the record.

FINDINGS OF FACT:

Having heard the testimony of the witnesses and having examined all of the evidence in the record, the administrative law judge finds: Lisa Wisner was employed by Continuum from February 21, 2000 until January 29, 2004. She was the administrator of the Stacyville Community Nursing Home (Stacyville).

On January 23, 2004 President Tim Mortenson was advised by the company's independent accountant that there might be a problem regarding a contract employee, Larry Ribble. Mr. Mortenson went to Stacyville on Monday, January 26, 2004, to discuss the problem with Ms. Wisner. Mr. Ribble had been hired first as a temporary cook and dietary aide in May 2003. He then went to a PRN status, at which time he began doing contract work which encompassed various tasks such as revamping recipes, producing charts and graphs on residents who were at risk for falls, and rewriting policies. By the end of December 2003, he had been paid \$12,283.76 through the facility. In January and February 2000, the board of directors had agreed to limit contract fees to less than \$1,000.00, but the claimant had put Mr. Ribble's fees under other categories so they were not easily detectable as contract fees.

Much of the work for which Mr. Ribble had been contracted was already available from employees of Continuum or from vendors in the area with whom business relations were already established. The head of the dietary department had to "sign off" on any modified recipes, which could only be done after a thorough review. Services for the graphs and data collations were not required to pass state inspections. Help for re-writing of the policies was available through the corporate office.

Mr. Ribble had lived with Ms. Wisner during the time he was in the area. However, he moved out of state in July 2003, although he continue to "consult" via computer link. Checks being paid to him by Stacyville were signed by Ms. Wisner and deposited in a checking account she held jointly with Mr. Ribble and to which they both had access. When the president asked her on January 26, 2004, to produce some of the work product for which Mr. Ribble had been paid, she was unable to do so. She was given until January 29, 2004, to produce at least some work product but was again unable to do so. Mr. Mortenson then discharged the claimant, stating he no longer had any confidence in her.

Lisa Wisner has received unemployment benefits since filing a claim with an effective date of January 25, 2004.

REASONING AND CONCLUSIONS OF LAW:

The issue is whether the claimant is disqualified. The judge concludes she is.

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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. Huntoon v. Iowa Department of Job Service, 275 N.W.2d 445, 448 (Iowa 1979).

The claimant maintains she was only contracting necessary services for the facility. However, the evidence establishes this was merely a veiled attempt to provide a livelihood for a person with whom she had a personal relationship, at the expense of the employer. The services were not necessary, were not approved by the board or by the president, and the fees paid exceeded the agreed upon limit of \$1,000.00. The fact Ms. Wisner put the fees paid to Mr. Ribble under various categories lends substantial weight to the employer's assertion she was attempting to disguise the nature of the payments in an attempt to conceal them from casual audit.

The claimant's conduct, while not actually criminal, was a violation of her duties to maintain the best interests of the employer. The excessive fees paid, with no work product being produced, may arguably be considered a form of theft in which she collaborated. She is disqualified.

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.

The claimant has received unemployment benefits to which she is not entitled. These must be recovered in accordance with the provisions of Iowa law.

DECISION:

The representative's decision of February 20, 2004, reference 01, is reversed. Lisa Wiser is disqualified and benefits are withheld until she has earned ten times her weekly benefit amount, provided she is otherwise eligible. She is overpaid in the amount of \$2,400.00.

bgh/b