

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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**DIANA L EASTLICK**  
Claimant

**GOOD SAMARITAN SOCIETY INC**  
Employer

**APPEAL 15A-UI-09066-JP-T**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**OC: 07/19/15**  
**Claimant: Appellant (2)**

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

**STATEMENT OF THE CASE:**

The claimant filed an appeal from the August 4, 2015, (reference 01) unemployment insurance decision that denied benefits. The parties were properly notified about the hearing. A telephone hearing was held on August 31, 2015. Claimant participated personally and through her attorney, Robert Box. Employer participated through administrator, Isaac Gerdes. Human resources director, Kelly Kaster was present on behalf of the employer, but did not testify. Employer Exhibit One was admitted into evidence without objection. Claimant Exhibits A through F were admitted into evidence without objection.

**ISSUE:**

Was the claimant discharged for disqualifying job-related misconduct?

**FINDINGS OF FACT:**

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed full-time as a housekeeping assistant from February 23, 2009, and was separated from employment on June 22, 2015, when she was discharged.

The employer has a disciplinary policy that provides for a written warning, then a final warning, and then termination for Group II Offenses. Employer Exhibit One and Claimant Exhibit F. Only CNAs and licensed nurses are allowed to transfer residents. A transfer is when a resident is moved from one location to another (e.g., from a wheelchair to a bed; from the bed to a chair); however, pushing a resident while they are in their wheelchair, is not considered a transfer. Claimant was aware she was not to transfer residents.

On June 22, 2015, in the morning, a resident requested claimant push her in her wheelchair to her room. Claimant complied with the resident's request. Once they arrived in the resident's room, there was a tray that was in the middle of the room. Claimant then proceeded to move the tray out of the way. While claimant was moving the tray, the resident rolled her wheelchair forward. When claimant was done moving the tray, she started to move claimant (still sitting on her wheelchair) back when a CNA walked in. Claimant informed the CNA that she was moving the resident so she could leave. The CNA then left the room. Claimant then left the room and

the resident was still in her wheelchair. Claimant then finished her shift and left in the afternoon. Claimant was subsequently called back to the employer that afternoon. Claimant then met with the employer. The employer told claimant they had conducted an investigation and both the staff member and the resident stated claimant transferred the resident. Employer Exhibit One and Claimant Exhibit E. The employer then discharged claimant. Claimant denied that she transferred the resident. Claimant testified she was not physically able to transfer the resident. The resident did not testify at the hearing. The staff member did not testify at the hearing.

Claimant had received a prior written warning on February 3, 2015. Employer Exhibit One. Claimant received a final written warning on February 27, 2015. Employer Exhibit One. Claimant was aware her job was in jeopardy.

### **REASONING AND CONCLUSIONS OF LAW:**

For the reasons that follow, the administrative law judge concludes claimant was discharged from employment for no disqualifying reason. Benefits are allowed.

When the record is composed solely of hearsay evidence, that evidence must be examined closely in light of the entire record. *Schmitz v. Iowa Dep't Human Servs.*, 461 N.W.2d 603, 607 (Iowa Ct. App. 1990). Both the quality and the quantity of the evidence must be evaluated to see whether it rises to the necessary levels of trustworthiness, credibility, and accuracy required by a reasonably prudent person in the conduct of serious affairs. See, Iowa Code § 17A.14 (1). In making the evaluation, the fact-finder should conduct a common sense evaluation of (1) the nature of the hearsay; (2) the availability of better evidence; (3) the cost of acquiring better information; (4) the need for precision; and (5) the administrative policy to be fulfilled. *Schmitz*, 461 N.W.2d at 608.

The decision in this case rests, at least in part, upon the credibility of the parties. The employer did not present a witness with direct knowledge of the situation. No request to continue the hearing was made and no written statement of the resident or the staff member was offered. Claimant presented direct, first-hand testimony while the employer relied upon second-hand reports; this administrative law judge concludes that the claimant's recollection of the events is more credible than that of the employer.

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).

Iowa Admin. Code r. 871-24.32(4) provides:

(4) Report required. The claimant's statement and the employer's statement must give detailed facts as to the specific reason for the claimant's discharge. 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. In cases where a suspension or disciplinary layoff exists, the claimant is considered as discharged, and the issue of misconduct shall be resolved.

