

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**BRENDA S SHERMAN**  
Claimant

**APPEAL NO. 12A-UI-00011-LT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**IOWA DEPARTMENT OF HUMAN  
SERVICES/GLENWOOD**  
Employer

**OC: 11/27/11  
Claimant: Respondent (1)**

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

**STATEMENT OF THE CASE:**

Employer filed an appeal from the December 21, 2012 (reference 01) decision that allowed benefits. After due notice was issued, a hearing was held by telephone conference call on February 23, 2012. Claimant Brenda Sherman, formerly known as Hamlin, participated and was represented by Michael Murphy, Attorney at Law. Employer participated through public service supervisor, Pam Stipe; nursing administrator, Connie Brown; and public service executive, Jill Cuff. Gary Anders did not testify. The employer was represented by David Williams of TALX. Employer's Exhibits 1 through 7 were admitted to the record.

**ISSUE:**

Did employer discharge claimant for reasons related to job misconduct sufficient to warrant a denial of benefits?

**FINDINGS OF FACT:**

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed full time as a RN from May 10, 2009 and was separated from employment on November 22, 2011. She was placed on paid suspension on October 28, 2011 pending investigation. On October 25 she allowed her husband and their dog into the home. The policy does not specifically prohibit animals and at least one other employee brought her pet into the home. The employer referred to residents as "medically fragile" but any feeding tubes are covered and they were regularly taken outdoors in wheelchairs or downtown in an attempt to integrate them into the community. The house has no posted restrictions on who may enter. On October 23 her authorized break period was scheduled from 5:00 to 5:30 p.m. She took the break from 7:00 to 7:30 p.m. She notified her shift coworker LPN Valerie Glenn but did not call her nurse supervisor JoDonn Shaver. During her break a "medication variance" occurred, which claimant does not recall being a subject during the investigation interview. During her break her husband brought in food and she escorted him from the kitchen counter/door to the secure medication room where her desk is and they ate out of view of residents. The computers were locked while he was there. After they were done eating, he left. Employees regularly ate at their desks in the medication room. (Employer's Exhibit 4, policy 7.1) Her husband was

escorted while in the home and he did not enter any residents' rooms. The policy does not specify supervisory permission but indicates the visitors should be supervised. (Employer's Exhibit 3, handbook page 28) The dog was held by claimant or her husband at all times. Claimant and other staff brought their pets to the center for the benefit of residents and there is a dog that has the run of the campus.

LPN Valerie Glenn reported to nurse supervisor JoDonn Shaver reported to Brown on October 26. Glenn and Shaver did not participate in the hearing. Superintendent Zvia McCormick directed Cuff, director of vocational and recreational therapy services Darlene Lovato, and director of food and nutrition services Patricia Austin to investigate. On November 1, 2011 Cuff conducted the final interview. There was no date on the report or recollection about when it was given to Brown. Brown forwarded the investigation report for determination of disciplinary action. Claimant had no prior warnings, verbal or written, her job was jeopardy for any reason. The computer use issue during the suspension was not a reason for the separation.

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

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

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.

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 establishing disqualifying job misconduct. *Cosper v. Iowa Department of Job Service*, 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. IDJS*, 364 N.W.2d 262 (Iowa 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. IDJS*, 425 N.W.2d 679 (Iowa 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 Department of Job Service*, 351 N.W.2d 806 (Iowa App. 1984).

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 assess points or impose discipline up to or including discharge for the incident under its policy. The conduct for which claimant was discharged were merely isolated incidents of poor judgment or misunderstanding and inasmuch as employer had not previously warned claimant about any of the issues leading to the separation, it has not met the burden of proof to establish that claimant acted deliberately or with recurrent negligence in violation of company policy, procedure, or prior warning. An employee is entitled to fair warning that the employer will no longer tolerate certain performance and conduct. Without fair warning, an employee has no reasonable way of knowing that there are changes that need be made in order to preserve the employment. If an employer expects an employee to conform to certain expectations or face discharge, appropriate (preferably written), detailed, and reasonable notice should be given. Benefits are allowed.

**DECISION:**

The December 21, 2011 (reference 01) decision is affirmed. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed.

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Dévon M. Lewis  
Administrative Law Judge

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Decision Dated and Mailed

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