

IOWA WORKFORCE DEVELOPMENT
Unemployment Insurance Appeals Section
1000 East Grand—Des Moines, Iowa 50319
DECISION OF THE ADMINISTRATIVE LAW JUDGE
68-0157 (7-97) – 3091078 - EI

CAROL M THAYER
408 - 2ND AVE SE
BELMOND IA 50421

ABCM CORPORATION
PO BOX 436
HAMPTON IA 50441-0436

Appeal Number: 05A-UI-01528-H
OC: 01/16/05 R: 02
Claimant: Appellant (1)

This Decision Shall Become Final, unless within fifteen (15) days from the date below, you or any interested party appeal to the Employment Appeal Board by submitting either a signed letter or a signed written Notice of Appeal, directly to the **Employment Appeal Board, 4th Floor—Lucas Building, Des Moines, Iowa 50319**.

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

STATE CLEARLY

1. The name, address and social security number of the claimant.
2. A reference to the decision from which the appeal is taken.
3. That an appeal from such decision is being made and such appeal is signed.
4. The grounds upon which such appeal is based.

YOU MAY REPRESENT yourself in this appeal or you may obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds. It is important that you file your claim as directed, while this appeal is pending, to protect your continuing right to benefits.

(Administrative Law Judge)

(Decision Dated & Mailed)

Section 96.5-2a - Discharge

STATEMENT OF THE CASE:

Carol Thayer filed an appeal from a decision dated February 9, 2005, reference 01. The decision disqualified her from receiving unemployment benefits. After due notice was issued, an in-person hearing was held in Mason City, Iowa, on March 15, 2005. The claimant participated on her own behalf and with witness/representative, Karen Thayer. ABCM/Belmond participated by Administrator Lisa Loring, Corporate Dietician Dorothy Riddle and was represented by attorney Phil Garland. Exhibits One, A, and B were admitted.

FINDINGS OF FACT:

Having heard the testimony of the witnesses and having examined all of the evidence in the record, the administrative law judge finds: Carol Thayer was employed by ABCM/Belmond from August 15, 1989 until January 17, 2005. She was a full time dietary aide and cook. Throughout the course of her employment, Ms. Thayer had received evaluations and disciplinary actions mostly regarding her attitude, conduct, and lack of professionalism. She was known to make inappropriate comments, gossip, complain, and otherwise disrupt the workplace. She was given specific warnings for failing to follow the dietary guidelines by grinding the meat in a dish she was cooking in violation of the nutritional requirements of the residents and not giving bread to all of the residents when it was on the menu. The federal and state guidelines require residents to be given everything on the menu except those things which their doctor has strictly prohibited them to eat. If the resident chooses not to eat the items, that is up to the resident him or herself, but the dietary aide may not make that determination for them. That final warning was given on January 14, 2005 and she was specifically warned her job was in jeopardy.

On January 17, 2005, Administrator Lisa Loring received reports from Corporate Dietician Dorothy Riddle regarding incidents the previous day. Ms. Thayer had been assisting a resident by putting on a covering to protect her clothes and the resident was making noises. The claimant also made noises and another resident felt that Ms. Thayer was mocking or making fun of the other resident. Later that same day, the claimant was walking past an LPN who was bending over. She swatted the LPN on the buttocks with a notebook and the LPN told her that she was not to touch her again and made the complaint.

Ms. Loring and Ms. Riddle reviewed the claimant's personnel file and determined the number of prior warnings, which warranted a discharge. The claimant's work was generally good and Ms. Loring had been hoping to improve the claimant's other deficiencies in terms of her professionalism, conduct, and inappropriate comments. However, the final violation was serious enough as far as impairing the dignity of a resident and inappropriately touching another employee.

REASONING AND CONCLUSIONS OF LAW:

The issue is whether the claimant is disqualified. The judge concludes she is.

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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. Huntoon v. Iowa Department of Job Service, 275 N.W.2d 445, 448 (Iowa 1979).

The claimant had been advised her job was in jeopardy as a result of her ongoing failures to observe appropriate conduct and procedures in the performance of her job. Although she did make some improvement after the warnings, they were not sufficient to prevent further incidents, which precipitated the discharge. The employer is charged with the care of dependent adults and even though Ms. Thayer may not have intended her "noises" to be offensive to or mocking of the one resident, it is obvious that others did take it in that manner. The claimant's ongoing failure to achieve a level of professionalism necessary in this situation was pointed out to her, but she still failed to improve the situation. Her inappropriate touching of the other employee, while also maybe not intending to be offensive, nonetheless was. Ms. Thayer's poor judgment was not a one-time situation but an ongoing course of conduct about which she had been warned. She failed to make the necessary improvements to her interactions with residents and staff and this is conduct not in the best interest of the employer. She is disqualified.

DECISION:

The representative's decision of February 9, 2005, reference 01, is affirmed. Carol Thayer is disqualified and benefits are withheld until she has requalified by earning ten times her weekly benefit amount, provided she is otherwise eligible.

kjf/sc