

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

ELIZABETH A HARKNESS
Claimant

APPEAL NO. 08A-UI-05856-S2T

**ADMINISTRATIVE LAW JUDGE
DECISION**

CARE INITIATIVES
Employer

OC: 05/16/08 R: 01
Claimant: Appellant (2)

Section 96.5-2-a – Discharge for Misconduct

STATEMENT OF THE CASE:

The claimant filed a timely appeal from the June 16, 2008, reference 01, decision that denied benefits. After due notice was issued, a telephone conference hearing was held on June 16, 2008. The claimant participated personally. The employer was represented by Gordon Peterson, Hearing Representative, and participated through Alan Bruinsma, Administrator, and Jackie Blanchard, Nurse Manager. The employer offered and Exhibit One was received into evidence.

ISSUE:

The issue is whether the claimant was discharged for misconduct.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds that: The claimant was hired on August 7, 2006, as a full-time certified nurse aide. The claimant has a loud voice and she is often blunt, appearing harsh to others. The employer asked the claimant approximately five times to soften her voice. The employer issued the claimant a written warning on April 15, 2007, for placing a resident in the whirlpool and leaving for break. This resident often took long baths unattended. When the resident was finished the resident would pull the rope and a worker would help the resident to exit. During this incident the resident changed the temperature setting to a hotter than normal reading. The claimant remembers telling a co-worker that the resident was in the whirlpool before going to break.

On August 20, 2007, the employer issued the claimant a written warning for unprofessional behavior to a resident. The claimant spoke loudly to the resident because the claimant thought the resident could not hear her. The claimant only yelled at residents if they were about to harm themselves or her.

On September 26, 2007, the employer issued the claimant a written warning after a dietary aid overheard the claimant tell a resident she would not help the resident to shave. The dietary aid did not know the resident's instructions. The claimant was instructed by the employer to

encourage the resident to shave without help. The resident often tried to get the claimant to perform this task. After attempting several times to get the claimant to shave, the resident shaves without help.

On April 22, 2008, the claimant was helping a resident hurry to get dressed because the van driver had arrived. From time to time the resident could not hear the claimant and the claimant would speak louder. The claimant did not speak harshly to the resident. On May 15, 2008, the resident's Power of Attorney (POA) complained about the incident to the employer. The POA said she heard the claimant say "You're going to do what the hell I tell you to do". At some other time the resident told the POA that the claimant said "You haven't seen me mad yet". The POA reported to the employer that the resident was afraid of the claimant. The employer suspended the claimant on May 15, 2008, after receiving the complaint. On May 19, 2008, the employer terminated the claimant even though the claimant denied making any such statements and the employer did not hear the claimant make the comments.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow the administrative law judge concludes the claimant was not discharged for misconduct.

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). If a party has the power to produce more explicit and direct evidence than it chooses to do, it may be fairly inferred that other evidence would lay open deficiencies in that party's case. Crosser v. Iowa Department of Public Safety, 240 N.W.2d 682 (Iowa 1976). In this case the employer may not have the power to present the testimony of an eye witness. There was only one eye witness who presented testimony at the hearing, the claimant. The claimant denies having acted unprofessionally in a conversation the claimant had with the resident a month before the termination. The POA told the employer that the resident was afraid of the claimant but did not report the incident for one month. During that time the claimant continued to work at the facility. The administrative law judge concludes that the hearsay evidence provided by the employer is not more persuasive than the claimant's denial of such conduct. The employer has not carried its burden of proof to establish that the claimant committed any act of misconduct in connection with employment for which the claimant was discharged. Misconduct has not been established. The claimant is allowed unemployment insurance benefits.

DECISION:

The June 16, 2008, reference 01, representative's decision is reversed. The claimant was discharged. Misconduct has not been established. Benefits are allowed provided the claimant is otherwise eligible.

Beth A. Scheetz
Administrative Law Judge

Decision Dated and Mailed

bas/pjs