

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

CAROL D GILLYARD
Claimant

APPEAL NO. 12A-UI-01733-NT

**ADMINISTRATIVE LAW JUDGE
DECISION**

WESLEY RETIREMENT SERVICES INC
Employer

OC: 01/08/12
Claimant: Respondent (1)

Section 96.5-2-a – Discharge

STATEMENT OF THE CASE:

Employer filed a timely appeal from a representative's decision dated February 16, 2012, reference 01, which held claimant eligible to receive unemployment insurance benefits. After due notice, a telephone hearing was held on March 8, 2012. Claimant participated. Participating as witnesses for the claimant were Bridgett McNearney and Ms. Kimberly Bunch. Employer participated by Ms. Maria Jordan and Ms. Julie DeMoss.

ISSUE:

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

FINDINGS OF FACT:

Having considered all of the evidence in the record, the administrative law judge finds: Carol Gillyard was employed by Wesley Retirement Services, Inc. as a full-time home care aide from April 5, 2010 until January 6, 2012 when she was discharged from employment. Ms. Gillyard was paid by the hour. Her immediate supervisor was Julie DeMoss.

A decision was made to terminate Ms. Gillyard following an incident that took place at a nursing facility on January 1, 2012. The claimant had worked an approximate 12-hour overnight shift and was expecting her scheduled replacement to arrive at 7:00 a.m. on the morning of January 1, 2012. When the replacement did not appear, Ms. Gillyard called her employer indicating the necessity that she leave because of other duties and child care responsibilities. The claimant was instructed to remain at the work location and continue to give personalized assistance to the elderly resident until the replacement arrived that morning.

At approximately 7:19 a.m. the replacement home care aide arrived and Ms. Gillyard began giving a quick report to the aide. Ms. Gillyard began to assist the elderly resident who was blind to the bathroom but the replacement health care aide assumed those duties. Ms. Gillyard stated that a gait belt would not be necessary although it was available. Subsequently, the elderly resident was left unattended by the replacement aide. While Ms. Gillyard continued to

give a report to the replacement aide, the elderly resident fell. The claimant immediately went to assist the elderly resident and informed the staff at the facility where the resident was residing. Ms. Gillyard then made a report to her employer regarding the incident as required.

Based upon the employer's belief that Ms. Gillyard was still "on duty" and that it was the claimant's responsibility to care for the elderly resident, the employer concluded the claimant had not fulfilled her duties and discharged the claimant. The employer believed that a gait belt should have been used and that the elderly resident should not have been left alone in the bathroom. The employer also believed that the claimant may have jeopardized the elderly resident's well being because the claimant was anxious to leave the shift and was not properly providing care.

REASONING AND CONCLUSIONS OF LAW:

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

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 this matter. See Iowa Code § 96.6(2). Misconduct must be substantial in order to justify a denial of unemployment insurance benefits. Misconduct that may be serious enough to warrant the discharge of an employee may not necessarily be

serious enough to warrant the denial of unemployment insurance benefits. See Lee v. Employment Appeal Board, 616 N.W.2d 661 (Iowa 2000). The focus is on deliberate, intentional or culpable acts by the employee. See Gimbel v. Employment Appeal Board, 489 N.W.2d 36, 39 (Iowa Ct. of Appeals 1992).

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.

The testimony in this case is disputed. The administrative law judge, having considered the matter at length, concludes that the claimant was reasonable in her belief that a gait belt was not needed to assist the resident in her own apartment. The administrative law judge concludes that the claimant did stay as required until her replacement arrived and that the claimant was reasonable in her belief that when the replacement home care aide had arrived, the replacement aide had primary responsibility to provide care and safety to the elderly resident. The replacement aide had assisted the elderly resident into the bathroom area but failed to remain in the bathroom area to provide care resulting in the elderly resident falling. Ms. Gillyard acted reasonably in assisting the resident after the fall and in notifying the employer of the factors involved in the mishap. The administrative law judge thus concludes that the evidence in the record does not establish the requisite intentional misconduct sufficient to warrant the denial of unemployment insurance benefits.

The administrative law judge does conclude that the claimant's conduct in badgering the employer and threatening to leave if the replacement did not arrive was not laudatory conduct and caused the employer to have reasonable suspicions about the claimant's concern for her job and for the well being of the elderly resident that had been placed in her care. As the evidence establishes, however, that the claimant did wait for her replacement, the administrative law judge concludes that the claimant's conduct did not rise to the level of disqualifying misconduct in connection with her work. While the decision to terminate Ms. Gillyard from her employment may have been a sound decision from a management viewpoint, for the above-stated reasons the administrative law judge concludes that the claimant's conduct did not rise to the level that would disqualify her from the receipt of unemployment insurance benefits. Benefits are allowed, providing the claimant is otherwise eligible.

DECISION:

The representative's decision dated February 16, 2012, reference 01, is affirmed. The claimant was discharged for no disqualifying reason. Unemployment insurance benefits are allowed, providing the claimant meets all other eligibility requirements of Iowa law.

Terence P. Nice
Administrative Law Judge

Decision Dated and Mailed

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