

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**JESSICA M DUNLOP**  
Claimant

**APPEAL NO. 11A-UI-07615-LT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**EMBASSY REHAB & CARE CENTER INC**  
Employer

**OC: 05/08/11**  
**Claimant: Appellant (2)**

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

**STATEMENT OF THE CASE:**

The claimant filed an appeal from the June 9, 2011 (reference 01) decision that denied benefits. After due notice was issued, a hearing was held by telephone conference call on July 6, 2011. Claimant participated. Employer participated through Administrator Leslie Hugen, DON Brenda Thrift, and Assistant DON Megan Jimenez.

**ISSUE:**

The issue is whether claimant was discharged for reasons related to job misconduct sufficient to warrant a denial of benefits.

**FINDINGS OF FACT:**

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed full time as a CNA and was separated from employment on May 13, 2011. On that date Thrift accused claimant of having failed to put a fall alarm on resident KH and the foot pedals on her wheelchair to support her broken leg according to the resident's care plan, however the resident is not fully cognitive but is able to ambulate to the extent that she can remove alarms and foot pedals. Thrift testified that on May 12 resident EM did not have a personal alarm on her or her call light within reach, resident KH did not have a pad alarm on; resident AF had wheelchair foot pedals on the floor at the foot of the bed creating a trip hazard, there was stool on the toilet riser; and resident MM did not have a pillow case cover and there were gloves in the trash can without a liner. Again, these residents have some degree of cognitive impairment but are ambulatory to the extent that they can remove alarms and parts of wheelchairs. Claimant was not the sole CNA assigned to these residents and the other CNA was not disciplined for the issues. On May 8 resident PM allegedly complained that claimant did not empty her leg bag but she did not ask claimant to do so. Resident MH reportedly complained that claimant made her bed sloppily and flushed pericare wipes down the toilet contrary to standard practice but claimant made her bed as she did for other residents. Resident PC claimed that the claimant shouted for her to get up beginning at 6:00 a.m. on a Sunday when she is allowed to choose her own time to get up for the day but claimant did not address her about getting up for the day until her breakfast tray arrived at 8:00 a.m. Claimant had returned from maternity leave within a few weeks of the separation. She had been warned

in writing and suspended for three days on April 27, 2011 because on April 26 a dirty brief was found in a garbage can in each of three residents' rooms when they should have been removed from the rooms but another CNA was responsible for those residents as well and was not disciplined. On July 22, 2010 a verbal warning was issued by the previous DON for chastising two residents (CP and RU) about having bowel movement accidents. On June 10, 2010 claimant was verbally warned about not giving baths to 26 residents from May 8 to May 22, 2010 when she was a bath attendant at the time but the charge nurse instructed her to help with CNA duties instead and leave showers and baths to another shift.

### **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." *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).

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, employer incurs potential liability for unemployment insurance benefits related to that separation. The employer has not met the burden of proof to establish that claimant actually engaged in these acts or caused them to happen since the residents were not all cognitively functional but were physically able to do these things that were blamed on the claimant. Thus, claimant's testimony that the reasons for the separation were pretextual is credible. Even had claimant done as alleged, since the consequence was more severe than others who were also responsible for the same residents received for the same offense, the disparate application of the policy cannot support a disqualification from benefits. Benefits are allowed.

**DECISION:**

The June 9, 2011 (reference 01) decision is reversed. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed. The benefits withheld shall be paid, provided the claimant is otherwise eligible.

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Dévon M. Lewis  
Administrative Law Judge

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Decision Dated and Mailed

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