

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

MELISSA A WILLIAMS
Claimant

APPEAL NO. 10A-UI-00294-H2T

**ADMINISTRATIVE LAW JUDGE
DECISION**

GOOD SAMARITAN SOCIETY INC
Employer

**Original Claim: 12-06-09
Claimant: Appellant (2)**

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

STATEMENT OF THE CASE:

The claimant filed a timely appeal from the December 31, 2009, reference 01, decision that denied benefits. After due notice was issued, a hearing was held on February 15, 2010. The claimant did participate along with Randy Williams, her husband, and was represented by William G. Brewer, Attorney at Law. The employer did participate through Lori Welch, Human Resources Director; Layne Gross, Administrator; and Gwen Musick, Director of Nursing. Employer's Exhibit One was received.

ISSUE:

Was the claimant discharged for work-related misconduct?

FINDINGS OF FACT:

Having reviewed the testimony and all of the evidence in the record, the administrative law judge finds: Claimant was employed as a certified nurse's aide, full-time, beginning May 28, 2009, through November 27, 2009, when she was discharged.

The claimant was discharged for the alleged theft from a resident, TK, of \$220.00 and for the destruction of his cell phone. On November 22 the claimant entered TK's room to help another employee, Santos, clean up resident TK, who had suffered an episode of incontinence. TK was sitting on the toilet with his sweat pants around his ankles and Santos was helping him clean up. Santos handed the claimant TK's soiled sweat pants. In the pocket of the sweat pants was TK's cell phone with \$220.00 folded up inside of it. The claimant took the sweat pants to the utility room, rinsed them and put them in the laundry. She returned to resident TK's room, which he shared with two other residents, and completed cleaning him up. Later, TK inquired as to the location of his cell phone, which he could not find, and a facility wide search was conducted. By that time, the claimant had already left work. Another certified nurse's aide called the claimant and asked if she knew where TK's cell phone was. The claimant denied having seen the cell phone or the money both when asked by the CNA and later when questioned by the employer. Eventually, TK's cell phone was found wrapped in a small black garbage bag in the bottom of a trash receptacle in a bathroom used only by staff members. The phone, which no longer worked, was water logged and smelled of feces. The money was never found.

A local police investigation was conducted. The claimant has not been charged with the theft. There were other residents in TK's room as well as other visitor's that day.

The employer interviewed both the claimant and Santos, who each reported the same events had occurred and each denied stealing TK's money or cell phone. The employer determined that the claimant had found TK's cell phone in his pants pocket when she was rinsing out his pants and taken the money from the cell phone, then wrapped the now broken phone in a trash bag and tried to hide it in the employee bathroom trash can. Because the employer determined that the claimant stole the money and destroyed the cell phone, she was discharged.

REASONING AND CONCLUSIONS OF LAW:

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

Iowa Code § 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 claimant, 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 misconduct warrants denial of unemployment insurance benefits are two separate decisions. *Pierce v. IDJS*, 425

N.W.2d 679 (Iowa 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 Department of Job Service*, 351 N.W.2d 806 (Iowa App. 1984). Poor work performance is not misconduct in the absence of evidence of intent. *Miller v. Employment Appeal Board*, 423 N.W.2d 211 (Iowa App. 1988).

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

The employer's evidence does not establish that the claimant stole the money. No one saw the claimant take the money and in light of her denial and the admitted ability of others to have committed the theft, the administrative law judge must conclude that the employer has not established disqualifying misconduct. While the change in the claimant's story from the time the incident occurred to the time of the hearing is certainly suspect, that alone does not establish she committed the theft.

While the employer may have had good cause to discharge, conduct that might warrant a discharge from employment will not necessarily sustain a disqualification from job insurance benefits. *Budding v. Iowa Department of Job Service*, 337 N.W.2d 219 (Iowa App. 1983). Inasmuch as the employer has not established a current or final act of misconduct, benefits are allowed.

DECISION:

The December 31, 2009, reference 01, decision is reversed. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided claimant is otherwise eligible.

Teresa K. Hillary
Administrative Law Judge

Decision Dated and Mailed

tkh/kjw