

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

KAYE L HIGGINBOTHAM
Claimant

APPEAL NO. 10A-UI-06046-VST

**ADMINISTRATIVE LAW JUDGE
DECISION**

CARE INITIATIVES
Employer

OC: 04/19/09
Claimant: Appellant (2)

Section 96.5-2-a – Misconduct

STATEMENT OF THE CASE:

Claimant filed an appeal from a decision of a representative dated April 22, 2010, reference 02, which held claimant ineligible for unemployment insurance benefits. After due notice, a telephone conference hearing was scheduled for and held on June 9, 2010. Claimant participated. Employer participated by Tammy Kappel, director of nursing. The employer was represented by Tom Kuiper of TALX. The record consists of the testimony of Tammy Kappel; the testimony of Kaye Higgenbotham; and Employer's Exhibits 1-6.

ISSUE:

Whether the claimant was discharged for misconduct.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony of the witnesses and having considered all of the evidence in the record, makes the following findings of fact:

The employer is a long term care facility located in Waterloo, Iowa. The claimant was hired on October 5, 2009, as a full time certified nursing assistant. She was terminated on March 30, 2010, in accordance with employer's progressive discipline program.

The incident that led to the claimant's termination was her failure to check a resident who had had a suppository the shift before. As a result, the resident was soiled. The claimant had had three previous warnings concerning patient care. In accordance with the employer's policies, an employee is terminated on the fourth occurrence. Tammy Kappel, director of nursing, informed the claimant that she was being terminated on March 30, 2010. The claimant and Ms. Kappel agreed that the claimant had physical limitations and that she was overwhelmed by the amount of work she had to do. Ms. Kappel did not believe that any of the claimant's performance issues were deliberate.

REASONING AND CONCLUSIONS OF LAW:

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.

Misconduct that leads to termination is not necessarily misconduct that disqualifies an individual from receiving unemployment insurance benefits. Misconduct occurs when there are deliberate acts or omissions that constitute a material breach of the worker's duty to the employer. The legal definition of misconduct excludes unsatisfactory performance due to inability or incapacity. The employer has the burden of proof to show misconduct.

The evidence in this case establishes unsatisfactory performance but not misconduct. The claimant, due to her age and physical limitations, was simply incapable of performing her job in accordance with her employer's standards. The claimant admitted that she was slow and that the amount of work she had to do was overwhelming. The claimant had worked in much smaller facilities prior to her job with the employer. Ms. Kappel did not believe that the claimant did anything wrong deliberately. The administrative law judge concludes that the claimant's discharge was not due to misconduct as defined in unemployment insurance law. Benefits are allowed if the claimant is otherwise eligible

DECISION:

The decision of the representative dated April 22, 2010, reference 02, is reversed. Unemployment insurance benefits are allowed, provided claimant is otherwise eligible.

Vicki L. Seeck
Administrative Law Judge

Decision Dated and Mailed

vls/pjs