

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

JOANNE M RANKIN
Claimant

APPEAL NO. 13A-UI-00487-WT

**ADMINISTRATIVE LAW JUDGE
DECISION**

DSM HEALTHCARE MANAGEMENT
Employer

OC: 12/9/12
Claimant: Appellant (2)

Section 96.5-2-a – Discharge for Misconduct

STATEMENT OF THE CASE:

Claimant filed an appeal from a fact-finding decision dated January 7, 2013, reference 01, which held claimant ineligible for unemployment insurance benefits. The employer, Des Moines Healthcare Management does business as Regency Care Center and Assisted Living. After a period of discovery, a telephone conference hearing was scheduled for and held on May 20, 2013. An in-person hearing was originally requested, however, the parties ultimately agreed to a telephone hearing. Claimant participated through Attorney Kyle Reilly. Employer participated by Megan Toney, Assisted Living Director and Director of Nursing. Business Manager Tracy Gilmore was also present for the employer. No exhibits were admitted into evidence.

ISSUE:

The issue in this matter is whether claimant was discharged for misconduct.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds:

The employer provides long-term and short-term care, as well as assisted living services. Claimant was employed as a full-time CNA from June 22, 2007 to November 20, 2012. Claimant was discharged on November 20, 2012 by employer because of unprofessional conduct involving a tenant. The incident in question occurred on November 17, 2012.

On November 17, 2012, a tenant, identified as Tenant One throughout the hearing complained about the claimant. Specifically, Tenant One complained that the claimant was late to provide her bath. She alleged claimant was hurried and abrasive. She asked that the claimant not provide care for her any longer. Based upon the claimant's prior history of discipline, combined with the final act on November 17, 2012, Megan Toney decided to terminate the claimant.

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.

871 IAC 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.

871 IAC 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.

The gravity of the incident, number of policy violations and prior warnings are factors considered when analyzing misconduct. The lack of a current warning may detract from a finding of an intentional policy violation.

In this matter, the evidence fails to establish that claimant was discharged for an act of misconduct. The employer failed to meet its burden of proof.

The final incident which led to the claimant's discharge is entirely comprised of a complaint from a tenant, referred to at hearing as Tenant One. This complaint, as it exists in the record at hand, consists exclusively of out of court statements by Tenant One. The undersigned respects the difficulty of the employer in attaining additional evidence. It would be awkward, to say the least, to request or insist that a paying client testify at a hearing on the employer's behalf. The employer has good reasons for not wanting to do this. Nevertheless, it is noteworthy that this evidence would not even be admissible pursuant to the standard Rules of Evidence. It would be considered inadmissible hearsay. While hearsay is admissible in this administrative proceeding, the hearsay admitted at this hearing is not the type of reliable evidence which forms the basis for a finding of intentional misconduct, particularly when combined with the nature of the allegations at hand.

Specifically, the tenant complaint in question was really not an allegation of misconduct by itself. The employer conceded that the incident, by itself, would not have led to the claimant's termination. When asked why the employer believed that the allegations against the claimant amounted to misconduct, the employer testified that when combined with the numerous past work rule violations and disciplinary actions, the employer felt it had "reasonable cause to terminate employment." This may very well be true. The issue, however, is not whether the employer had reasonable cause to sever the relationship. The issue is whether the employer can prove misconduct by a preponderance of evidence. Misconduct requires an intentional act or omission which violates an employer's reasonable standard of employment. This is a higher standard than "reasonable cause."

In this case, the undersigned judge has no doubt that Tenant One made a complaint against the claimant on November 17, 2012. The complaint made, however, is entirely subjective. In essence, Tenant One felt the claimant made her wait too long for her shower/bath while she listened to another tenant play the organ. She also felt the claimant washed her too quickly, abrasively and briskly, which made her feel uncomfortable. The claimant testified that she did not do this and that Tenant One did not make any complaints during the washing. The evidence when viewed as a whole strongly suggests that Tenant One felt as though claimant was hurried and was too rough while helping her get cleaned up. The claimant is found credible that this was not her intent, based upon her first-hand testimony, as well as the corroborating character evidence offered by witness, Jamie Graham.

The past incidents, particularly when combined with the final act, certainly may have given the employer a good business reason or "reasonable cause" for parting ways with the claimant. It is found, however, that the claimant was not terminated for a current act of misconduct as defined by Iowa law.

DECISION:

The fact-finding decision dated January 7, 2013, reference 01, is reversed. Claimant is eligible to receive unemployment insurance benefits, provided claimant meets all other eligibility requirements.

Joseph L. Walsh
Administrative Law Judge

Decision Dated and Mailed

jlw/tll