

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

JORDAN N LUCKEL
Claimant

ABILIT HOLDINGS (LAWTON) LLC
Employer

APPEAL 20A-UI-10310-HP-T
ADMINISTRATIVE LAW JUDGE
DECISION

OC: 12/29/19
Claimant: Appellant (1)

Iowa Code § 96.5(1) – Voluntary Quitting
Iowa Code § 96.5(2)a – Discharge for Misconduct

STATEMENT OF THE CASE:

Claimant Jordan Luckel filed an appeal from an August 6, 2020 (reference 03) unemployment insurance decision that denied benefits based upon her discharge from employment from Abilit Holdings (Lawton) LLC (“Lawton Senior Living”). Notices of hearing were mailed to the parties’ last known addresses of record for a telephone hearing scheduled for October 8, 2020. Luckel appeared and testified. Danica Forch and Denise Temple appeared and testified on behalf of Lawton Senior Living. Exhibit 1 was admitted into the record. I took administrative notice of the claimant’s unemployment insurance benefits records maintained by Iowa Workforce Development.

ISSUE:

Was the separation a layoff, discharge for misconduct or voluntary quit without good cause?

FINDINGS OF FACT:

On January 8, 2020, Luckel commenced full-time employment with Lawton Senior Living as a resident assistant. Lawton Senior Living operates an assisted living facility. Luckel was assigned to work with a certain number of residents each day and to assist them with activities of daily living, including, but not limited to bathing and toileting. Forch became her direct supervisor in April 2020.

On May 4, 2020, a resident assistant went to check on two female residents at shift change. She found the two residents’ clothing was soaked through with urine. Both residents had care plans that required they be taken to the toilet every two hours. Forch observed both residents were saturated with urine through their clothing. Luckel charted in the records for both residents she took them to the toilet every two hours that day. One of the residents was verbal and the other was nonverbal. Forch spoke to the verbal resident and the resident stated she was upset because Luckel had not gotten her up to go to the toilet. Forch testified in her experience the women had not been toileted every two hours given the amount of urine.

On May 5, 2020, Forch and Temple called Luckel into a meeting where she received a final warning. (Ex. 1) The Counseling Documentation Form provided on May 4, 2020, two residents were found at shift change, 2:00 p.m., to be incontinent of urine, soaking through their clothing and into their wheelchairs and both residents showed redness on their perineum. (Ex. 1) The form warned Luckel she was receiving a final warning due to neglect of two residents, that she needed to assist all residents to the restroom at appropriate intervals and check for incontinence frequently, and if her performance did not improve, she would be terminated. (Ex. 1) The form also noted Luckel would be supervised during her shift on May 7, 2020, to determine if she was appropriately attending to resident needs. (Ex. 1) Luckel signed the disciplinary form. She testified she was aware that her job was in jeopardy.

On May 18, 2020, Forch discovered the same two women were soaked in urine through their clothing when Luckel had been working with them. Forch spoke to the verbal resident and she told her Luckel had not taken her to the toilet and when she asked to go to the toilet Luckel told her to go in her Depend undergarment. The resident also reported she wanted to get up out of bed and Luckel told her she would have to wait for the next shift. Forch looked at the charts for the two residents and Luckel had entered charting that she had taken both women to the toilet every two hours. Forch reported Luckel could not have taken the women every two hours to the toilet given the amount of urine she observed.

On May 19, 2020, Forch and Temple called Luckel into a meeting where they terminated her employment. The Counseling Documentation Form provided Luckel had received a final warning for neglect of residents on May 4, 2020, for leaving the two residents sitting in urine and not properly toileting them throughout the shift. (Ex. 1) The form noted on May 18, 2020, the same two residents were found not to be properly toileted and one of the two residents reported Luckel had only changed her once throughout her shift and told her to just "go in her depends." (Ex. 1) The same resident also stated she wanted to get up out of bed and Luckel told her she would have to wait until later. (Ex. 1) Luckel refused to sign the discipline form and wrote a note that the statements were false. (Ex. 1)

During her meetings with Forch and Temple, Luckel reported another resident assistant had offered to help her and that it was impossible for the residents to be soaked through with urine. Forch testified the resident assistant taking a resident to the toilet is supposed to document in the resident's chart the resident assistant took the resident to the toilet. Forch reported no other resident assistant charted they took either of the two women Luckel was assigned to work with to the toilet on May 4, 2020 or May 18, 2020.

