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

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APT 7
2201 GIBSON ST
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EMBASSY REHAB & CARE CENTER INC
PO BOX 699
SPEARFISH SD 57783

Appeal Number: 06A-UI-00234-LT
OC: 11-27-05 R: 01
Claimant: Respondent (1)

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)

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

STATEMENT OF THE CASE:

Employer filed a timely appeal from the December 30, 2005, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on January 24, 2006. Claimant did participate with Sharrell Brown and Nicole Groetken. Employer did participate through Rebecca Bangston and Stephanie Amick. The administrative law judge took judicial notice of the administrative record.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed as a full-time CNA through December 1, 2005, when she was discharged. Irene Conlon, CNA, complained on November 21 that claimant and other CNAs Sherrell Brown, Sherry Rodriguez, Vicky Corio, and Nicole Groetken, LPN, were harassing her. Corio and

Groetken were also fired. Conlon did not participate in the hearing. Stephanie Amick, DON, investigated Conlon's complaints and the investigation ended on November 25, 2005, before Amick confronted claimant about the allegations on November 26.

Conlon complained specifically that claimant did not help with her cares when claimant had trained her. Conlon did not listen, was confrontational and defensive when others asked for help, was difficult to work with, slow and tried to do everything perfectly. As a result, Conlon frequently asked for help and claimant complied.

Conlon's second complaint was about a confrontation in front of a resident about not putting a coat on the resident. Employer claimed that LPN Nicole Groetken said during the investigation that the group imitated Conlon's walk, made fun of her in the hallway, and was not helping Conlon. However, at hearing, Groetken testified herself that claimant had told Rodriguez, Corio, and CNA Connie Miller their conduct was not nice and they should not do that to Conlon. Groetken had also observed the confrontation between claimant and Conlon on December 2 when Conlon failed to put a coat on a resident in preparation to go to an appointment. Both raised their voices, but claimant walked away from the situation while Conlon continued on.

Conlon also reported that on one occasion in the break room, claimant poked her in the back, yelled at her to worry about her own break time and gave her "the finger." Claimant admitted to verbal and figural confrontation with Conlon but did not physically touch her. There was an ongoing conflict with Conlon about breaks and at least once, Conlon told claimant she was "tired of her shit" and called her a "bitch."

Claimant had a miscommunication with Conlon about rinsing out laundry of residents before it was sent to the laundry because of a rotation of duties of doing books, rinsing linens, and collecting trash. She did not imitate Conlon's walk or talk but did admit to once laughing at others doing so in the hallway. It was Corio, and not claimant, that referred to Conlon as lazy and not performing her job duties. Sharrell Brown observed Rodriguez, Corio and Miller imitate Conlon's walk but never saw claimant act inappropriately towards Conlon or refuse to help,

Employer issued a verbal warning on April 14, 2005, for allegedly becoming verbally aggressive and using profanity towards her supervisor, Bessie Monroe, when claimant actually had a dispute with a coworker, not her supervisor. Another coworker was a witness, and in spite of employer's allegation about the verbal abuse, Monroe did not offer any statements against claimant when interviewed during the investigation in November. On September 13, 2005, claimant was suspended for three days for alleged verbal abuse towards supervisor, DON Lisa Grettinger, in front of a resident. Grettinger told claimant and another coworker to put on their gowns and she would watch them perform a resident transfer. During the transfer when the resident started to fall and claimant told her, "See Lisa, you can't do it this way. How can you tell us to do something that is wrong; practice what you preach." When Grettinger corrected claimant on proper procedure claimant disputed the procedure according to a state inspector's instructions. She also asked Grettinger not to touch things in the room without gloves, as was policy for that resident. Monroe and Grettinger did not participate in the hearing.

Miller, activities director Kris Baker, CNA Rebecca Hutchinson, housekeeper Sarah Terrell, CNA Shonda Dodson, and housekeeping supervisor Julie Shurn did not participate in the hearing. Given the discrepancies in other investigation interview notes, theirs is not considered.

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 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 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." When based on carelessness, the carelessness must actually indicate a "wrongful intent" to be disqualifying in nature. Newman v. Iowa Department of Job Service, 351 N.W.2d 806 (Iowa App. 1984). Poor work performance is not misconduct in the absence of evidence of intent. Miller v. Employment Appeal Board, 423 N.W.2d 211 (Iowa App. 1988).

An employer may discharge an employee for any number of reasons or no reason at all, but if it fails to meet its burden of proof to establish job related misconduct as the reason for the separation, employer incurs potential liability for unemployment insurance benefits related to that separation. Claimant's testimony and recollection of the events is considered credible, as employer's investigation notes and allegations varied from sworn testimony. Multiple witnesses agreed that the issue with Conlon came from Corio, Miller and Rodriguez, and not claimant, who attempted to stop the behavior. Grettinger had bias in her statement to employer, since claimant was correct in confronting her about a resident transfer and sanitary procedure. Monroe had the opportunity to speak of issues she might have had with claimant but did not, which reasonably indicates she had none. Finally, employer did not bother to interview claimant before completing the investigation and would have discovered that claimant had a reasonable basis for complaints about Conlon's abusive language (claimant never called Conlon names). This indicates disparate treatment of the two employees. While the work relationship was not ideal, claimant did not engage in conduct that rose to the level of disqualification. Benefits are allowed.

DECISION:

The December 30, 2005, reference 01, decision is affirmed. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided claimant is otherwise eligible.

dml/kjw