**IOWA WORKFORCE DEVELOPMENT**
**UNEMPLOYMENT INSURANCE APPEALS**

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

**LORIE L DESTIGTER**
Claimant

**HOPE HAVEN INC**
Employer

**APPEAL NO. 13A-UI-05835-LT**

**ADMINISTRATIVE LAW JUDGE DECISION**

**OC: 04/14/13**
**Claimant: Appellant (2)**

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

**STATEMENT OF THE CASE:**

The claimant filed an appeal from the May 7, 2013 (reference 01) unemployment insurance decision that denied benefits. The parties were properly notified about the hearing. A telephone hearing was held on June 24, 2013. Claimant participated. Employer participated through residential manager Amy Vanroekel and residential specialist and home supervisor Shar Vanschouwen. Employer's Exhibit 1 (fax pages 3 – 6 and 12 -16) was received. Claimant's Exhibits A and B were received.

**ISSUE:**

Was the claimant discharged for disqualifying job related misconduct?

**FINDINGS OF FACT:**

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed part-time as an instructor/direct care provider in a home for adults with intellectual disabilities and mental illness and was separated from employment on April 12, 2013. On April 7 from 7:45 a.m. through 8 a.m. she ran a tornado drill. Residential program instructor and immediate supervisor Nicole Ausborn arrived just before the residents completed the tornado drill. Resident R.S. went into his room to listen to a television show opening song at 8 a.m. Both claimant and Ausborn set up his medications from the cassette and claimant gave them to R.S. at the breakfast table when he was pouring his milk within a minute after the song was over. She did not see him take the medications because Ausborn was talking to her about shift change issues. Her shift over at 8 a.m. and she clocked out at 8:11 a.m. Ausborn is not authorized to pass medications and reported finding R.S.'s medication after claimant left.

A couple of weeks earlier in her evaluation on March 4, 2013 Vanschouwen told her not to preset medications in cups behind locked doors because the employer's license does not allow dispensation from medication cassettes prior to the time they are due to be given. This information was provided in the form of policy change information in response to a question rather than as a disciplinary notice. The employer had not previously warned claimant her job

was in jeopardy for similar reasons. The general staff directive to watch consumers ingest medications was not raised until it was inserted in a team meeting agenda for April 9, 2013. (Claimant's Exhibit B)

On April 9 claimant did not give a resident the medication Miralax from one consumer's bottle to another consumer who was prescribed the same medication. Claimant did not find an empty container or she would have faxed an order for more. All other staff have keys to the medication cabinet even if they are not licensed or authorized to pass medications. Ausborn did not complete reports about either April 7 or 9 and the employer did not confront or interview claimant before she was fired without knowing what Ausborn said happened or a chance to respond.

**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 § 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.

The employer has the burden of proof in establishing disqualifying job misconduct. *Cosper v. Iowa Dep't of Job Serv.*, 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. Iowa Dep't of Job Serv.*, 364 N.W.2d 262 (Iowa

Ct. 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. Iowa Dep't of Job Serv.*, 425 N.W.2d 679 (Iowa Ct. 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." *Newman v. Iowa Dep't of Job Serv.*, 351 N.W.2d 806 (Iowa Ct. App. 1984). When based on carelessness, the carelessness must actually indicate a "wrongful intent" to be disqualifying in nature. *Id.* Negligence does not constitute misconduct unless recurrent in nature; a single act is not disqualifying unless indicative of a deliberate disregard of the employer's interests. *Henry v. Iowa Dep't of Job Serv.,* 391 N.W.2d 731 (Iowa Ct. App. 1986). Poor work performance is not misconduct in the absence of evidence of intent. *Miller v. Emp't Appeal Bd.*, 423 N.W.2d 211 (Iowa Ct. App. 1988).

The employer has not presented any non-hearsay evidence that R.S. did not take his medication, but even assuming he did not, the conduct for which claimant was discharged was merely an isolated incident of poor judgment. Although claimant had been disciplined for other issues, inasmuch as employer had not previously warned claimant about similar medication error issues as that leading to the separation, it has not met 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. Training or general notice to staff about a policy is not considered a disciplinary warning. A warning for attendance or money handling is not similar to medication error warnings and the employer's simple accrual of a certain number of warnings counting towards discharge does not establish repeated negligence or deliberation and is not dispositive of the issue of misconduct for the purpose of determining eligibility for unemployment insurance benefits. Benefits are allowed.

**DECISION:**

The May 7, 2013 (reference 01) decision is reversed. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed. The benefits withheld shall be paid, provided she is otherwise eligible.

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Dévon M. Lewis
Administrative Law Judge

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Decision Dated and Mailed

dml/pjs