Forch testified Luckel was aware her job was in jeopardy when she received the written warning. Forch reported failing to toilet the women was neglectful. Forch reported both women showed redness in the perineum, which could place them at risk for skin breakdown and infection.

Luckel testified neither woman was saturated with urine when she left them on May 4, 2020 or May 18, 2020. She reported another employee offered to help her toilet the women on both days and the nonverbal woman had spilled lunch on her pants and did not have another pair of pants and so she used a wet washcloth to clean off her pants. Luckel denied she had refused to toilet the verbal resident, reporting she took her to the toilet around 1:00 p.m. or 1:30 p.m., and when Luckel left that day at 2:00 p.m., she was sleeping.

REASONING AND CONCLUSIONS OF LAW:

Under Iowa Code section 96.5(2)a,

An individual shall be disqualified for benefits, regardless of the source of the individual's wage credits: . . .

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 disqualification shall continue 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 Iowa Administrative Code 24.31(1)a, defines the term "misconduct" 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 Iowa Legislature. *Huntoon v. Iowa Dep't of Job Serv.*, 275 N.W.2d 445, 558 (Iowa 1979).

871 Iowa Administrative Code 24.32(4) also provides,

Report required. The claimant's statement and employer's statement must give detailed facts as to the specific reason for the claimant's discharge. Allegations of misconduct or dishonesty without additional evidence shall not be sufficient to result in disqualification. If the employer is unwilling to furnish available evidence to corroborate the allegation, misconduct cannot be established. In cases where a suspension or disciplinary layoff exists, the claimant is considered as discharged, and the issue of misconduct shall be resolved.

871 Iowa Administrative Code 24.32(8) provides:

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 bears the burden of proving the employee engaged in disqualifying misconduct. *Cosper v. Iowa Dep't of Job Serv.*, 321 N.W.2d 6, 11 (Iowa 1982) The issue is not whether the employer made a correct decision in separating the claimant, but whether the claimant is entitled to unemployment insurance benefits. *Infante v. Iowa Dep't of Job Serv.*, 364 N.W.2d 262, 264 (Iowa Ct. App. 1984).

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 Dep’t of Job Serv.*, 351 N.W.2d 806, 808 (Iowa Ct. App. 1984) The definition of misconduct in the administrative rule focuses on deliberate, intentional, or culpable acts by the employee. *Id.* When based on carelessness, the carelessness must actually indicate a “wrongful intent” to be disqualifying in nature. *Id.* at 808-09. Negligence does not constitute misconduct unless it is recurrent in nature; a single act is not disqualifying unless it is indicative of a deliberate disregard of the employer’s interests. *Henry v. Iowa Dep’t of Job Serv.*, 391 N.W.2d 731, 735 (Iowa Ct. App. 1986) Additionally, poor work performance is not misconduct in the absence of intent. *Miller v. Emp’t Appeal Bd.*, 423 N.W.2d 211, 213 (Iowa Ct. App. 1988). The law limits disqualifying misconduct to substantial and willful wrongdoing or repeated carelessness or negligence that equals willful misconduct in culpability. *Lee v. Emp’t Appeal Bd.*, 616 N.W.2d 661, 666-69 (Iowa 2000). What constitutes misconduct justifying termination of an employee and what misconduct warrants a denial of unemployment insurance benefits are two separate decisions. *Pierce v. Iowa Dep’t of Job Serv.*, 425 N.W.2d 679, 680 (Iowa Ct. App. 1988). Instances of poor judgment are not misconduct. *Richers v. Iowa Dep’t of Job Serv.*, 479 N.W.2d 308, 312 (Iowa 1991); *Kelly v. Iowa Dep’t of Job Serv.*, 386 N.W.2d 552, 555 (Iowa Ct. App. 1986).

