

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

SHERRIN R GONZALES-GARCIA
Claimant

APPEAL NO. 07A-UI-00565-H2

**ADMINISTRATIVE LAW JUDGE
DECISION**

CARE INITIATIVES
Employer

OC: 09-24-06 R: 03
Claimant: Appellant (2)

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

STATEMENT OF THE CASE:

The claimant filed a timely appeal from the January 4, 2007, reference 02, decision that denied benefits. After due notice was issued, a hearing was held on February 13, 2007, in Creston, Iowa. Claimant did participate and was represented by B.J. Terrones, Attorney at Law. Employer did participate through Tim Boswell, Director of Nursing, and Selena Selsor, Administrator. Claimant's Exhibit A, B, and C were entered and received into the record. Employer's Exhibit One was entered and received into the record.

ISSUE:

Was the claimant discharged for work related misconduct?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed as a CNA part time beginning on November 5, 2005 through December 12, 2006, when she was discharged.

On December 9 the claimant and one of her coworkers were helping move a resident. The claimant was to use a gait belt when moving this resident. The claimant admits that it was a violation of the employer's policy to move the resident without a gait belt. The resident began to slip so the claimant and her coworker lowered him to the floor. They then moved the claimant on to the bed. After they finished moving the resident onto the bed, the claimant felt a pain in her chest. The pain quickly subsided and the claimant was able to complete her work shift without any pain, discomfort, soreness or any other problem at all. She went home and went to bed. The claimant did not report any injury to her employer on December 9 because she did not think she had sustained an injury.

When she awoke the next morning she felt pain in her lower back. She reported the injury to her employer on December 10, 2006 and sought medical treatment that same day.

Thereafter, the claimant was written up for failing to report a work related injury and for failing to use a gait belt when moving a resident. The employer considers both violations class B, serious

violations and discharges an employee when she receives two class B violations. The claimant was given both the class B write-ups on December 12 and was discharged. The employer admits that had the claimant not been given both class B write-ups, she would not have been discharged. The claimant does not deny that she should have used a gait belt when moving the resident. The claimant disputes that she had an obligation to report an injury after the incident happened because she did not believe anything was wrong with her. The claimant reported the incident the next day and the employer had ample opportunity to control her medical care for a workers' compensation injury and to investigate the injury.

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.

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 if it is not contrary to public policy, 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. The claimant did not report an injury because she did not believe she had sustained an injury. When she learned that she had sustained an injury, she immediately reported the incident to the employer. This conduct was merely an isolated incident of poor judgment; and, inasmuch as employer had not previously warned claimant about any of the issues leading to the separation, it has not met the burden of proof to establish that claimant acted deliberately or with recurrent negligence in violation of company policy, procedure, or prior warning. The employer's evidence does not establish that the claimant deliberately and intentionally acted in a manner she knew to be contrary to the employer's interests or standards. There was no wanton or willful disregard of the employer's standards as the claimant did not believe there was anything to report. In short, substantial misconduct has not been established by the evidence. While the employer may have had good cause to discharge, conduct which might warrant a discharge from employment will not necessarily sustain a disqualification from job insurance benefits. *Budding v. Iowa Department of Job Service*, 337 N.W.2d 219 (Iowa App. 1983). Inasmuch as the employer has not established a current or final act of misconduct, benefits are allowed.

DECISION:

The January 4, 2007, reference 02, decision is reversed. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided claimant is otherwise eligible.

Teresa K. Hillary
Administrative Law Judge

Decision Dated and Mailed

tkh/kjw