

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

KELLEY K NUTT

Claimant

APPEAL NO: 09A-UI-09427-DT

**ADMINISTRATIVE LAW JUDGE
DECISION**

DUMONT CARE CENTER

Employer

OC: 05/24/09

Claimant: Respondent (1)

Section 96.5-2-a – Discharge

STATEMENT OF THE CASE:

Dumont Care Center (employer)) appealed a representative's June 23, 2009 decision (reference 01) that concluded Kelley K. Nutt (claimant) was qualified to receive unemployment insurance benefits after a separation from employment. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on July 17, 2009. The claimant participated in the hearing. Kathy Meyer-Allbee appeared on the employer's behalf and presented testimony from three other witnesses, Courtney Burkett, Kim Burkett, and Marilyn Moser. Based on the evidence, the arguments of the parties, and the law, 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 August 30, 2005. She worked part time (approximately 20 hours per week) as a dietary aide in the employer's long-term care nursing facility. Her last day of work was May 21, 2009. The employer discharged her on May 22, 2009. The reason asserted for the discharge was failure to follow residents' care plans by providing them with juice rather than water or water products on May 16 and May 17.

The employer had commented in a performance review on or about March 27 that the claimant needed to exercise more care in following the dietary care plans. On March 30 she was given a documented verbal warning for giving residents in a unit for mentally challenged residents juice rather than the proper water drink. On May 16 and May 17 the claimant does not recall putting juice in the second glass on the 15 residents' trays, rather than either thickened water, tap water, or flavored water. She acknowledges that there was at least one resident to whom she gave juice rather than water, with the knowledge and approval of a certified nursing aide (CNA) on duty, as that resident would not drink water.

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 her failure to properly and fully follow the residents' care plans regarding water products rather than juice. Misconduct connotes volition. A failure in job performance is not misconduct unless it is intentional. Huntoon, supra. The claimant had not previously been effectively warned a future incident would result in termination. Higgins v. IDJS, 350 N.W.2d 187 (Iowa 1984). Under the circumstances of this case, the claimant's failure to completely follow the care plans was the result of inefficiency, unsatisfactory conduct, inadvertence, or ordinary negligence in an isolated instance, and was a good faith error in judgment or discretion. While the employer had a good business reason for discharging the claimant, it has not met its burden to show disqualifying misconduct. 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 June 23, 2009 decision (reference 01) is affirmed. 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

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