

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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**TONI LEBO-TULLIS**  
Claimant

**CCRC OF AMES LLC**  
Employer

**APPEAL 21A-UI-00655-SN-T**  
**ADMINISTRATIVE LAW JUDGE  
DECISION**

**OC: 08/16/20**  
**Claimant: Appellant (2)**

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Iowa Code § 96.5(2)a – Discharge for Misconduct  
Iowa Admin. Code r. 871-24.32(1)a – Discharge for Misconduct

**STATEMENT OF THE CASE:**

The claimant filed an appeal from the November 16, 2020, (reference 01) unemployment insurance decision that denied benefits based upon the conclusion she was discharged for willful misconduct. The parties were properly notified of the hearing. A telephone hearing was held on February 10, 2021. The claimant participated and testified. The employer did not participate. Official notice was taken of the administrative records.

**ISSUE:**

Was the claimant discharged for disqualifying job-related misconduct?

**FINDINGS OF FACT:**

Having reviewed all of the evidence in the record, the administrative law judge finds:

The claimant, Toni Lebo-Tullis, was employed as a full-time registered charge nurse by the employer, CCRC of Ames LLC, beginning September 6, 2016 until she was discharged on August 8, 2020. She worked full time on the night shift which began at 10:00 p.m. and ended at 6:30 a.m. Her immediate supervisor was Director of Nursing Jainie Rethke.

The employer outlines its policies in its employee handbook. The claimant received an employee handbook at the time of her hire.

On August 6, 2020, the claimant received a team member coaching from temporary Director of Nursing Angie Anderson prior to her final shift. The team member coaching said the claimant had removed alcohol from a resident's room and had not stored it in a locked storage space. At the bottom of this team member coaching, Ms. Anderson wrote, "Final written warning, suspension termination." The claimant believes Ms. Anderson meant to write that if the claimant engaged in behavior of a similar nature in the future it could result in her termination.

On August 7, 2020, the claimant went on a smoke break at 3:00 a.m. to smoke in her truck in the parking lot outside of the employer's facility as she always did. The claimant unintentionally drifted off to sleep until 6:00 a.m. The claimant saw dietary member Caroline (last name unknown) walking a couple feet from the hood of her truck and the day shift entering the building. The claimant does not believe Caroline made eye contact with her. The claimant had a two way radio on her that she used while on working shifts, so other staff would be able to reach her. The claimant does not believe her staff attempted to figure out where she was on that night either through the two way radio or otherwise.

On August 8, 2020, the claimant received a letter from Administrator Greg Hanson that said she had been terminated effective August 6, 2020 for misconduct. The termination letter did not specify the misconduct that led to her termination.

### **REASONING AND CONCLUSIONS OF LAW:**

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment for non-disqualifying 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.

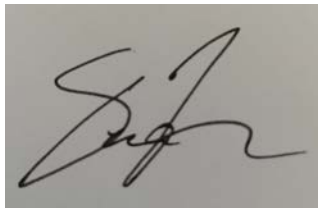
This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. *Huntoon v. Iowa Department of Job Service*, 275 N.W.2d 445, 448 (Iowa 1979).

The employer has the burden of proof in establishing disqualifying job misconduct. *Cosper v. Iowa Dept of Job Serv.*, 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. Iowa Dept of Job Serv.*, 364 N.W.2d 262 (Iowa Ct. App. 1984). The Iowa Court of Appeals found substantial evidence of misconduct in testimony that the claimant worked slower than he was capable of working and would temporarily and briefly improve following oral reprimands. *Sellers v. Emp't Appeal Bd.*, 531 N.W.2d 645 (Iowa Ct. App. 1995). Generally, continued refusal to follow reasonable instructions constitutes misconduct. *Gilliam v. Atlantic Bottling Co.*, 453 N.W.2d 230 (Iowa Ct. App. 1990). Misconduct must be "substantial" to warrant a denial of job insurance benefits. *Newman v. Iowa Dept of Job Serv.*, 351 N.W.2d 806 (Iowa Ct. App. 1984). Poor work performance is not misconduct in the absence of evidence of intent. *Miller v. Emp't Appeal Bd.*, 423 N.W.2d 211 (Iowa Ct. App. 1988).

In this case, the claimant credibly testified she unintentionally fell asleep during a work break. She did not receive prior warnings regarding this type of misconduct. While the claimant received a written disciplinary warning earlier that day, it was for dissimilar behavior. It is also unclear what level of discipline this warning was because it appears to list varying degrees of discipline in an unbroken sentence. The employer has failed to satisfy its burden that the claimant engaged in willful or deliberate misconduct. Benefits are granted.

**DECISION:**

The November 16, 2020, (reference 01) unemployment insurance decision is reversed. The claimant was discharged from employment, but not for job disqualifying misconduct. Benefits are granted.



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Sean M. Nelson  
Administrative Law Judge  
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February 22, 2021  
Decision Dated and Mailed

smn/scn