

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

SHELBY N MILLER
Claimant

APPEAL NO: 09A-UI-10004-DT

**ADMINISTRATIVE LAW JUDGE
DECISION**

BARTELS LUTHERAN HOME INC
Employer

OC: 05/31/09
Claimant: Appellant (2)

Section 96.5-2-a – Discharge

STATEMENT OF THE CASE:

Shelby N. Miller (claimant) appealed a representative's July 1, 2009 decision (reference 01) that concluded she was not qualified to receive unemployment insurance benefits after a separation from employment with Bartels Lutheran Home, Inc. (employer). After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on July 27, 2009. The claimant participated in the hearing. Carol Brown appeared on the employer's behalf and presented testimony from one other witness, Cheryl Sherburne. Based on the evidence, the arguments of the parties, a review of the law, and assessing the credibility of the witnesses and reliability of the evidence in conjunction with the applicable burden of proof, 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 January 26, 2009. She worked full time as a certified nursing aide (CNA) in the employer's long-term care nursing facility. Her regular schedule was the second shift, 2:00 p.m. to 10:30 p.m., Monday through Friday. Her last day of work was May 29, 2009. The employer discharged her on June 1, 2009. The reason asserted for the discharge was repeat consumer complaints about not attending to a resident's call.

On May 11 the employer had given the claimant a warning for turning off a resident's call light saying she would be right back and then not returning for ten minutes. It was subsequently reported to the employer that on May 21 the claimant had come into a resident's room at approximately 8:00 p.m. and turned off the call light saying she would be right back, but she had not returned by 8:34 p.m. when another aide assisted the resident. The resident identified the claimant as being the CNA who had initially turned off the light and left. However, the claimant denied under oath that it was her, and indicated another aide bore a resemblance to her. There was no first hand testimony from any employer witness who was on duty that evening.

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 the belief that the claimant had repeated conduct for which she had just been warned on May 11 by turning off a call light and not returning to attend to the resident. The employer relies exclusively on the second-hand account from the resident and others who were on duty on May 21; however, without that information being provided first-hand, the administrative law judge is unable to ascertain whether the resident might have been mistaken, or whether the other employees who made reports to the employer are credible. The administrative law judge concludes that the employer has not met its burden to show by a preponderance of the evidence that it was the claimant who neglected the resident. 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 July 1, 2009 decision (reference 01) is reversed. 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.

Lynette A. F. Donner
Administrative Law Judge

Decision Dated and Mailed

ld/pjs