

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

OLIVIA L TUTTLE
Claimant

APPEAL NO. 12A-UI-02083-H2

**ADMINISTRATIVE LAW JUDGE
DECISION**

HEALTHLY CONNECTIONS INC
Employer

OC: 01-15-12
Claimant: Respondent (1)

Iowa Code § 96.5(2)a – Discharge/Misconduct

STATEMENT OF THE CASE:

The employer filed a timely appeal from the February 22, 2012, reference 01, decision that allowed benefits. After due notice was issued, an in person hearing was held on April 4, 2012 in Des Moines, Iowa. The claimant did participate. The employer did participate through Valerie Owens, executive director.

ISSUE:

Was the claimant discharged due to job 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 day habilitation manager, full-time, beginning January 12, 2011 through December 30, 2011, when she was discharged. The claimant was discharged for failing to meet the employer's expectations in the performance of her job and for allegedly improperly restraining a resident on December 29. The claimant denied restraining the resident or even improperly touching the resident. At least five other coworkers were present when the incident took place, including the claimant's immediate supervisor, Patty Webster. Ms. Webster did not say anything to the claimant at the time the incident occurred, nor did any other employee. No one complained to the employer until Mr. Hickok asked the claimant to let a client exhibit any behavior he wanted and the claimant told him that was not possible or permissible. Only after the claimant told Mr. Hickok that residents were not allowed to engage in any behavior they chose were complaints made about the claimant improperly restraining a resident. The only person with firsthand knowledge about what occurred who testified at the hearing was the claimant. The claimant did not improperly restrain or touch a resident on December 29 or any other occasion.

The claimant had been given a 90-day performance evaluation on November 21, 2011 that outlined areas of job performance where the employer expected improvement. The written performance evaluation did not put the claimant on notice that her failure to meet the employer's expectations was placing her job in jeopardy. The claimant had not even completed the 90 days given to her to show job performance prior to her discharge.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes claimant was discharged from employment for no disqualifying reason.

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.

Failure in job performance due to inability or incapacity is not considered misconduct because the actions were not volitional. *Huntoon v. Iowa Department of Job Service*, 275 N.W.2d 445, 448 (Iowa 1979). Where an individual is discharged due to a failure in job performance, proof of that individual's ability to do the job is required to justify disqualification, rather than accepting the employer's subjective view. To do so is to impermissibly shift the burden of proof to the claimant. *Kelly v. IDJS*, 386 N.W.2d 552 (Iowa App. 1986). The claimant had been given 90 days to improve her job performance. She was not allowed to complete the 90 days and had not been warned that anything she was doing or failing to do was placing her job in jeopardy. She performed the job to the best of her ability.

The employer's evidence does not establish that the claimant improperly restrained or touched a resident on December 29, 2011. The administrative law judge is persuaded, based on the first-hand testimony of the claimant, the only person to testify with such knowledge, that she acted properly during the incident. The complaint was made when the claimant would not allow another employee to engage in prohibited behavior.

The employer has the burden of proof in establishing disqualifying job misconduct. *Cosper v. Iowa Department of Job Service*, 321 N.W.2d 6 (Iowa 1982). The issue is not whether the employer made a correct decision in separating claimant, 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 misconduct warrants denial of unemployment insurance benefits are two separate decisions. *Pierce v. IDJS*, 425 N.W.2d 679 (Iowa App. 1988). Misconduct serious enough to warrant discharge is not necessarily serious enough to warrant a denial of job insurance benefits. Such misconduct must be "substantial." Poor work performance is not misconduct in the absence of evidence of intent. *Miller v. Employment Appeal Board*, 423 N.W.2d 211 (Iowa App. 1988).

In an at-will employment environment, an employer may discharge an employee for any number of reasons or no reason at all if it is not contrary to public policy, but if it fails to meet its burden of proof to establish job related misconduct as the reason for the separation, employer incurs potential liability for unemployment insurance benefits related to that separation. The employer did not meet the burden of proof to establish that claimant acted deliberately or with recurrent negligence in violation of company policy, procedure, or prior warning. An employee is entitled to fair warning that the employer will no longer tolerate certain performance and conduct. Without fair warning, an employee has no reasonable way of knowing that there are changes that need be made in order to preserve the employment. If an employer expects an employee to conform to certain expectations or face discharge, appropriate (preferably written), detailed, and reasonable notice should be given. Benefits are allowed.

DECISION:

The February 22, 2012 (reference 01) decision is affirmed. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided claimant is otherwise eligible.

Teresa K. Hillary
Administrative Law Judge

Decision Dated and Mailed

tkh/kjw