

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

KRISTI WESSEL
Claimant

APPEAL NO. 08A-UI-02702-ET

**ADMINISTRATIVE LAW JUDGE
DECISION**

**EVENTIDE LUTHERAN HOME
FOR THE AGED**
Employer

**OC: 02-17-08 R: 01
Claimant: Respondent (1)**

Section 96.5-2-a – Discharge/Misconduct

STATEMENT OF THE CASE:

The employer filed a timely appeal from the March 11, 2008, reference 01, decision that allowed benefits to the claimant. After due notice was issued, a hearing was held by telephone conference call before Administrative Law Judge Julie Elder on April 1, 2008. The claimant participated in the hearing. Mindy Baker, Administrator; Doreen Adams, Director of Nursing; and Angela Adams, LPN, participated in the hearing on behalf of the employer.

ISSUE:

The issue is whether the employer discharged the claimant for work-connected misconduct.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed as a full-time LPN for Eventide Lutheran Home for the Aged from June 8, 1996 to November 6, 2007. On October 26, 2007, the claimant was suspended following a complaint from DIA that she failed to provide critical care because she failed to perform CPR on a resident and the resident died. The claimant testified the resident was complaining of leg weakness at 10:00 p.m. rounds and the doctor said to observe her. Between 10:00 p.m. and 2:00 a.m. the staff assisted the resident in using the restroom and during midnight rounds the resident appeared “normal.” At 2:00 a.m. the CNA started rounds and found the resident unresponsive, so the claimant was asked to come into the room stat and she went in and found the resident “pale white/grayish, with her mouth slack, pupils fixed and dilated, skin cold to the touch, no pulse and no blood pressure.” She determined the resident had passed away, and even though she was a code she did not see any reason to perform CPR, because she believed the resident was already dead. She yelled for LPN Angela Aldana to come into the room and confirm the death and then went to the nurse’s station to make calls to the doctor, family, and mortuary. The doctor told the claimant it would be “fruitless” to perform CPR at that time. The CNA stated the resident was lukewarm to the touch and Ms. Aldana did not go to the room because she never heard the claimant call for her to confirm the death. During the investigation, the claimant could not provide the employer with Ms. Aldana’s name when asked who she had confirm the death. After completing the

investigation, the employer terminated the claimant's employment for denial of critical care. The claimant received a written warning April 17, 2007, for insubordination because she allowed her staff extra break time after they left their unit to go to the Alzheimer's Unit to speak to her about some of their concerns regarding the job. She also received a written warning October 3, 2007, for failing to do a neurological check on an Alzheimer's Unit resident after an unwitnessed fall because she was not aware the fall was not witnessed.

REASONING AND CONCLUSIONS OF LAW:

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

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.

The employer has the burden of proving disqualifying misconduct. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). The propriety of a discharge is not at issue in an

unemployment insurance case. An employer may be justified in discharging an employee, but the employee's conduct may not amount to misconduct precluding the payment of unemployment compensation. The law limits disqualifying misconduct to substantial and willful wrongdoing or repeated carelessness or negligence that equals willful misconduct in culpability. Lee v. Employment Appeal Board, 616 N.W.2d 661, 665 (Iowa 2000). While the claimant may have been incorrect in her assessment of the resident's condition September 18, 2007, she made a nursing judgment based on her experience that CPR was pointless at the time the body was discovered because of the body color, temperature, slack mouth, fixed and dilated pupils, no pulse and no blood pressure. Although Ms. Aldana denies that the claimant called her to confirm the death, the claimant is just as credible in stating that she did so and it appears there was a lack of communication between the parties. Additionally, the incident occurred September 18, 2007; she was not suspended until October 26, 2007, and was not discharged until November 6, 2007, making it questionable whether this was even a current act of misconduct. Consequently, the administrative law judge must conclude that the claimant's actions do not rise to the level of intentional, disqualifying job misconduct as defined by Iowa law. Therefore, benefits are allowed.

DECISION:

The March 11, 2008, reference 01, decision is affirmed. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided the claimant is otherwise eligible.

Julie Elder
Administrative Law Judge

Decision Dated and Mailed

je/kjw