

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

SHARON A CARROLL
Claimant

APPEAL NO. 11A-UI-08661-VST

**ADMINISTRATIVE LAW JUDGE
DECISION**

MAINSTREAM LIVING INC
Employer

OC: 05/22/11
Claimant: Appellant (1)

Section 96.5-2-A – Discharge for Misconduct

STATEMENT OF THE CASE:

Claimant filed an appeal from a decision of a representative dated June 23, 2011, reference 01, which held claimant ineligible for unemployment insurance benefits. After due notice, a telephone conference hearing was scheduled for and held on August 3, 2011. Claimant participated. Virgil Benson was a witness for the claimant. Employer participated by Marcanne Lynch, Regional Human Resources Director; Reed Hamann, Vice President of Human Resources; Louanne Wingfield, Regional Vice President; Jim Fox, Program Administrator; Jennifer Bruggeman, Supervisor; Beth Kenny, Co-worker; and Rhonda Martinez, Co-worker. The employer was represented by Gary Fischer, Attorney at Law. The record consists of the testimony of Reed Hamann; the testimony of Marcanne Lynch; the testimony of Beth Kenny; the testimony of Jennifer Bruggeman; the testimony of Sharon Carroll; the testimony of Virgil Benson; and Employer's Exhibits 1-15.

ISSUE:

Whether the claimant was discharged for misconduct.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony of the witnesses and having considered all of the evidence in the record, makes the following findings of fact:

The employer is a private not for profit agency that provides services for individuals who have mental illness and mental disabilities. The claimant was hired on September 9, 1996. Her last day of work was May 18, 2011. She was placed on suspension pending further investigation on May 18, 2011. She was terminated on May 23, 2011. At the time of her termination the claimant was a certified medication aid. She was a full-time employee.

The events that led to the claimant's termination occurred on May 17, 2011. The claimant was working with another employee named Beth Kenny. Ms. Kenny was responsible for passing out medication. She arrived at 6:00 a.m. and was preparing to dispense medication, which occurs

at 7:00 a.m. The claimant was responsible for preparing and serving breakfast. She arrived prior to 7:00 a.m.

One of the most important policies in place at the residential facility where the claimant worked was that the kitchen was never to be left unsupervised by a staff member. If a staff member was not personally present in the kitchen, it was to be locked. The reason for this policy was that all the residents had care plans and physician ordered diets. The claimant was aware of this policy. The employer also had a policy that this was the home of the residents and that the television channel was not to be changed if a resident was watching television. This was emphasized by Jennifer Bruggeman, the supervisor of the resident, in a staff meeting in April 2011. The claimant was present at that staff meeting.

When the claimant arrived she informed Ms. Kenny that she was going to do the documentation for the women that day. Ms. Kenny perceived the claimant's tone and comment as rude. The claimant did not prepare and serve breakfast. She opened the kitchen and the residents were in the kitchen preparing their own food. The claimant sat down at the dining table and read the paper with her back to the kitchen. The claimant made a computer entry that she and a resident made ten slices of toast and buttered the toast. No toast was made because there was no bread. The claimant then went into the television room and changed the channel even though a resident was watching a news program. She told the resident to move because she could not see the television.

Ms. Kenny reported these events and an investigation ensued. The claimant was asked to come to a meeting on May 18, 2011. She informed the employer that none of the events reported by Ms. Kenny had occurred. The claimant was placed on suspension pending further investigation. The claimant knew that her job was in jeopardy. Marcanne Lynch and Ms. Bruggeman then interviewed the residents and the residents confirmed Ms. Kenny's report. Ms. Lynch and Ms. Bruggeman personally knew the residents over a period of years and felt that their reports were credible and could be relied upon. The computer records were also reviewed.

The claimant had been placed on probation on April 29, 2011, for her unacceptable conduct at a staff meeting on April 27, 2011. The claimant did want to be at the meeting. During a team building exercise, she was asked to say something positive about a co-worker. Her response was "Late but comes in." This response was considered inappropriate given that the purpose of the exercise was to be positive.

Following the investigation conducted by Ms. Lynch and Ms. Bruggeman, the decision was made to terminate the claimant. The claimant was informed of her termination by telephone on May 23, 2011.

REASONING AND CONCLUSIONS OF LAW:

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.

871 IAC 24.32(8) provides:

(8) Past acts of misconduct. While past acts and warnings can be used to determine the magnitude of a current act of misconduct, a discharge for misconduct cannot be based on such past act or acts. The termination of employment must be based on a current act.

Misconduct that disqualifies an individual from receiving unemployment insurance benefits occurs when there are deliberate acts or omissions that constitute a material breach of the worker's duty to the employer. The employer in this case provides services to individuals with mental illness and disability. The employer has in place written policies designed to protect the safety and health of these individuals and can reasonably expect that an employee will follow those policies. Insubordination, which is the continued failure to follow reasonable instructions, constitutes misconduct. See Gilliam v. Atlantic Bottling Company, 453 N.W.2d 230 (Iowa App. 1990) The employer has the burden of proof to establish misconduct.

The employer's witnesses testified that claimant violated multiple written and known policies of the employer on May 17, 2011. The claimant allowed residents to be in the kitchen without supervision and did not prepare and serve breakfast as she was required to do. She falsified computer entries that she did prepare and serve breakfast. She was observed sitting a dining room table reading the paper with her back to the kitchen, which was unlocked. The residents prepared their own breakfast that morning. The claimant then went to the television area and changed the channel. A resident had been watching a news program and the claimant turned it to a court proceedings channel. She then told the resident to get out of the way because she could not see the screen.

Although the claimant denied that any of these events took place, her testimony is not credible. The employer had an eye witness report from a co-worker. This co-worker testified at the hearing and her testimony was credible. The employer then interviewed the residents and Ms. Kenny's version of events was confirmed. The administrative law judge specifically asked if the residents' reports were credible and could be relied upon and both Ms. Lynch and

Ms. Bruggeman testified yes. They were familiar with the residents and had no doubt about the reliability of their reports.

The claimant testified that Ms. Kenny falsified her report because the claimant had reported that Ms. Kenny made a racist statement on May 10, 2011. The statement, which included the use of the n word, was not directed at the claimant. Ms. Kenny simply told the claimant what a neighbor had said about her and her daughter. Ms. Kenny's daughter had an African American father. Ms. Kenny was disciplined by the employer and she has been forthright about what she said and the circumstances under which she said it. Even assuming Ms. Kenny was not truthful, this does not explain the reports of the residents following the investigation done by Ms. Lynch and Ms. Bruggeman. None of the residents and neither of these individuals had any reason whatsoever to fabricate what occurred on May 17, 2011. In addition, the claimant's conduct on May 17, 2011, is consistent with her behavior at the staff meeting on April 27, 2011.

The greater weight of the credible evidence in this case shows that the claimant was insubordinate and deliberately violated known policies of the employer on the safety and health of the individuals for whom the employer provides services. The claimant breached a material duty owed to the employer. Misconduct has been established. Benefits are denied.

DECISION:

The decision of the representative dated June 23, 2011, reference 01, is affirmed. Unemployment insurance benefits shall be withheld until claimant has worked in and been paid wages for insured work equal to ten times claimant's weekly benefit amount, provided claimant is otherwise eligible.

Vicki L. Seeck
Administrative Law Judge

Decision Dated and Mailed

vls/css