

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

SHYLA MIXON

Claimant

APPEAL NO: 10A-UI-13476-ET

**ADMINISTRATIVE LAW JUDGE
DECISION**

CARE INITIATIVES

Employer

OC: 08-29-10

Claimant: Appellant (1)

Section 96.5-2-a – Discharge/Misconduct

STATEMENT OF THE CASE:

The claimant filed a timely appeal from the September 22, 2010, reference 01, decision that denied benefits. After due notice was issued, a hearing was held by telephone conference call before Administrative Law Judge Julie Elder on November 10, 2010. The claimant participated in the hearing with witness/current cook for the employer Elizabeth Cunningham. Shawn Mikels, Administrator; Rosalind VanGorp, RN Charge Nurse; and Josh Burrows, Employer's Representative, participated in the hearing on behalf of the employer.

ISSUE:

The issue is whether the employer discharged the claimant for work-connected misconduct.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed as a full-time dietary aide for Care Initiatives from November 18, 2009 to August 30, 2010. On August 29, 2010, RN Charge Nurse Rosalind VanGorp was at the medication cart just outside the inner dining room around 11:45 a.m. when she overheard someone say "shit." She went to the inner dining room doorway and observed the claimant, with her back toward Ms. VanGorp, next to a resident's wheelchair speaking harshly to the resident. Ms. VanGorp saw the resident look at the claimant and say, "You ain't shit. You're nobody" and the claimant bent down near the resident's face and said, "Oh, yeah? I'll show you who ain't shit" and acted like she spit in the resident's face but actually just spit air toward her. The claimant started walking away with the juice cart and the resident said, "You are a piece of shit" and the claimant came back and said, "You are a piece of shit" and went into the kitchen. Ms. VanGorp testified both parties were angry and she took the resident out by the nurse's station to prevent any further confrontation. Ms. VanGorp called her supervisor and left a message for her and also called the claimant's direct supervisor and left her a message as well. Ms. VanGorp's supervisor called her back and directed her to write a statement detailing the incident and she did so. Administrator Shawn Mikels received a report from Ms. VanGorp when he reported for work Monday, August 30, 2010, and he met with the claimant who admitted that she did call the resident a "piece of shit." Mr. Mikels terminated the claimant's employment for verbally abusing a resident which was a critical type A violation resulting in immediate

termination. The claimant had not received any previous warnings but because her actions were considered abusive and the claimant "got in the resident's face" Mr. Mikels did not feel he could take a chance of it happening again.

REASONING AND CONCLUSIONS OF LAW:

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

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.

While the claimant denies using any profanity when speaking to the resident in question or calling her names she did say the resident told her she "was nothing but a piece of shit" and said she laughed when the resident made the comment. Both the claimant and Ms. VanGorp stated they were friendly with each other and neither reported any personality conflicts or previous problems between them. Consequently, Ms. VanGorp's testimony, refreshed by her written statement completed at the time of the incident, is more persuasive than the claimant's blanket denial of the incident and her responses to the resident. Ms. VanGorp was surprised by the exchange and had no discernable reason to be dishonest in her written statement and testimony while the claimant did have something to gain by failing to be forthcoming about the situation. Consequently, under these circumstances, the administrative law judge concludes the claimant's conduct demonstrated a willful disregard of the standards of behavior the employer has the right to expect of employees and shows an intentional and substantial disregard of the

employer's interests and the employee's duties and obligations to the employer. The employer has met its burden of proving disqualifying job misconduct. Cosper v. IDJS, 321 N.W.2d 6 (Iowa 1982). Therefore, benefits must be denied.

DECISION:

The September 22, 2010, reference 01, decision is affirmed. The claimant was discharged from employment due to job-related misconduct. Benefits are withheld until such time as she has worked in and been paid wages for insured work equal to ten times her weekly benefit amount, provided she is otherwise eligible.

Julie Elder
Administrative Law Judge

Decision Dated and Mailed

je/css