Iowa Admin. Code r. 871-24.32(8) provides:

(8) Past acts of misconduct. While past acts and warnings can be used to determine the magnitude of a current act of misconduct, a discharge for misconduct cannot be based on such past act or acts. The termination of employment must be based on a current act.

The employer has the burden of proof in establishing disqualifying job misconduct. *Cosper v. Iowa Dep't of Job Serv.*, 321 N.W.2d 6 (Iowa 1982). The issue is not whether the employer made a correct decision in separating claimant, but whether the claimant is entitled to unemployment insurance benefits. *Infante v. Iowa Dep't of Job Serv.*, 364 N.W.2d 262 (Iowa Ct. App. 1984). What constitutes misconduct justifying termination of an employee and what misconduct warrants denial of unemployment insurance benefits are two separate decisions. *Pierce v. Iowa Dep't of Job Serv.*, 425 N.W.2d 679 (Iowa Ct. App. 1988). Misconduct serious enough to warrant discharge is not necessarily serious enough to warrant a denial of job insurance benefits. Such misconduct must be "substantial." *Newman v. Iowa Dep't of Job Serv.*, 351 N.W.2d 806 (Iowa Ct. App. 1984). When based on carelessness, the carelessness must actually indicate a "wrongful intent" to be disqualifying in nature. *Id.* Negligence does not constitute misconduct unless recurrent in nature; a single act is not disqualifying unless indicative of a deliberate disregard of the employer's interests. *Henry v. Iowa Dep't of Job Serv.*, 391 N.W.2d 731 (Iowa Ct. App. 1986). Poor work performance is not misconduct in the

absence of evidence of intent. *Miller v. Emp't Appeal Bd.*, 423 N.W.2d 211 (Iowa Ct. App. 1988).

In an at-will employment environment an employer may discharge an employee for any number of reasons or no reason at all if it is not contrary to public policy, but if it fails to meet its burden of proof to establish job related misconduct as the reason for the separation, it incurs potential liability for unemployment insurance benefits related to that separation. A determination as to whether an employee's act is misconduct does not rest solely on the interpretation or application of the employer's policy or rule. A violation is not necessarily disqualifying misconduct even if the employer was fully within its rights to impose discipline up to or including discharge for the incident under its policy.

Claimant was given her final warning on February 27, 2015, and put on notice that further violation may result in termination. Employer Exhibit One. There were no incidents of alleged misconduct thereafter until June 22, 2015. On June 22, 2015, claimant pushed a resident, in her wheelchair, to the resident's room. Once at the room, claimant proceeded to move a tray out of the way. While claimant was moving the tray, the resident moved her wheelchair forward. Claimant then grabbed the wheelchair to move it back just as a CNA entered the resident's room. Claimant explained what she was doing, and the CNA then left. Claimant then exited the room. The resident was left in her wheelchair. Claimant worked the rest of her shift and then left work. Mr. Gerdes testified that the employer conducted an investigation, wherein the staff member said claimant transferred the resident and the resident confirmed this. However, the employer did not present a witness with firsthand knowledge of what happened on June 22, 2015. Furthermore, claimant denied transferring the resident on June 22, 2015 and at this hearing. Claimant testified she did not transfer a resident on June 22, 2015; she merely pushed the resident in her wheelchair. Claimant further testified she would not have been able to physically transfer the resident. The employer has failed to meet its burden of proof to establish a current or final act of misconduct occurred on June 22, 2015.

Inasmuch as employer had given claimant a final warning on February 27, 2015, and there were no incidents of misconduct thereafter, it has not met the burden of proof to establish that claimant acted deliberately or negligently after the most recent warning. The employer has not met its burden of proof to establish a current or final act of misconduct, and, without such, the history of other incidents need not be examined. Accordingly, benefits are allowed.

**DECISION:**

The August 4, 2015, (reference 01) unemployment insurance decision is reversed. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided she is otherwise eligible. Any benefits claimed and withheld on this basis shall be paid.

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Jeremy Peterson  
Administrative Law Judge

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Decision Dated and Mailed

jp/pjs