

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

**FRANK M LOWERY**  
Claimant

**CHILDSERVE HOMES INC**  
Employer

**APPEAL 17A-UI-05973-CL**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**OC: 04/16/17**  
**Claimant: Appellant (1)**

Iowa Code § 96.6(2) – Timeliness of Appeal  
Iowa Code § 96.5(2)a – Discharge for Misconduct

**STATEMENT OF THE CASE:**

The claimant filed an appeal from the May 16, 2017, (reference 02) unemployment insurance decision that denied benefits based upon a discharge for misconduct. The parties were properly notified about the hearing. A hearing was held in Des Moines, Iowa on June 30, 2017. Claimant participated personally. Employer participated through supervisor Kandice Knoop, staff relations specialist Alyssa Bisenius, and home supervisor Anna Sindt. Department's Exhibit D-1 was received. Employer's Exhibits 1 through 4 were received. Claimant's Exhibit A was received.

**ISSUES:**

Is the appeal timely?  
Was the claimant discharged for disqualifying job-related misconduct?

**FINDINGS OF FACT:**

Having reviewed all of the evidence in the record, the administrative law judge finds: The unemployment insurance decision was mailed to the appellant's address of record on May 16, 2017. The appellant did not receive the decision until June 9, 2017. The appeal was sent within ten days after receipt of that decision.

Claimant began working for employer on February 19, 2015. Claimant last worked as a full-time resident assistant. Claimant was separated from employment on April 21, 2017, when he was terminated.

Employer has a code of conduct for its employees. The code of conduct requires employees to provide proper care for clients, prevent unnecessary potential for injury, and to perform assigned duties. Claimant was aware of the code of conduct. Employer allows employees working in its homes to take cigarette breaks, but only when appropriate staff coverage for clients is available. Employer allows employees to watch television, but only when they are watching television with the residents. Employer allows employees to use personal cell phones for emergencies only. Claimant was aware of these rules.

On April 19, 2017, claimant worked in a house with one other staff member named Christina. There were three clients present in the home. The clients' care plans require one staff to be present for every two clients during meal times. During the shift, claimant used his personal cell phone for short periods of time. At mealtime, claimant went outside for a smoke break and left Christina in the home with three residents. Claimant did not return from his smoke break until after mealtime ended. Claimant also watched television throughout the shift. Christina reported claimant's conduct during the shift to supervisor Kandice Knoop. Knoop alerted home supervisor Anna Sindt and the human resource department.

On April 20, 2017, Knoop and another manager called claimant and informed him that he was being suspended with pay. Christina was interviewed about what happened during the shift, and reported claimant performed little to none of his assigned job duties.

On April 21, 2017, employer terminated claimant's employment.

Claimant had been previously issued disciplinary warnings. On March 20, 2017, claimant was suspended for three days for refusal to perform assigned duties or follow reasonable supervisory directions. Claimant was sitting on the couch looking at his phone when his supervisor asked him to help his co-worker put away laundry. Claimant responded by stating, "Quit riding my ass."

Throughout his employment, many of claimant's co-workers complained about his lack of work and unprofessional comments on the job.

#### **REASONING AND CONCLUSIONS OF LAW:**

The first issue to be considered in this appeal is whether the appellant's appeal is timely. The administrative law judge determines it is.

Iowa Code § 96.6(2) provides, in pertinent part:

The representative shall promptly examine the claim and any protest, take the initiative to ascertain relevant information concerning the claim, and, on the basis of the facts found by the representative, shall determine whether or not the claim is valid, the week with respect to which benefits shall commence, the weekly benefit amount payable and its maximum duration, and whether any disqualification shall be imposed. . . . Unless the claimant or other interested party, after notification or within ten calendar days after notification was mailed to the claimant's last known address, files an appeal from the decision, the decision is final and benefits shall be paid or denied in accordance with the decision.

The appellant did not have an opportunity to appeal the unemployment insurance decision because the decision was not received in a timely fashion. Without timely notice of a disqualification, no meaningful opportunity for appeal exists. See *Smith v. Iowa Emp't Sec. Comm'n*, 212 N.W.2d 471, 472 (Iowa 1973). The appellant filed the appeal within three days of receipt. Therefore, the appeal shall be accepted as timely.

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment due to job-related misconduct.

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.

Iowa Admin. Code r. 871-24.32(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 Dep't of Job Serv.*, 275 N.W.2d 445, 448 (Iowa 1979).

The employer has the burden to prove the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law. *Cosper v. Iowa Dep't of Job Serv.*, 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. Iowa Dep't of Job Serv.*, 364 N.W.2d 262 (Iowa Ct. 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. Iowa Dep't of Job Serv.*, 425 N.W.2d 679 (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 (Iowa 2000).

Misconduct must be "substantial" to warrant a denial of job insurance benefits. *Newman v. Iowa Dep't of Job Serv.*, 351 N.W.2d 806 (Iowa Ct. App. 1984). When based on carelessness, the carelessness must actually indicate a "wrongful intent" to be disqualifying in nature. *Id.* Negligence does not constitute misconduct unless recurrent in nature; a single act is not disqualifying unless indicative of a deliberate disregard of the employer's interests. *Henry v. Iowa Dep't of Job Serv.*, 391 N.W.2d 731 (Iowa Ct. App. 1986). Poor work performance is not misconduct in the absence of evidence of intent. *Miller v. Emp't Appeal Bd.*, 423 N.W.2d 211 (Iowa Ct. App. 1988).

In this case, claimant was terminated for failure to perform his work duties after being warned. Although claimant testified he did not engage in the alleged conduct on April 19, 2017, I do not find his testimony credible. I give more weight to employer's evidence that claimant developed

a pattern of failing to perform work duties and unprofessionalism toward the end of his employment. Employer provided testimony stating that throughout his employment, many if not all of claimant's co-workers complained about his failure to perform work duties and lack of professionalism. I find this testimony credible. More significantly, I find credible supervisor Kandice Knoop's testimony that she asked claimant to perform work duties when he was sitting on the couch and he responded by stating, "Quit riding my ass." Finally, I find credible the report given by claimant's co-worker regarding the events of April 19 credible. I give the witness statements provided by claimant little weight as the individuals making the statements do not have knowledge of the events that led to claimant's termination. Employer has established claimant was terminated for job-related misconduct. Benefits must be denied.

**DECISION:**

The May 16, 2017, (reference 02) unemployment insurance decision is affirmed. The appeal is timely. The claimant was discharged from employment due to job-related misconduct. Benefits are withheld until such time as he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible.

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Christine A. Louis  
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Decision Dated and Mailed

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