

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**KATHY VOSS-BOLDT**  
Claimant

**APPEAL NO. 10A-UI-11137-ET**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**JODY STERN**  
Employer

**OC: 07-04-10**  
**Claimant: Appellant (2)**

Section 96.5-2-a – Discharge/Misconduct  
871 IAC 24.32(9) – Suspension or Disciplinary Layoff

**STATEMENT OF THE CASE:**

The claimant filed a timely appeal from the August 4, 2010, reference 01, decision that denied benefits. After due notice was issued, a hearing was held by telephone conference call before Administrative Law Judge Julie Elder on October 26, 2010. The claimant participated in the hearing with Attorney Kim Butler. Brenda Larkin, Administrator, participated in the hearing on behalf of the employer.

**ISSUE:**

The issue is whether the employer discharged the claimant for work-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 full-time residential staff member for Genesis Development from July 1, 2009 to July 7, 2010. The claimant was suspended without pay July 7, 2010, while the employer reviewed a suspicion of dependent adult abuse. Two staff members and three residents stated the claimant forced a resident into a chair and forcibly pulled her down the hall by her arm while speaking to her in a loud and aggressive tone. The resident showed a staff member a bruise on her arm that she alleged was made by the claimant. The resident primarily speaks Spanish and the employer had to find a staff member to interpret for her. The claimant denies all charges and explained that particular resident often acted out after returning from family visits. She acknowledges the resident acted out Monday and Tuesday, July 5 and 6, 2010, but stated she was fine July 7, 2010, and was following the claimant around and later held her hand as they went for a walk and sat and talked on a bench. When the resident was acting out July 5 and 6, 2010, the claimant had to repeatedly tell her to sit down in her chair and stop different behaviors, including sticking her tongue down another resident's throat and continually going to the dining room where she was not allowed. The resident had shoved the claimant, knocking her off balance, but the claimant did not respond and did not even consider it worthy of documentation. The employer is waiting to hear from the State before making the decision to bring the claimant back to work with back pay or to terminate her employment.

## REASONING AND CONCLUSIONS OF LAW:

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

871 IAC 24.32(9) provides:

(9) Suspension or disciplinary layoff. Whenever a claim is filed and the reason for the claimant's unemployment is the result of a disciplinary layoff or suspension imposed by the employer, the claimant is considered as discharged, and the issue of misconduct must be resolved. Alleged misconduct or dishonesty without corroboration is not sufficient to result in disqualification.

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.

When an individual is unemployed as a result of a disciplinary suspension imposed by the employer, the individual is considered to have been discharged and the issue of misconduct must be resolved. See 871 IAC 24.32(9). An individual who was discharged or suspended for misconduct is disqualified from receiving job insurance benefits. See Iowa Code section 96.5-2-a. In order for a suspension to be a disqualifying event, the evidence must establish misconduct. See 871 IAC 24.32(9). Misconduct is defined as deliberate actions contrary to the employer's interest. See 871 IAC 24.32(1). The employer has the burden of proving disqualifying misconduct. 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 N.W.2d 661, 665 (Iowa 2000). Although the employer testified it suspended the claimant because it suspected her of dependent adult abuse for allegedly forcing a resident into a chair and then forcing her down the hall by her arm, leaving a bruise on her arm, while speaking to her in a loud and aggressive tone of voice, the claimant denies doing any of those things or doing anything inappropriate in dealing with the resident and the claimant's explanation of her interactions with the resident was credible. The employer's witness did not observe any of these events personally but did have access to the witnesses and their statements. The witnesses did not, however, participate in the hearing or, in lieu of participating personally, at least provide their written statements for the hearing. If a party has the power to produce more explicit and direct evidence than it chooses to do, it may be fairly inferred that other evidence would lay open deficiencies in that party's case. Crosser v. Iowa Department of Public Safety, 240 N.W.2d 682 (Iowa 1976). While hearsay is allowed in administrative hearings, it is not as persuasive as firsthand testimony. Additionally, when a witness does not participate in the hearing personally, she is not subject to cross examination of her testimony. Under these circumstances, the administrative law judge concludes the claimant's firsthand testimony is credible and the employer has not met its burden of proving disqualifying job misconduct as defined by Iowa law. Therefore, benefits are allowed.

**DECISION:**

The August 4, 2010, reference 01, decision is reversed. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided the claimant is otherwise eligible.

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Julie Elder  
Administrative Law Judge

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Decision Dated and Mailed

je/kjw