IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

THEDUS A JENKINS
Claimant

CARE INITIATIVES
Employer

APPEAL NO. 09A-UI-07530-E2T

ADMINISTRATIVE LAW JUDGE DECISION

OC: 03/29/09
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 May 13, 2009, reference 02, which held claimant ineligible for unemployment insurance benefits. After due notice, a telephone conference hearing was scheduled for and held on June 9, 2009. Claimant participated personally. Employer participated by Dixie Phillips, Shelley Veldhuizen and was represented by Lynn Corbeil. Exhibits One, A and B were admitted into evidence.

ISSUE:

The issue in this matter is whether claimant was discharged for misconduct.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds: Claimant last worked for employer on April 8, 2009. The claimant was a Certified Nurse Assistant (CNA) and worked in a nursing home. The claimant received a warning on January 15, 2009 for leaving a resident who was a fall risk unattended. The warning states it was a "Minor Type C; Verbal Warning." There are two other warning steps before termination for Minor Type C violations, Written Warning, Final Warning, and then termination, according to the employer's documentation. The claimant was given "re-education" after the January 15 verbal warning.

On April 1, 2009 the claimant came to work and found three call lights on. She first attended resident D.A. D.A was at risk of fall. She went to another wing and got help from another CNA to use an EZ-Lift to help him to the bathroom. The claimant used the straps she could use without causing him pain. The other CNA was unaware there may have been missing straps. The other aide left. The claimant heard resident D.K call out for her from her room. She was also a fall risk and the claimant was concerned based upon D.K.'s past action she would fall trying to get herself into a wheel chair. The claimant told D.A to put on the call light when he was through and not to get up. D.A. followed these instructions and Dixie Phillips RN came in response to the call light. Ms. Phillips called the help of another aide and noticed that not all of the belts were being used for the EZ-Lift. Ms Philips told the claimant she should not have left D.A. to assist the other resident. The claimant then went to help resident S.K. This resident

was seated and was slipping out of her chair. The resident's daughter was in the room. The claimant and the resident's daughter used the Hoyer Lift to get the resident to bed. Ms. Phillips came into the resident's room and noted the claimant did not have the assistance of another aide but had had a family member help her. The claimant was suspended. On April 8, 2009 she was discharged. The claimant had difficulty in getting assistance from other CNAs and staff to assist with two person lifts. There were other staff in the nursing home but there was difficulty in getting a timely response to call lights. The claimant has 15 to 18 residents she was trying to provide help to on her floor on April 1, 2009.

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.

The gravity of the incident, number of policy violations and prior warnings are factors considered when analyzing misconduct. The lack of a current warning may detract from a finding of an intentional policy violation.

A claimant is not qualified to receive unemployment insurance benefits if an employer discharges him for reasons constituting work-connected misconduct. Iowa Code section 96.5-2-a. 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 Department of Job Service, 321 N.W.2d 6 (Iowa 1982). The propriety of a discharge is not at issue in an unemployment insurance case. An employer may be justified in discharging an employee, but the employee's conduct may not amount to misconduct precluding the payment of unemployment compensation. The law limits disqualifying misconduct to willful wrongdoing or repeated carelessness or negligence that equals willful misconduct in culpability. Lee v. Employment Appeal Board, 616 N.W.2d 661, 665 (Iowa 2000).

For unemployment insurance purposes, misconduct amounts to a deliberate act and a material breach of the duties and obligations arising out of a worker's contract of employment. Misconduct is a deliberate violation or disregard of the standard of behavior the employer has a right to expect from employees or is an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to the employer. Inefficiency, unsatisfactory conduct, unsatisfactory performance due to inability or incapacity, inadvertence or ordinary negligence in isolated incidents, or good-faith errors in judgment or discretion are not deemed to constitute work-connected misconduct. 871 IAC 24.32(1)(a).

This is a close case. Both the employer and the claimant are concerned about the safety of the residents. The employer provided a warning to the claimant in January of 2009 about not leaving a fall risk patient alone. There had been training about this issue. The claimant was faced with the choice of having another resident D.K. fall when she left D.A in the restroom. This is a Hobson's choice[1] for the claimant. Both residents are at risk. The claimant exercised her judgment in believing that D.A would follow her instruction and not get up and went to provide help to D.K. who was at risk of falling. The claimant had to act quickly. The claimant made a poor choice but it was not an intentional disregard of her employer's interests. She was trying to protect her residents and her employer. She made the wrong choice which is not misconduct.

The second incident involved the use of a Hoyer lift. The claimant used the help of a family member who was familiar with the use of the lift. The resident was slipping in her chair and was trying to get in to the bed. The claimant was using two people for the lift. The testimony established that while it may not have been official policy, family members would occasionally help CNAs. The claimant was trying to assist a resident and did not follow the strict policy. She did rely upon a family member who was familiar with the use of a Hoyer Lift. Other staff have used family members to help.

The employer chose to terminate the claimant rather than give the claimant a "Written Warning and Final Warning" as suggested by the Disciplinary Action Form (Exhibit 1, pp. 3, 20). The employer classified the January infraction as a minor infraction. The claimant was trying to do her job with limited help available in the time frame she needed to help residents who were at risk of falling or slipping out of a bed and chair. The employer has the right to terminate the claimant for any legal reason. The claimant did not strictly follow policy, but her actions were not misconduct.

[1] A "Hobson's choice" is an apparently free choice that offers no real alternative.

DECISION:

The decision of the representative dated May 13, 2009, reference 02, is reversed. Claimant is eligible to receive unemployment insurance benefits, provided claimant meets all other eligibility requirements.

_____
James Elliott
Administrative Law Judge

_____
Decision Dated and Mailed

jfe/pjs