**IOWA WORKFORCE DEVELOPMENT**
**UNEMPLOYMENT INSURANCE APPEALS**

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

**DEBRA J SIEWERTSEN**
Claimant

**ACC ENTERPRISES LLC**
**CEDAR HEALTH**
Employer

**APPEAL NO. 09A-UI-06907-LT**

**ADMINISTRATIVE LAW JUDGE DECISION**

**Original Claim: 04/05/09**
**Claimant: Respondent (1)**

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

**STATEMENT OF THE CASE:**

The employer filed a timely appeal from the April 27, 2009, reference 01, decision that allowed benefits. After due notice was issued, a telephone conference hearing was held on June 1, 2009. Claimant participated. Employer participated through Marina Ludsvigsen, nutrition director, and Michael Blume, resident care director.

**ISSUE:**

The issue is whether claimant was discharged for reasons related to job misconduct sufficient to warrant a denial of unemployment 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 part-time as a dietary aide since May 1, 2007 and was separated on March 30, 2009. She was discharged three weeks after she failed to wash the tables as a part of her job duties. She had been verbally counseled on February 16 about missing two tables, and on February 19 none of the tables were washed. Ludsvigsen also gave her constant reminders to wash the door handles and had noted her job performance deteriorated in the last six months of her employment because she babysits for her grandchildren and was tired. She seemed better rested on the 5 p.m.-to-8 p.m. shift than the 7 a.m.-to-1:30 p.m., so employer tried switching shifts. Ludsvigsen noticed claimant seemed confused at times in the kitchen and had to remind her to change her gloves and wash her hands. Other aides complained they had to take garbage out for her when she failed to do so. Her only written warning was on February 4 for serving beverages too early so that the food temperatures were not sufficient by the time the food was served. She fell asleep in a dietary in-service meeting on December 10, 2008.

**REASONING AND CONCLUSIONS OF LAW:**

For the reasons that follow, the administrative law judge concludes the 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.

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.

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." When based on carelessness, the carelessness must actually indicate a "wrongful intent" to be disqualifying in nature. *Newman v. Iowa Department of Job Service*, 351 N.W.2d 806 (Iowa App. 1984). Poor work performance is not misconduct in the absence of evidence of intent. *Miller v. Employment Appeal Board*, 423 N.W.2d 211 (Iowa App. 1988). Failure in job performance due to inability or incapacity is not considered misconduct because

the actions were not volitional. *Huntoon v. Iowa Department of Job Service*, 275 N.W.2d 445, 448 (Iowa 1979). Where an individual is discharged due to a failure in job performance, proof of that individual's ability to do the job is required to justify disqualification, rather than accepting the employer's subjective view. To do so is to impermissibly shift the burden of proof to the claimant. *Kelly v. IDJS*, 386 N.W.2d 552 (Iowa App. 1986).

In an at-will employment environment, 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, employer incurs potential liability for unemployment insurance benefits related to that separation. Inasmuch as employer allowed claimant to continue working for three weeks after the final incident and there were no established incidents of alleged misconduct thereafter, it has not met the burden of proof to establish that claimant acted deliberately or negligently after the most recent warning. Employer has not established a current or final act of misconduct, and, without such, the history of other incidents need not be examined. Accordingly, benefits are allowed.

**DECISION:**

The April 27, 2009, reference 01, decision is affirmed. The claimant was discharged from employment for no current disqualifying reason. Benefits are allowed, provided the claimant is otherwise eligible.

_____
Dévon M. Lewis
Administrative Law Judge

_____
Decision Dated and Mailed

dml/kjw