

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**DIXIE L FOSTER**  
Claimant

**APPEAL NO. 10A-UI-15659-LT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**DAC INC**  
Employer

**OC: 09/12/10**  
**Claimant: Respondent (1)**

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

**STATEMENT OF THE CASE:**

The employer filed a timely appeal from the November 3, 2010 (reference 01) decision that allowed benefits. After due notice was issued, a telephone conference hearing was held on January 6, 2011. Claimant participated. Employer participated through Human Resources Director Tina Miller and RN Brenda Behrens. Employer's Exhibits 1 and 2 were admitted to the record.

**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 heard the testimony and having reviewed the evidence in the record, the administrative law judge finds: Claimant most recently worked full-time as a supported living specialist (direct care of individuals with physical and mental disabilities) and was separated from employment on September 17, 2010. Her last day of work was September 8, 2010. In a staff meeting on September 8, 2010, a staff member, Amber, spoke at a meeting and said she believed that holding a glass of cold water over a mentally impaired client's (N.S.) head was a threat and should not be done. Claimant responded that the client knows what is in the glass and does not want cold water on her so she gets up when asked to do so. N.S is mentally disabled and her behavior program only allows offering a glass of water or soda to drink as an enticement to get up or move where the staff member asks. Employer suspended claimant pending investigation. Claimant indicated she had never spilled water on N.S. but only used the technique as a last resort and did not use it often but generally followed the behavior program that allowed the use of a gait belt to move her. She knew holding a glass of water over her head was not in the program but mimicked her shift supervisor Danielle and saw other staff carry an empty glass towards N.S. to incite her to move. She had also seen her supervisor use physical force to move N.S. and reported it once, but not multiple times. Claimant had training about client treatment upon her hire and periodically throughout the employment. Employer had warned her for having left client R.W., who is physically and mentally disabled, unattended in a van with the doors shut and the windows closed on August 8, 2010.

## 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).

Even though claimant did threaten, rather than entice, N.S. with a glass, whether empty or full, and that is considered misconduct, since the consequence was more severe than others, including her immediate supervisor, received for the same offense, the disparate application of the policy cannot support a disqualification from benefits. Benefits are allowed.

**DECISION:**

The November 3, 2010 (reference 01) decision is affirmed. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided claimant is otherwise eligible.

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Dévon M. Lewis  
Administrative Law Judge

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Decision Dated and Mailed

dml/kjw