

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

JAMI A SIBAJA-TOLEDO
Claimant

APPEAL NO: 12A-UI-11131-DT

**ADMINISTRATIVE LAW JUDGE
DECISION**

CARE INITIATIVES
Employer

OC: 07/31/11

Claimant: Appellant (2)

Section 96.5-2-a – Discharge

STATEMENT OF THE CASE:

Jami A. Sibaja-Toledo (claimant) appealed a representative's September 12, 2012 decision (reference 04) that concluded she was not qualified to receive unemployment insurance benefits after a separation from employment. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on October 9, 2012. The claimant participated in the hearing. Craig Cree of TALX Employer Services appeared on the employer's behalf. 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.

ISSUE:

Was the claimant discharged for work-connected misconduct?

OUTCOME:

Reversed. Benefits allowed.

FINDINGS OF FACT:

The claimant started working for the employer on April 30, 2012. She worked full time as a licensed practical nurse (LPN)/charge nurse in the employer's Albia, Iowa long-term care nursing facility. Her last day of work was July 11, 2012. The employer suspended her that day and discharged her on July 17, 2012. The reason asserted for the discharge was not carrying out her job responsibilities as expected in her 90-day probationary period.

The claimant's only warning was given to her on July 3 after an error was made in the narcotics count. The employer asserted that after that date the claimant had failed to complete an altercation report after being told to do so; however, the claimant was not told she should prepare a report until July 12, after she was suspended. The employer also asserted the claimant had failed to complete skilled flow sheets. The claimant testified that she had completed the sheets; the employer could not identify what specific sheets it believed the claimant had not completed. The employer also asserted she had failed to complete

documentation for a doctor's phone order; however, the claimant was not the nurse who had spoken to the doctor, so did not believe it was appropriate that she write up the documentation. Finally, the employer asserted that the claimant failed to do an incident report on a resident's fall; however, the claimant testified that she had in fact done this incident report.

Because the employer concluded that the claimant's job performance during her probationary period was not satisfactory, she was discharged.

The claimant established an unemployment insurance benefit year effective July 31, 2011. After the separation, effective August 19, 2012 that claim was reopened as a claim for emergency unemployment compensation (EUC) under the 2011 claim year. No weekly continued claims have been filed since the claim year was reopened.

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).

In order to establish misconduct such as to disqualify a former employee from benefits an employer must establish the employee was responsible for a deliberate act or omission which was a material breach of the duties and obligations owed by the employee to the employer. 871 IAC 24.32(1)a; *Huntoon v. Iowa Department of Job Service*, 275 N.W.2d 445 (Iowa 1979); *Henry v. Iowa Department of Job Service*, 391 N.W.2d 731, 735 (Iowa App. 1986). The conduct must show a 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. 871 IAC 24.32(1)a; *Huntoon*, supra; *Henry*, supra. In contrast, 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(1)a; *Huntoon*, supra; *Newman v. Iowa Department of Job Service*, 351 N.W.2d 806 (Iowa App. 1984).

The reason cited by the employer for discharging the claimant is failure to satisfactorily carry out job responsibilities in the probationary period. Misconduct connotes volition. A failure in job performance is not misconduct unless it is intentional. *Huntoon*, supra. There is no evidence the claimant intentionally failed to work below the best of her abilities. A discharge solely due to a failure to satisfactorily complete a trial or probationary period of employment does not constitute misconduct, and does not in and of itself relieve the employer's account from charge. 871 IAC 24.32(5). 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 employer is not a base period employer under the July 31, 2011 claim year.

DECISION:

The representative's September 12, 2012 decision (reference 04) 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 July 31, 2011 benefit year.

Lynette A. F. Donner
Administrative Law Judge

Decision Dated and Mailed

ld/pjs