

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

MYRTLE GODFREY
Claimant

APPEAL NO: 07O-UI-04270-DT

**ADMINISTRATIVE LAW JUDGE
DECISION**

EXCEPTIONAL PERSONS INC
Employer

**OC: 12/24/06 R: 03
Claimant: Appellant (2)**

Section 96.5-2-a – Discharge
Section 96.7-2-a(2) – Charges Against Employer’s Account

STATEMENT OF THE CASE:

Myrtle Godfrey (claimant) appealed a representative’s January 18, 2007 decision (reference 01) that concluded she was not qualified to receive unemployment insurance benefits after a separation from employment with Exceptional Persons, Inc.. After hearing notices were mailed to the parties’ last-known addresses of record, a telephone hearing was held on June 11, 2007. The claimant participated in the hearing and was represented by David Odekirk, attorney at law. Helen Adams, attorney at law, appeared on the employer’s behalf and presented testimony from four witnesses, Rebecca Van Lengen, Sandy Giordana, Brad Buchholtz, and Julie Folken. During the hearing, Employer’s Exhibits Three, Four, Six, Seven, Eight, Fifteen, Sixteen, Seventeen, and Eighteen were entered into evidence. Based on the evidence, the arguments of the parties, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUES:

Was the claimant discharged for work-connected misconduct? Is the employer’s account subject to charge?

FINDINGS OF FACT:

The claimant started working for the employer on August 23, 2006. She worked full time as a support living staff person in the employer’s organization providing services to persons with disabilities. Her last day of work was December 14, 2006. The employer discharged her on that date. The reason asserted for the discharge was failure to satisfactorily complete her probationary period primarily due to failing to handle medication dispensation as expected and failing to exercise sufficient diligence to carrying out her duties.

The final incidents which contributed to the employer’s ultimate decision to discharge the claimant included that on December 11 the claimant had not realized that a resident who was not to be left unsupervised had left his room and had gone onto the home’s front porch. The claimant was at a table completing paperwork and had not observed the resident going outside. Further, while she realized he could not be allowed to leave the premises unsupervised, she

had not understood this would also apply to being on the front porch of the house. On October 17 she had been counseled for using poor judgment for having allowed the same resident to go out to her car with her car keys to retrieve an item from the car.

Also on December 11 the claimant had scheduled herself to attend a first-aid training course but had forgotten and had not attended. When hired she was advised that she needed to obtain the first-aid training during her probationary period, and on November 7 she had been reminded of that need. At approximately that time she had scheduled the December 11 training, but had failed to appropriately mark or check her schedule for the planned training.

Also on or about December 14 Ms. Van Lengen, the site coordinator, had determined the claimant had not verified a resident's medications against the resident's medication sheet before administration as required. The claimant asserted that in fact she had verified the medication that day although it was not immediately prior to the administration of the medication; there is no specific timeframe in the protocol in which the verification is to occur prior to administration. There was also some concern that there was a slight delay in the time the medication was administered due to timing with a meal. There was no evidence that the incorrect medication was in fact administered.

Prior to December 11 the claimant received numerous coachings usually at least weekly regarding her job performance. These coachings were not characterized as disciplinary in nature, but rather were in keeping with the probationary period being a training period. She was not advised that concerns regarding her performance were mounting such that her job might be in jeopardy. However, on November 22, 2006 she was given a written disciplinary report because of several missed documentations of medication administrations and a missed medication administration. She was then advised that "any further incidents will result in further disciplinary action up to and including termination of employment."

At the end of the claimant's probationary/training period, the employer noted, "your supervisor has spent considerable time working with you in an attempt to help you succeed in the Supported Living Staff position, yet improvement has not been noted. It appears you are not a good match for the Supported Living Staff job position. Therefore, your employment is being terminated effective immediately."

The claimant established an unemployment insurance benefit year effective December 24, 2006.

REASONING AND CONCLUSIONS OF LAW:

A claimant is not qualified to receive unemployment insurance benefits if an employer has discharged the claimant for reasons constituting work-connected misconduct. Iowa Code § 96.5-2-a. Before a claimant can be denied unemployment insurance benefits, the employer has the burden to establish the claimant was discharged for work-connected misconduct. Cosper v. IDJS, 321 N.W.2d 6 (Iowa 1982). The question is not whether the employer was right to terminate the claimant's employment, 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 is misconduct that warrants denial of unemployment insurance benefits are two separate matters. Pierce v. IDJS, 425 N.W.2d 679 (Iowa App. 1988).

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.

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).

871 IAC 24.32(5) provides:

(5) Trial period. A dismissal, because of being physically unable to do the work, being not capable of doing the work assigned, not meeting the employer's standards, or having been hired on a trial period of employment and not being able to do the work shall not be issues of misconduct.

The focus of the definition of misconduct is on acts or omissions by a claimant that "rise to the level of being deliberate, intentional or culpable." Henry v. Iowa Department of Job Service, 391 N.W.2d 731, 735 (Iowa App. 1986). The acts must show:

1. Willful and wanton disregard of an employer's interest, such as found in:
 - a. Deliberate violation of standards of behavior that the employer has the right to expect of its employees, or
 - b. Deliberate disregard of standards of behavior the employer has the right to expect of its employees; or

2. Carelessness or negligence of such degree of recurrence as to:
 - a. Manifest equal culpability, wrongful intent or evil design; or
 - b. Show an intentional and substantial disregard of:
 1. The employer's interest, or
 2. The employee's duties and obligations to the employer.

Henry, supra. The reason cited by the employer for discharging the claimant is her failure to meet the employer's job performance expectations. Those expectations are entirely reasonable, and the employer had a good business reason for concluding to discharge the claimant for her failure to meet those expectations. However, the claimant never truly demonstrated an ability to comply with those job expectations. Sellers v. Employment Appeal Board, 531 N.W.2d 645 (Iowa App. 1995). The mere fact that an employee might have repeated incidents of unsatisfactory job performance does not establish the necessary element of intent; misconduct connotes volition. A failure in job performance is not misconduct unless it is intentional. Huntoon, supra; Lee v. Employment Appeal Board, 616 N.W.2d 661 (Iowa 2000). The evidence does not establish the claimant intentionally failed to perform her duties to the employer's expectations. Therefore, the employer has not met its burden to show disqualifying misconduct. Cosper, supra. Based upon the evidence provided, the claimant's actions were not misconduct within the meaning of the statute, and the claimant is not disqualified from benefits.

The final issue is whether the employer's account is subject to charge. An employer's account is only chargeable if the employer is a base period employer. Iowa Code § 96.7. The base period is "the period beginning with the first day of the five completed calendar quarters immediately preceding the first day of an individual's benefit year and ending with the last day of the next to the last completed calendar quarter immediately preceding the date on which the individual filed a valid claim." Iowa Code § 96.19-3. The claimant's base period began July 1, 2005 and ended June 30, 2006. The employer did not employ the claimant during this time, and therefore the employer is not currently a base period employer and its account is not currently chargeable for benefits paid to the claimant.

DECISION:

The representative's January 18, 2007 decision (reference 01) is reversed. The employer did discharge the claimant but not for disqualifying reasons. The claimant is qualified to receive unemployment insurance benefits, if she is otherwise eligible. The employer's account is not subject to charge in the current benefit year.

Lynette A. F. Donner
Administrative Law Judge

Decision Dated and Mailed

ld/pjs