On May 4, 2020, Forch observed two residents who needed assistance with toileting soaked through with urine following the end of Luckel’s shift. Luckel was assigned to the two residents on May 4, 2020. One of the residents was verbal and told Forch Luckel had not taken her to the toilet. Both residents had care plans requiring them to be taken to the toilet every two hours. Forch testified given the amount of urine, the residents had not been toileted for more than two hours. Forch and Temple gave Luckel a final warning on May 5, 2020 and told her she needed to assist all residents at appropriate intervals and check for incontinence frequently, and that if her performance did not improve she would be terminated.

A few weeks later, on May 18, 2020, Forch discovered the same two residents were soaked with urine when Luckel had been assigned to provide them care. Forch interviewed the verbal resident and she told Forch Luckel had refused to take her to the toilet and told her to go in her Depend undergarment. The same resident reported she asked Luckel for help getting out of bed and Luckel told her she needed to wait until the next shift. Forch and Temple terminated Luckel due to neglect of two residents. I find Luckel engaged in substantial and willful misconduct. She had been warned that her job was in jeopardy and she would be terminated if she failed to take residents to the toilet. After receiving the warning, Luckel again failed to toilet the residents, but charted she had. The verbal resident told Forch Luckel told her to go in her Depend undergarment. I find Luckel was discharged for disqualifying misconduct. Benefits are denied.

DECISION:

Regular Unemployment Insurance Benefits Under State Law

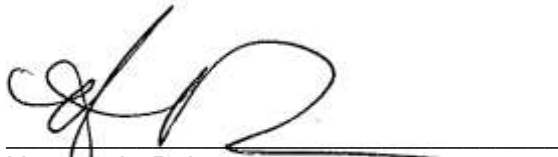
The August 6, 2020 (reference 03) unemployment insurance decision denying unemployment insurance benefits is affirmed. Claimant was discharged for disqualifying misconduct. Unemployment insurance benefits are denied until the claimant has worked in and earned wages for insured work equal to ten times the claimant’s weekly benefit amount after the claimant’s separation date, and provided the claimant is otherwise eligible.

Pandemic Unemployment Assistance (“PUA”) Under the Federal CARES Act

Even though the claimant is not eligible for regular unemployment insurance benefits under state law, the claimant may be eligible for federally funded unemployment insurance benefits under the

CARES Act. Section 2102 of the CARES Act creates a new temporary federal program called Pandemic Unemployment Assistance (“PUA”) that may provide up to 39 weeks of unemployment benefits. An individual receiving PUA benefits may also receive an additional \$600 weekly benefit amount under the Federal Pandemic Unemployment Compensation (“FPUC”) program if the individual is eligible for PUA benefits for the week claimed. The FPUC additional \$600 payment per week ended as of July 25th in Iowa. This means the \$600 weekly additional benefit stopped and at this time, no extension or change to the program has been made by Congress at this time. This does mean that you will see a corresponding decrease in your weekly benefit amount. The FPUC payments are not a state benefit and Iowa is unable to make any changes to the availability of this benefit. If a change takes place to this benefit in the future, IWD will share on the IWD website and social media. This decision does not address whether the claimant is eligible for PUA. If the claimant wishes to receive PUA benefits, the claimant must apply for PUA, as noted in the instructions provided in the “Note to Claimant” below:

Note to Claimant: If this decision determines you are not eligible for regular unemployment insurance benefits and you disagree with this decision, you may file an appeal to the Employment Appeal Board by following the instructions on the first page of this decision. Individuals who do not qualify for regular unemployment insurance benefits, but who are currently unemployed for reasons related to COVID-19 may qualify for Pandemic Unemployment Assistance (“PUA”). **You will need to apply for PUA to determine your eligibility under the program. Additional information on how to apply for PUA can be found at <https://www.iowaworkforcedevelopment.gov/pua-information>.** This decision denies benefits. If this decision becomes final or if you are not eligible for PUA, you may have an overpayment of benefits.



Heather L. Palmer
Administrative Law Judge
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October 12, 2020
Decision Dated and Mailed

hlp/sam