

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

CRYSTAL M SHELTON
Claimant

APPEAL NO. 11A-UI-08086-VS

**ADMINISTRATIVE LAW JUDGE
DECISION**

DISCOVERY LIVING INC
Employer

**OC: 05/15/11
Claimant: Appellant (2)**

Section 96.5-2-A – Discharge for Misconduct

STATEMENT OF THE CASE:

Claimant filed an appeal from a decision of a representative dated June 9, 2011, reference 01, which held claimant ineligible for unemployment insurance benefits. After due notice, a telephone conference hearing was scheduled for and held on July 28, 2011, in Cedar Rapids, Iowa. Claimant participated. Employer participated by Bob Hebl, Executive Director, and Deb Berg, Human Resources Director. The record consists of the testimony of Bob Hebl; the testimony of Deb Berg; the testimony of Crystal Shelton; claimant's exhibits A,B,C,D,G,H,I,J, and K; and Employer's Exhibits 1-2.

ISSUE:

Whether the claimant was discharged for misconduct.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony of the witnesses and having considered all of the evidence in the record, makes the following findings of fact:

The employer is a nonprofit agency that provides residential support to individuals with intellectual disabilities. The claimant was hired in June 2007 as a part-time community living assistant and was later hired as a full-time employee. The claimant's last day of work was April 22, 2011. The claimant was terminated on April 25, 2011. The claimant asked the employer to reconsider its decision and the decision to terminate was confirmed on April 26, 2011.

The incident that led to the claimant's termination occurred on April 22, 2011. The claimant and another employee were assigned to work at a particular residence. The other employee was scheduled to leave at 9:00 p.m. and the claimant would remain at the residence through the night. She was permitted to sleep at the residence but had to be available should she be needed by a resident. The claimant did some grocery shopping and recalls being at a grocery store in the early evening. The other employee noted that the claimant was in the bathroom for a long time. He asked one of the female residents to check on the claimant. The claimant said she was okay and she and the female resident went outside.

The other employee was scheduled to leave at 9:00 p.m. and at 8:45 p.m. he discovered that the claimant and the female resident were missing as was one of the employer's vans. The other employee immediately notified management and the police were called to search for the claimant and the resident. At approximately 2:30 a.m. the van was located by the police outside the claimant's apartment building. The resident was sitting in the van. The claimant was in her apartment. The police suggested that the claimant go to the hospital. She did so and had a rapid pulse rate and high blood pressure. A drug screen was done and was negative. No diagnosis was given by the emergency room doctors and the claimant was told to see her personal physician. Her personal physician recommended an evaluation by a neurologist. The claimant did not keep her appointment with the neurologist because she could not afford it. The claimant has no recollection of anything that occurred after she went grocery shopping in the early evening of April 22, 2011, until the police arrived at her door at approximately 2:30 a.m. It is unknown how long the resident was sitting in the van or how long the claimant was in her apartment.

The claimant had been previously disciplined for two unexcused absences on January 17, 2009, and January 27, 2009. The claimant was going to be terminated but the employer decided to change it to a two-day suspension.

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.

Misconduct that leads to termination is not necessarily misconduct that disqualifies an individual from receiving unemployment insurance benefits. Misconduct occurs when there are deliberate acts or omissions that constitute a material breach of the worker's duty to the employer. Excessive unexcused absenteeism is one form of misconduct. However, the employer must show that the absenteeism is both excessive and unexcused. The employer has the burden of proof to establish misconduct.

The events that occurred on April 22, 2011, could have had serious repercussions. It is entirely possible that an intellectually disabled adult sat alone in a van for as long as five hours. This resident was the responsibility of the claimant and it is indeed fortunate that no harm came to the resident. The claimant herself understood that she could no longer work with the residents and the employer was entirely justified in its decision to terminate the claimant.

Where matters become much more complicated is whether the claimant's actions on April 22, 2011, were misconduct. The legal definition of misconduct requires a finding that there were deliberate acts or omissions. The claimant has no recollection of what occurred after she did the grocery shopping. A co-employee was worried about her as she seemed to be acting abnormally. The claimant assured him that she was okay. The claimant does not remember taking the resident and driving the van and going to her apartment building.

The claimant was evaluated at the hospital and no diagnosis was given other than to see a personal physician. The claimant had a rapid pulse rate and high blood pressure. A drug screen was negative. The most reasonable inference from the evidence is that the claimant had some sort of health event over which she had no control. This means that the claimant could not have acted deliberately to breach a material interest owed to her employer. The administrative law judge concludes that there is insufficient evidence in this record to conclude that the claimant's actions constitute misconduct that disqualifies her from receiving unemployment insurance benefits. Benefits are allowed if the claimant is otherwise eligible.

DECISION:

The decision of the representative dated June 9, 2011, reference 01, is reversed. Unemployment insurance benefits are allowed, provided claimant is otherwise eligible.

Vicki L. Seeck
Administrative Law Judge

Decision Dated and Mailed

vls/css