

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**RAMONA R TEPASKE**  
Claimant

**APPEAL NO. 12A-UI-14697-NT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**ABCM CORPORATION**  
Employer

**OC: 10/28/12**  
**Claimant: Appellant (2)**

Section 96.5-2-a – Discharge

**STATEMENT OF THE CASE:**

The claimant filed a timely appeal from a representative's decision dated December 5, 2012, reference 01, which denied unemployment insurance benefits. After due notice was provided, a telephone hearing was held on January 16, 2013. The claimant participated. Participating on behalf of the claimant was Nina Forcier, Attorney at Law. The employer participated by Ms. Tiffany Adams, Administrator and Michelle Moore, Program Coordinator. Employer's Exhibits A, B, C and D and Claimant's Exhibits One and Two were received into evidence.

**ISSUE:**

The issue in this matter is whether the claimant was discharged for misconduct sufficient to warrant the denial of unemployment insurance benefits.

**FINDINGS OF FACT:**

The administrative law judge, having considered the evidence in the record, finds: Ramona Tepaske began employment with the captioned employer, doing business as Harmony House Health Care Center, on Marcy 6, 1989. Ms. Tepaske last held the position of full-time music therapist and was paid by the hour. Her immediate supervisor was Alexis Freye, Activity Coordinator.

Ms. Tepaske was discharged on October 31, 2012 on the same date that a new developmental assistant (nursing assistant) complained about Ms. Tepaske stating that the claimant was picking on her, going through her charts and threatening to write the new assistant up. Because the claimant had received two previous but unrelated warnings within a 12-month period, under company policy she was subject to being discharged if she received another warning. The employer made preparations to discharge the claimant and met with her at the end of the workday.

Ms. Tepaske denied intimidating or threatening to write up the new worker but agreed that she had looked at some charts that the employee was working on to ensure that the new employee was not leaving gaps in her charting. Based upon the allegations made by the new employee

and the possibility that Ms. Tepaske's viewing of charts that she was not directly required to do so for her duties might be a HIPAA violation, Ms. Tepaske was discharged at that time.

Ms. Tepaske had looked at the charts of the new assistant because another employee had indicated that there were "holes" in the new worker's charting and Ms. Tepaske believed based upon previous training that she had an obligation to assist other workers when necessary. Ms. Tepaske had previously held some supervisory positions with the origination in her many years of employment and did not consider her conduct with the new employee to be inappropriate as her intention was to teach the new employee to urge her to make her charting more complete. Ms. Tepaske realized that any residual supervisory authority that she might still have was limited and that official write ups or reprimands would be left to the worker's supervisor.

Because Ms. Tepaske also worked on weekends as a recreational therapist she worked with all residents of the facility. The claimant's intention was not to violate HIPAA rules or disclose the contents of charts to unauthorized individuals but only to assist the new worker after another employee had noted difficulty with the new worker performing her duties.

#### **REASONING AND CONCLUSIONS OF LAW:**

The question before the administrative law judge is whether the evidence in the record establishes misconduct sufficient to warrant the denial of unemployment insurance benefits. It does not.

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.

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 the claimant but whether the claimant is entitled to unemployment insurance benefits. Infante v. Iowa Department of Job Service, 364 N.W.2d 262 (Iowa App. 1984). Misconduct serious enough to warrant discharge may not necessarily be serious enough to warrant the denial of unemployment insurance benefits. Such misconduct must be “substantial.”

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, the employer incurs potential liability for unemployment insurance benefits related to that separation.

In this matter the employer relies primarily on hearsay evidence to establish that the claimant was discharged for misconduct in connection with her work. An unidentified new worker had made complaints about Ms. Tepaske's conduct and although the claimant denied picking on or threatening to write up the new worker, the employer chose to believe the new worker over the claimant's denials. In contrast, the claimant appeared personally and provided sworn testimony denying picking on the new worker or threatening to write her up. The claimant admitted to her employer and admitted during the hearing that on occasion she reviewed the new worker's charting but testified additionally that the reason for the review was because another worker had indicated that the new employee was leaving gaps in the charting. The claimant believed that she had some responsibility to assist the new employee based upon the claimant's many years of service with the organization in her previous supervisory positions with the organization. Ms. Tepaske understood that she did not have the right to warn or write up the new employee and that that responsibility would be delegated to the new employee's direct supervisor. The claimant felt it reasonable, however, to point out to the new worker gaps in the charting needed to be filled in. The claimant testified under oath that that was the limit of her involvement with the employee whose complaint caused the claimant's discharge.

There is no evidence in the record that Ms. Tepaske reviewed the charts of residents for her own purposes or that her intention was to disseminate any chart information. The claimant further testified that when she attempted to assist the new employee the new employee seemed to be grateful and did not indicate any displeasure with the claimant's assistance.

In this matter the evidence in the record establishes that the claimant was not discharged for the incident with the new worker alone but also because of past warnings that had been served upon her for unrelated reasons during the previous 12 months. While past acts and warnings can be used to determine the magnitude of a current act of misconduct, a discharge for misconduct cannot be based upon such past acts. The termination of employment must be based upon a current act. See 871 IAC 24.32(8).

The question before the administrative law judge is not whether the employer has a right to discharge this employee for these reasons but whether the discharge is disqualifying under the provisions of the Employment Security Law. While the decision to terminate Ms. Tepaske may have been a sound decision from a management viewpoint, for the above-stated reasons the administrative law judge concludes that the evidence in the record does not establish misconduct at the time of the final incident to warrant a disqualification from unemployment insurance benefits. Benefits are allowed providing the claimant is otherwise eligible.

**DECISION:**

The representative's decision dated December 5, 2012, reference 01, is reversed. The claimant was discharged under nondisqualifying reasons. Unemployment insurance benefits are allowed, providing the claimant is otherwise eligible.

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Terence P. Nice  
Administrative Law Judge

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Decision Dated and Mailed

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