

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**DI'ANN S KOENIG**

Claimant

**APPEAL NO: 11A-UI-02899-DT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**ASSISTED LIVING CONCEPTS INC**

Employer

**OC: 01/23/11**

**Claimant: Respondent (1)**

Section 96.5-2-a – Discharge

**STATEMENT OF THE CASE:**

Assisted Living Concepts, Inc. (employer) appealed a representative's March 1, 2011 decision (reference 01) that concluded Di'Ann S. Koenig (claimant) was 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 March 31, 2011. The claimant participated in the hearing and presented testimony from one other witness, Jane Ronfelt. Michael Fox appeared on the employer's behalf. During the hearing, Claimant's Exhibit A was entered into evidence. 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?

**FINDINGS OF FACT:**

The claimant started working for the employer on November 5, 2008. She worked full time as a personal service attendant and medications manager at the employer's Sergeant Bluffs, Iowa senior housing facility, Floyd House. Her last day of work was January 21, 2011. The employer suspended her that day and discharged her on January 24, 2011. The reason asserted for the discharge was recording a photograph without management approval.

The employer has a policy describing offenses for which an employee might be discharged which includes:

20. Tape recording, videotaping, or in any other way recording, without permission, written or oral communications between or among management, co-workers, residents, or family members.

On January 21 the claimant arrived for work at approximately 7:00 a.m., and in discussing resident status with the staff person coming off the overnight shift, learned there was a resident with some sores on his legs that had caused that staff person and the staff person before her to

have had sufficient concern that they had contacted the reference nurse, Ms. Ronfelt. Ms. Ronfelt was only on site about one day a week. When the claimant observed the sores on the resident's legs, she had extreme concern regarding the health of the resident, believing it was so serious he should be seen by a doctor immediately, not waiting until a scheduled appointment later in the week. She then contacted Ms. Ronfelt herself and expressed her concerns. Ms. Ronfelt indicated she was having a difficult time getting a sufficient explanation as to the appearance of the sores, so the claimant offered to take a picture of the sores on her cell phone camera and send the picture to Ms. Ronfelt, which suggestion Ms. Ronfelt welcomed and approved. The claimant discussed this with the resident, who also approved. The claimant proceeded to take the picture, taking care not to include any identifying information in the photo, and transmitted the photo to Ms. Ronfelt. Upon seeing the photo, Ms. Ronfelt agreed that the resident's condition was critical and required emergency transportation to the hospital, which was accomplished.

The afternoon of January 21 the resident director of the facility, Mr. Fox, learned that the claimant had taken and transmitted the picture. He indicated he considered this to be a violation of the cited policy, as well as a breach of resident confidentiality, and therefore first suspended and then fired the claimant. He had previously voiced a desire to "get rid of" the claimant, possibly because she had been working under work restrictions since a 2010 injury.

#### **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 her asserted violation of the cited policy and a breach of resident confidentiality. The employer has not established that

there in fact was a breach of the policy or confidentiality provisions. The claimant had the consent of the resident and the acting manager, Ms. Ronfelt. Further, the sending of the photo is not a "written or oral communication" which would be the necessary subject of conduct that might be prohibited under the employer's cited policy. 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.

**DECISION:**

The representative's March 1, 2011 decision (reference 01) is affirmed. 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.

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Lynette A. F. Donner  
Administrative Law Judge

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Decision Dated and Mailed

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