

BEFORE THE
EMPLOYMENT APPEAL BOARD
Lucas State Office Building
Fourth floor
Des Moines, Iowa 50319

DEBORAH A GILMORE

Claimant

and

CRESTRIDGE INC

Employer

HEARING NUMBER: 17BUI-07362

EMPLOYMENT APPEAL BOARD
DECISION

NOTICE

THIS DECISION BECOMES FINAL unless (1) a **request for a REHEARING** is filed with the Employment Appeal Board within **20 days** of the date of the Board's decision or, (2) a **PETITION TO DISTRICT COURT** IS FILED WITHIN **30 days** of the date of the Board's decision.

A REHEARING REQUEST shall state the specific grounds and relief sought. If the rehearing request is denied, a petition may be filed in **DISTRICT COURT** within **30 days** of the date of the denial.

SECTION: 96.5-2-A, 96.3-7

DECISION

UNEMPLOYMENT BENEFITS ARE ALLOWED IF OTHERWISE ELIGIBLE

The Claimant appealed this case to the Employment Appeal Board. The members of the Employment Appeal Board reviewed the entire record. The Appeal Board finds it cannot affirm the administrative law judge's decision. The Employment Appeal Board **REVERSES** as set forth below.

FINDINGS OF FACT:

The Claimant, Deborah A. Gilmore, worked for Crestridge, Inc. from May 29, 1979 through June 29, 2017 as a full-time certified nursing assistant (CNA). The Employer provided the Claimant with a copy of the employee handbook as well as provided training on Standards of Practice, which was updated January 1, 2017. (7:40-8:16) The Claimant did not receive a copy of the updated handbook. Nursing protocol specifically prohibits 'charting' for someone other than yourself. (13:00-13:21) Violation of this policy is considered falsification of business records and would result in discipline "...up to and including termination." The Claimant had been working as a certified restorative aide for the past 18 years wherein part of her charting duties involved recording whether or not she completed specific restorative tasks. (9:33-9:42; 20:14-20:31)

On June 16, 2017, Ms. Gilmore experienced difficulty with a resident (hereinafter referred to as Resident A). (22:05; 30:50) She asked a restorative nurse (Ashley) (25:51) for advice to which Nurse Ashley directed the Claimant to leave Resident A to her, and that she (Nurse Ashley) would complete the task. (22:15-22:18) Ms. Gilmore requested that she be allowed to observe how Nurse Ashley managed Resident A so she could learn from the experience (22:20-22:26), but the restorative nurse never came back to get the Claimant for observation purposes. (22:27-22:32) Nurse Ashley later told Ms. Gilmore that she had "...done [the resident] in a group setting in her wheelchair in the main dining room..." (22:30-22:41) The Claimant took her word that she had completed the task for Resident A. (23:13-23:20; 23:47; 27:39-27:41; 30:08-30:10) At the end of the Claimant's shift, she noted that Resident A's care hadn't been initialed by Nurse Ashley, who was gone for the day. (23:40; 24:08-24:10) Ms. Gilmore couldn't sign her initials because she hadn't done the task; so she put Nurse Ashley's initials down. (23:41-23:52) The Claimant didn't think to contact a superior regarding the situation. (24:18-24:29) She knew of other incidents where personnel signed off on a task for another person who actually performed the task, and didn't realize she was doing anything wrong. (24:45)

The next time Nurse Ashley worked in restorative care on June 28th, 2017, she noted the initials on the Resident A's chart were not her doing. She notified the Director of Nursing that same day to report that she had not, in fact, personally recorded her initials. (9:13-9:40. 18:15-18:20) An investigation ensued, as this was considered falsification of business documents and a serious offense. (8:24; 16:07-16:27; 18:20-18:32) The Employer terminated the Claimant for falsifying records. (18:34-18:37) Ms. Gilmore had never received any prior warnings for this type of incident or any other matter. (20:38-20:49; 33:25)

REASONING AND CONCLUSIONS OF LAW:

Iowa Code Section 96.5(2)(a) (2013) provides:

Discharge for Misconduct. If the department finds the individual has been discharged for misconduct in connection with the individual's employment:

The individual shall be disqualified for benefits until the individual has worked in and been paid wages for the insured work equal to ten times the individual's weekly benefit amount, provided the individual is otherwise eligible.

The Division of Job Service defines misconduct at 871 IAC 24.32(1)(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 the 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 Iowa Supreme court has accepted this definition as reflecting the intent of the legislature. *Lee v. Employment Appeal Board*, 616 N.W.2d 661, 665, (Iowa 2000) (quoting *Reigelsberger v. Employment Appeal Board*, 500 N.W.2d 64, 66 (Iowa 1993)).

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 substantial and willful wrongdoing or repeated carelessness or negligence that equals willful misconduct in culpability. *Lee v. Employment Appeal Board*, 616 NW2d 661 (Iowa 2000).

The Claimant is a long-term employee (38 years) with no prior history of disciplinary action issued against her. Although the Employer testified that the employee handbook is routinely updated, the Claimant denied that she ever received a copy of the last update. Ms. Gilmore's initialing on behalf of Nurse Ashley was, no doubt, against the Employer's policies and the Standards of Practice, which she probably was aware of given her lengthy employment with Crestridge. However, in light of the circumstances surrounding her behavior, we find that there were mitigating factors involved.

There is no dispute she had difficulty with Resident A for which she sought assistance from Nurse Ashley. According to Ms. Gilmore's testimony, which we find credible, she understood from Nurse Ashley that she had completed the task on Resident A and assured the Claimant of the same. The Claimant admitted signing Nurse Ashley's initials at the end of the shift and provided a cogent explanation for doing so. While we don't condone her behavior, it is clear from her testimony, which we again find credible, that she was simply taking care of a charting problem that she reasonably believed could be expediently rectified at the time. Nurse Ashley was not available, and wouldn't be until she returned to work in the upcoming days. By the Employer's own testimony, such a charting violation could result in discipline 'up to and including termination.' Why then would the Claimant, who had an otherwise stellar record, have to receive the maximum penalty? It is clear she didn't act maliciously or intentionally to cause harm to the Employer, or to Nurse Ashley. At worst, we find that this was an isolated instance of poor judgment that didn't rise to the legal definition of misconduct. Based on this record, we conclude that the Employer failed to satisfy their burden of proof.

DECISION:

The administrative law judge's decision dated August 9, 2017 is **REVERSED**. The Employment Appeal Board concludes that the Claimant was discharged for no disqualifying reason. Accordingly, she is allowed benefits provided the Claimant is otherwise eligible.

The Claimant submitted additional evidence to the Board which was not contained in the administrative file and which was not submitted to the administrative law judge. While the additional evidence was reviewed for the purposes of determining whether admission of the evidence was warranted despite it not being presented at hearing, the Employment Appeal Board, in its discretion, finds that the admission of the additional evidence is not warranted in reaching today's decision. There is no sufficient cause why the new and additional information

submitted by the Claimant was not presented at hearing. Accordingly all the new and additional information submitted has not been relied upon in making our decision, and has received no weight whatsoever, but rather has been wholly disregarded.

Kim D. Schmett

Ashley R. Koopmans

James M. Strohman