

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

TERI L DUNSHEE
Claimant

ABCM CORPORATION
Employer

APPEAL 16A-UI-11154-SC-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 09/04/16
Claimant: Appellant (2)

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

STATEMENT OF THE CASE:

Teri L. Dunshee (claimant) filed an appeal from the September 30, 2016, (reference 03) unemployment insurance decision that denied benefits based upon the determination ABCM Corporation (employer) discharged her for engaging in conduct that was not in its best interest. The parties were properly notified about the hearing. A telephone hearing began on October 31, 2016 and concluded on December 7, 2016. The claimant participated personally. Licensed Practical Nurse Belinda Gresham participated on the claimant's behalf. The employer participated through Administrator Jessica Kelchen, Certified Nursing Assistant Amanda Beeik, and Director of Nursing Wendy Chase. Claimant's Exhibit A and B were received. Employer's Exhibit 1 was 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: The claimant was employed full-time as a Registered Nurse beginning on March 1, 2016 after finishing her Nursing degree. She was separated from employment on September 6, 2016, when she was discharged. The claimant received constructive criticism and formal corrective actions related to basic nursing skills throughout her employment. (Claimant's Exhibit B and Employer's Exhibit 1.) The claimant did not receive formal training on how to transfer residents to other facilities including Emergency Rooms. (Claimant's Exhibit A.) The one other time that there had been a resident transfer during the claimant's shift, Licensed Practical Nurse Belinda Gresham took control of the situation the situation and handled the transfer for the claimant.

On September 1, 2016, the claimant had a resident who was experiencing stroke-like symptoms. The claimant performed an assessment of the resident and ordered the Certified Nursing Assistant (CNA) to start oxygen. She was going to call the ambulance, but Gresham told her to wait to call while the paperwork was put in order. The claimant and Gresham were unable to find the paperwork needed and, eventually, the ambulance was called. A CNA, and not the claimant, was with the patient in his room when the Emergency Medical Technicians

(EMTs) arrived. The claimant did not give a comprehensive report to the EMTs as she was giving a report to the Emergency Room to which the resident was being transferred. The claimant was suspended on September 3, 2016 and was discharged on September 6, 2016 for this incident.

REASONING AND CONCLUSIONS OF LAW:

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

Iowa law disqualifies individuals who are discharged from employment for misconduct from receiving unemployment insurance benefits. Iowa Code § 96.5(2)a. They remain disqualified until such time as they requalify for benefits by working and earning insured wages ten times their weekly benefit amount. *Id.* Iowa regulations define misconduct:

“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.

Iowa Admin. Code r. 871-24.32(1)a. This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. *Huntoon v. Iowa Dep't of Job Serv.*, 275 N.W.2d 445, 448 (Iowa 1979).

In an at-will employment environment 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, it incurs potential liability for unemployment insurance benefits related to that separation. 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.” When based on carelessness, the carelessness must actually indicate a “wrongful intent” to be disqualifying in nature. *Newman v. Iowa Dep't of Job Serv.*, 351 N.W.2d 806 (Iowa Ct. App. 1984). 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). A determination as to whether an employee's act is misconduct does not

rest solely on the interpretation or application of the employer's policy or rule. A violation is not necessarily disqualifying misconduct even if the employer was fully within its rights to impose discipline up to or including discharge for the incident under its policy.

The employer has argued that the claimant violated its policies and basic nursing standards during the incident that occurred on September 1, 2016. The claimant denied she engaged in the conduct of which she was accused as she was following instructions from another employee during a situation in which she had limited experience. It is the duty of the administrative law judge as the trier of fact in this case, to determine the credibility of witnesses, weigh the evidence and decide the facts in issue. *Arndt v. City of LeClaire*, 728 N.W.2d 389, 394-395 (Iowa 2007). The administrative law judge may believe all, part or none of any witness's testimony. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996). In assessing the credibility of witnesses, the administrative law judge should consider the evidence using his or her own observations, common sense and experience. *Id.* In determining the facts, and deciding what testimony to believe, the fact finder may consider the following factors: whether the testimony is reasonable and consistent with other believable evidence; whether a witness has made inconsistent statements; the witness's appearance, conduct, age, intelligence, memory and knowledge of the facts; and the witness's interest in the trial, their motive, candor, bias and prejudice. *Id.*

After assessing the credibility of the witnesses who testified during the hearing, considering the applicable factors listed above, and using her own common sense and experience, the administrative law judge finds the claimant's version of events to be more credible. The claimant has established that she ordered a CNA to give the resident oxygen immediately. The employer has not established that was a violation of its policies or practices as another more experienced employee who had been in charge of training the claimant believed this to be proper protocol. With regard to the other violations, specifically waiting to call the ambulance and not giving report to the ambulance crew, the employer has not established the claimant violated policy or protocol. The claimant had not received formal training on transferring a patient and she was following the direction of a more senior employee. The employer has not met the burden of proof to establish that the claimant acted deliberately or with recurrent negligence in violation of company policy, procedure, or prior warning. Accordingly, benefits are allowed.

Even if, as the employer has argued, the claimant engaged in misconduct due to a failure in basic nursing practices or the employer's policy, she is still eligible for benefits. Discharge within a probationary period or for not meeting the employer's standards, without more, is not disqualifying. Iowa Admin. Code r. 871-24.32(5). Failure in job performance due to inability or incapacity is not considered misconduct because the actions were not volitional. *Huntoon v. Iowa Dep't of Job Serv.*, 275 N.W.2d 445, 448 (Iowa 1979). Where an individual is discharged due to a failure in job performance, proof of that individual's ability to do the job is required to justify disqualification, rather than accepting the employer's subjective view. To do so is to impermissibly shift the burden of proof to the claimant. *Kelly v. Iowa Dep't of Job Serv.*, 386 N.W.2d 552 (Iowa Ct. App. 1986). Since the employer has not established that the claimant had a sustained period of time during which she performed her job duties to the employer's satisfaction and inasmuch as she was performing the job to the best of her ability but was unable to meet its expectations, no intentional misconduct has been established, as is the employer's burden of proof. *Cosper v. Iowa Dep't of Job Serv.*, 321 N.W.2d 6 (Iowa 1982). Accordingly, no disqualification pursuant to Iowa Code § 96.5(2)a is imposed.

DECISION:

The September 30, 2016, (reference 03) unemployment insurance decision is reversed. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided she is otherwise eligible. Any benefits claimed and withheld on this basis shall be paid.

Stephanie R. Callahan
Administrative Law Judge

Decision Dated and Mailed

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