BEFORE THE
EMPLOYMENT APPEAL BOARD
Lucas State Office Building
Fourth floor
Des Moines, Iowa 50319

CAROLYN A CUNNINGHAM Claimant, and ABCM CORPORATION Employer.	:	HEARING NUMBER: 07B-UI-07239 EMPLOYMENT APPEAL BOARD DECISION

N O T I C E

THIS DECISION BECOMES FINAL unless (1) a **request for a REHEARING** is filed with the Employment Appeal Board within **20 days** of the date of the Board's decision or, (2) a **PETITION TO DISTRICT COURT** IS FILED WITHIN **30 days** of the date of the Board's decision.

A REHEARING REQUEST shall state the specific grounds and relief sought. If the rehearing request is denied, a petition may be filed in **DISTRICT COURT** within **30 days** of the date of the denial.

SECTION: 96.5-2-a

D E C I S I O N

UNEMPLOYMENT BENEFITS ARE DENIED

The employer appealed this case to the Employment Appeal Board. The members of the Employment Appeal Board reviewed the entire record. A majority of the Appeal Board, one member dissenting, finds it cannot affirm the administrative law judge's decision. The majority of the Employment Appeal Board **REVERSES** as set forth below.

FINDINGS OF FACT:

Carolyn Cunningham (Claimant) worked as a charge nurse in a care facility operated by ABCM Corporation (Employer) from May 15, 2006 until the date of her discharge on August 20, 2007. (Tran at p. 2; p. 5; p. 17; p. 20-21; Ex. 14). On April 10, 2007 the Claimant used bungee cords to lock two mentally retarded residents in their room. (Tran at p. 7; p. 10; p. 16; p. 18-19; Ex. 17). There was no physician order authorization of any restraint. (Tran at p. 8-9). Physician orders are required for all types of restraint including those "used to promote safety" that are "not applied directly to [the patient's] person." (Ex. 15). Even emergency restraints used to protect a resident form injury must satisfy restrictions that were not attended to here. (Ex. 16). The Claimant had the 11th off. (Tran at p. 3). After the incident was reported to

the Employer, the Claimant was given a three-day suspension starting on April 12, 2007. (Tran at p. 2; p. 3; p. 17; Ex. 17). She was notified at that time that depending on the outcome of investigation she could be discharged. (Tran at p. 2). She was subsequently offered work at the Employer but she would have been barred from having contact with the residents in question. (Tran at p. 4). This assignment would be temporary pending the outcome of the Department of Inspections and Appeals adult abuse investigation. (Tran at p. 4; p. 10). The Claimant did not, however, return to work at any time. (Tran at p. 17). The Employer, of course, considers adult abuse to be a termination offense. (Tran at p. 5; p. 18; Ex. 1-4). On August 20, 2007 the Employer received notice that the allegations of abuse had been founded. (Tran at p. 4). The Claimant was terminated for having perpetrated founded abuse. (Tran at p. 11; p. 20-21).

REASONING AND CONCLUSIONS OF LAW:

Iowa Code Section 96.5(2)(a) (2007) provides:

> *Discharge for Misconduct*. If the department finds the individual has been discharged for misconduct in connection with the individual's employment:
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> The individual shall be disqualified for benefits until the individual has worked in and been paid wages for the insured work equal to ten times the individual's weekly benefit amount, provided the individual is otherwise eligible.

The Division of Job Service defines misconduct at 871 IAC 24.32(1)(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 the 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 is the meaning which has been given the term in other jurisdictions under similar statutes, and we believe it accurately reflects the intent of the legislature." Huntoon v. Iowa Department of Job Service, 275 N.W.2d, 445, 448 (Iowa 1979).

The employer has the burden to prove the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). The propriety of a discharge is not at issue in an unemployment insurance case. An

employer may be justified in discharging an employee, but the employee's conduct may not amount to misconduct precluding the payment of unemployment compensation. The law limits disqualifying misconduct to substantial and willful wrongdoing or repeated carelessness or negligence that equals willful misconduct in culpability. Lee v. Employment Appeal Board, 616 NW2d 661 (Iowa 2000).

There is absolutely no question that perpetrating adult abuse is an act of misconduct. In the right kind of case it could even be an act of gross misconduct. Iowa Code §235B.20 ("class 'C' felony if the intentional dependent adult abuse results in physical injury."). The Claimant's conduct not only was a "substantial disregard of the employer's interests", 871 IAC 24.32(1)(a), but was a disregard of her duty to render kind and considerate care to her patients. See 655 IAC 4.6 (ground for discipline of nurse). The conduct being clear misconduct, this case turns on the question of whether the Employer terminated the Claimant for a "current act" of misconduct. The law limits disqualification to current acts of misconduct:

> *Past acts of misconduct.* While past acts and warning can be used to determine the magnitude of a current act of misconduct, a discharge for misconduct cannot be based on such past act or acts. The termination of employment must be based on a current act.

871 IAC 24.32(8); accord Ray v. Iowa Dept. of Job Service, 398 N.W2d 191, 194 (Iowa App. 1986); Greene v. EAB, 426 N.W.2d 659 (Iowa App. 1988); Myers v. IDJS, 373 N.W.2d 509, 510 (Iowa App. 1985). We determine the issue of "current act" by looking to the date of the disciplinary action and comparing this to the date the misconduct first came to the attention of the Employer. Greene v. EAB, 426 N.W.2d 659 (Iowa App. 1988)(using date notice of disciplinary meeting first given).

