

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

KIMBERLY L SABO
Claimant

APPEAL NO. 15A-UI-00013-NT

**ADMINISTRATIVE LAW JUDGE
DECISION**

MID-STEP SERVICES INC
Employer

**OC: 11/16/14
Claimant: Respondent (1)**

Section 96.5-2-a – Discharge

STATEMENT OF THE CASE:

The employer filed a timely appeal from a representative's decision dated December 22, 2014, reference 01, which held claimant eligible to receive unemployment insurance benefits. After due notice was provided, a telephone hearing was held on January 26, 2015. Claimant participated. Participating on behalf of the claimant was Mr. John Beauvais, Attorney at Law. The employer participated by Ms. Karen Scroggin, Administrator, and Ms. Jan Hackett, Human Resource Manager.

ISSUE:

The issue is whether the evidence in the record establishes misconduct sufficient to warrant the denial of unemployment insurance benefits.

FINDINGS OF FACT:

Having considered the evidence in the record, the administrative law judge finds: Kimberly Sabo was employed by the captioned employer d/b/a Parkview Home from February 25, 2013 until September 17, 2014 when she was discharged based upon the employer's belief that she had mistreated a resident.

Ms. Sabo was employed as a full-time residential living assistant and was paid by the hour. Her immediate supervisor was Misty Titus.

Ms. Sabo was discharged after it was determined that an elderly resident, who had been temporarily cared for by Ms. Sabo, displayed body bruises that appeared to be bruises consistent with a type of a wooden key fob that Ms. Sabo had been using while caring for the resident on September 15, 2014.

Ms. Sabo had been caring for the resident temporarily on September 15, 2014 when the resident had returned from an outing. The resident was upset and crying after returning from the outing because she had been incontinent and the regular staff member assigned to the

resident had not changed her. While Ms. Sabo was assisting the resident she was using a key to access an area where incontinent pads are stored. Attached to the key is a wooden stick-like object that is used as a type of a key fob to prevent the key from being misplaced.

Approximately one and one-half days later when bruising was noted on the resident, an anonymous staff member reported that Ms. Sabo had been using the key fob-like object when caring for the resident on September 15, and also reported that Ms. Sabo had tried to "hide" the key fob from view when she was approached.

The matter was further investigated by the employer and the Sioux City Police Department was notified as well as the Department of Inspections and Appeals. Although, the claimant denied any wrongdoing in the matter, police charges were initially filed against Ms. Sabo. The Department of Inspections and Appeals investigated and determined that the allegation that the resident had suffered dependent abuse to be "founded." Subsequently, the criminal charges against the claimant were dropped. An appeal was also filed by the claimant with the Department of Inspections and Appeals. The appeal to the Department of Inspections and Appeals has not been adjudicated at the time of the unemployment hearing in this matter. The claimant presently continues to be on the dependent adult registry.

REASONING AND CONCLUSIONS OF LAW:

The question before the administrative law judge in this case is whether the evidence in the record establishes misconduct on the part of the claimant sufficient to warrant the denial of unemployment insurance benefits. It does not.

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).

In discharge cases the employer has the burden of proof to establish disqualifying conduct on the part of a claimant. See Iowa Code section 96.6(2). Misconduct must be substantial in order to justify a denial of unemployment insurance benefits. Misconduct that may be serious enough to warrant the discharge of an employee may not necessarily be serious enough to warrant the denial of unemployment insurance benefits. See Lee v. Employment Appeal Board, 616 N.W.2d 661 (Iowa 2000). The focus is on deliberate, intentional or culpable acts by the employee. See Gimbel v. Employment Appeal Board, 489 N.W.2d 36, 39 (Iowa Ct. of Appeals 1992).

Allegations of misconduct without additional evidence shall not be sufficient to result in disqualification. If the employer is unwilling to furnish available evidence to corroborate the allegation, misconduct cannot be established. See 871 IAC 24.32(4). When it is in a party's power to produce more direct and satisfactory evidence than what is actually produced, it may fairly be inferred that the more direct evidence will expose deficiencies in that party's case. See Crosser v. Iowa Department of Public Safety, 240 N.W.2d 682 (Iowa 1976).

While hearsay is admissible in administrative proceedings, it is not accorded the same weight as sworn, direct testimony providing that the direct testimony is credible and not inherently improbable.

In the case at hand, the employer made a decision to terminate Ms. Sabo based upon the information that was available to the employer from an anonymous source who had alleged that the claimant had been seen using an object similar to the one that had caused the bruising on a resident and further alleged that the claimant had attempted to "hide" the object from the observer. The Department of Inspections and Appeals made an initial determination that the allegation of abuse was "founded" and the claimant was placed on the registry list.

The administrative law judge notes that the claimant has at all times denied the allegation that she mistreated the resident and the administrative law judge notes that the criminal charges filed against the claimant have been dismissed by the local authorities on their own motion. In her testimony Ms. Sabo denied under oath all allegations of mistreatment of the resident in question, and provided a plausible explanation. The administrative law judge finds the claimant to be a credible witness, and finds her testimony is not inherently improbable. The anonymous allegation that the claimant may have caused the injury to the resident is not sufficient to establish intentional misconduct on the part of the claimant. Unemployment insurance benefits are allowed provided the claimant is otherwise eligible.

The administrative law judge concludes that the evidence in the record is not sufficient to establish intentional, disqualifying misconduct on the part of Ms. Sabo.

DECISION:

The adjudicator's decision dated December 22, 2014, reference 01, is affirmed. The claimant was separated under non-disqualifying conditions. Unemployment benefits are allowed, provided she is otherwise eligible.

Terence P. Nice
Administrative Law Judge

Decision Dated and Mailed

pjs/pjs