In Greene v. EAB, 426 N.W.2d 659 (Iowa App. 1988) the employee was given a warning but permitted to keep working. The final decision on whether he would be terminated was put off but Mr. Greene was specifically on notice that a decision would be made on whether to retain him. Based on this the Court found a current act. In this case we find, as in Green, a current act. First and foremost, the Employer did conduct an investigation and took action so that the Claimant would know her job was in the balance. The case was referred to DIA and, of course, a finding of abuse by DIA would bar the Claimant from continued employment at the Employer. Further, the Claimant was barred from working with the residents in question pending the outcome of the state investigation and knew the employment consequences of the investigation. Finally, there are statutory indications that the legislature anticipates that an employer may delay the employment decision pending the DIA abuse investigation. This Board is empowered to consider dependent adult abuse information. Iowa Code §235B.6(2)"d"(4). Since disqualification must be based on information known to the employer at the time of discharge, West v. Employment Appeal Board, 489 N.W.2d 731, 734 (Iowa 1992), this suggests that the employer may rely on the outcome of the investigation to make the termination decision. This is more directly shown by Iowa Code §235B.6(2)"c"(5)-(7) which allows certain health facility administrators access to adult abuse information but only if it concerns a person employed by the facility. Obviously, if the person is fired they are no longer employed there. If we required the facility to terminate before a State investigation could be completed then the Employer would not be able to access the adult abuse information and could never offer it into evidence at our hearing – thus vitiating the purpose of §235B.6(2)"d"(4). We conclude, therefore, that where an employer does investigate, does take action, and does place the employee on notice of a pending decision regarding continued employment then a delayed termination is still for a "current act" so long as the delay was caused by an active DIA investigation and the Employer acted promptly once the results were known. This means that the

Claimant was terminated for a current act of misconduct and must be disqualified.

Finally, since the Administrative Law Judge allowed benefits and in so doing affirmed a decision of the claims representative the Claimant falls under the double affirmance rule:

> Rule of two affirmances. 871 IAC 23.43(3)
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> a. Whenever an administrative law judge affirms a decision of the representative or the employment appeal board of the Iowa department of inspections and appeals affirms the decision of an administrative law judge, allowing payment of benefits, such benefits shall be paid regardless of any further appeal.
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> b. However, if the decision is subsequently reversed by higher authority:
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> (1) The protesting employer involved shall have all charges removed for all payments made on such claim.
> (2) All payments to the claimant will cease as of the date of the reversed decision unless the claimant is otherwise eligible.
> (3) No overpayment shall accrue to the claimant because of payment made prior to the reversal of the decision.

DECISION:

The administrative law judge's decision dated August 22, 2007 is **REVERSED**. The Employment Appeal Board concludes that the claimant was discharged for disqualifying misconduct. Accordingly, she is denied benefits until such time the Claimant has worked in and has been paid wages for insured work equal to ten times the Claimant's weekly benefit amount, provided the Claimant is otherwise eligible. See, Iowa Code section 96.5(2)"a".

No remand for determination of overpayment need be made under the double affirmance rule, 871 IAC 23.43(3), but still the Employer's account may not be charged.

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Elizabeth L. Seiser

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Mary Ann Spicer

AMG/fnv

DISSENTING OPINION OF JOHN A. PENO :

I respectfully dissent from the majority decision of the Employment Appeal Board; I would affirm the decision of the administrative law judge in its entirety. The Employer waited four months to take its actions even though the Claimant admitted the action. There was no reason for the Employer to delay. There was nothing to investigate. All the Employer needed to do was decide what action to take. What it did was offer to bring the Claimant back to work pending the outcome of the state investigation. It is clear that the Claimant was fired not because of what she had done but because of the outcome of the DIA investigation. The record does not contain even the allegation of an act of misconduct by the Claimant between her suspension and her termination. As far as we know the Claimant did nothing wrong at all between these two dates. What happened is that a complaint that had been filed with DIA resulted in a founded determination. It is only after this result that the Employer decided that the Claimant should be suspended. It was the outcome of the DIA investigation and not anything additional done by the Claimant that caused the Employer to change its action from allowing the Claimant to work to the termination of the Claimant.

Generally, "[t]here must be a direct causal relation between the misconduct and the discharge... Simply put, we think an employer must establish that the employer discharged the claimant because of a specific act or acts of misconduct." West v. Employment Appeal Board, 489 N.W.2d 731, 734 (Iowa 1992)(emphasis in original); accord Larson v. Employment Appeal Bd., 474 N.W.2d 570, 572 (Iowa 1991) (record revealed claimant was fired for incompetence; claim that she was fired for deceit was supplied by agency post hoc); Lee v. Employment Appeal Board, 616 N.W.2d 661, 669 (Iowa 2000)(incident occurring after decision to discharge is irrelevant). The burden on the Employer is to prove that the Claimant was "discharged for misconduct". Iowa Code §96.5(2)(a). The Code does not state that the Claimant is disqualified if a termination would be justified by misconduct but only if the termination was "for" misconduct. The Claimant cannot be disqualified for her alleged misconduct since the termination decision was not based on the alleged misconduct but rather on the outcome of the DIA investigation.

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John A. Peno

RRA/fnv