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

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| **LINDSEY M DIETZ**<br>Claimant<br><br>**WESLEYLIFE**<br>Employer | **APPEAL 16A-UI-08570-DL-T**<br><br>**ADMINISTRATIVE LAW JUDGE DECISION**<br><br>**OC: 07/10/16**<br>**Claimant: Appellant (2)** |

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

**STATEMENT OF THE CASE:**

The claimant filed an appeal from the July 28, 2016, (reference 01) unemployment insurance decision that denied benefits based upon a discharge from employment. The parties were properly notified about the hearing. A telephone hearing was held on September 27, 2016. Claimant participated and was represented by Christopher Clausen, Attorney at Law. Employer participated through director of people and culture Heidi Vanden Hull, administrator Denise Reed, current assistant and then-acting director of nursing Merit Schiltz, clinical quality specialist Karie Kesterson-Gibson. Connie Hickerson of Equifax/Talx represented the employer. The administrative law judge took official notice of the DHS website and links about Dependent Adult Abuse.

**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: Claimant was employed as a full-time minimum data set (MDS) coordinator/RN through June 29, 2016. On Saturday, June 25 claimant was the nurse on-call that weekend. Between 11:15 and 11:30 p.m. floor nurse LPN Christa Brooks (non-management) called claimant to report resident SB told her that CNA Sharee showed her a picture on her phone of an unidentified naked man and commented while laughing, “wow, and he thinks it looks big.” The photo was of an unidentified white male without any indication it was a resident. Claimant told Brooks she would follow up with Schlitz but did not indicate when and told Brooks to watch the resident’s mental health the rest of the weekend. The employer thought claimant, as the nurse on-call, should have reported the incident to acting DON Schiltz or Reed via the chain of command within 24 hours according to the employer’s dependent adult abuse reporting policy. Claimant notified them their next work day on Monday morning June 27. When asked why she did not report the incident within 24 hours, claimant said she thought it was something that could have waited and did not want to disturb them late during the weekend. She did not have information the photo was of a residenet and did not believe showing the photo to SB amounted to sexual exploitation. Further, Sharee had left by the time SB reported to Brooks and was not scheduled for the

remainder of the weekend. Sharee worked through a staffing agency and was instructed not to return. Brooks is still employed and was named as a witness but was not available and did not participate in the hearing. The employer had not previously warned claimant her job was in jeopardy for any similar reasons. After claimant discussed the situation with Schiltz Monday morning and Schiltz explained the "severity" of the situation claimant "understood" she should have reported it within 24 hours.

The employer's handbook policy mirrors the DHS/DIA mandatory reporting requirements of Iowa Code chapter 235B. The Participant's Handbook for the State of Iowa's Dependent Adult Abuse Mandatory Reporter Training (revised July 2015) at page five sets out the definition and examples of sexual exploitation of a dependent adult:

> Sexual Exploitation
> "Any consensual or nonconsensual sexual conduct with a dependent adult which includes but is not limited to…"Iowa Code 235B.2
> Sexual Abuse Indicators:
> ☐ Person's behavior changes drastically, such as acting out, angry, lashing out, inappropriate affect
> ☐ Person is depressed or symptoms of other mental health issues
> ☐ Person acts afraid in the presence of caretaker
> ☐ Person does not want to be left alone with the caretaker
> ☐ Genital or anal bruises; Vaginal or anal bleeding
> ☐ Swelling or redness of genital area
> ☐ Venereal Disease
> Examples Include:
> ☐ Kissing;
> ☐ Touching of the clothed or unclothed inner thigh, breast, groin, buttock, anus, pubes, or genitals; or a sex act (Iowa Code 702.17)
> **Transmission, display, taking of electronic images of the unclothed breast, groin, buttock, anus, pubes, or genitals of a dependent adult by a caretaker for a purpose not related to treatment or diagnosis or as part of an ongoing assessment, evaluation, or investigation**
> Does NOT include touching which is part of a necessary examination, treatment, or care by a caretaker acting within the scope of practice or employment of the caretaker; a brief touch or hug for the purpose of reassurance, comfort, or casual friendship; or touching between spouses

(Emphasis added.)
https://www.iowaaging.gov/sites/files/aging/documents/10%20Participants%20Handbook.pdf
Claimant had taken dependent adult abuse training twice in ten years.

**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 section 96.5(2)a provides:

> **Causes for disqualification.**
> 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.

Iowa Admin. Code r. 871-24.32(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. *Reigelsberger v. Emp't Appeal Bd.*, 500 N.W.2d 64, 66 (Iowa 1993); *accord Lee v. Emp't Appeal Bd.*, 616 N.W.2d 661, 665 (Iowa 2000).

Misconduct "must be substantial" to justify the denial of unemployment benefits. *Lee*, 616 N.W.2d at 665 (citation omitted). "Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of benefits." *Id.* (citation omitted). …the definition of misconduct requires more than a "disregard" it requires a "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." Iowa Admin. Code r. 871–24.32(1)(a) (emphasis added).

Whether an employee violated an employer's policies is a different issue from whether the employee is disqualified for misconduct for purposes of unemployment insurance benefits. *See Lee v. Emp't Appeal Bd.*, 616 N.W.2d 661, 665 (Iowa 2000) ("Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of benefits." (Quoting *Reigelsberger*, 500 N.W.2d at 66.)).

The conduct for which claimant was discharged was, at most, an isolated incident of poor judgment. There is no similar example in the training materials and claimant's judgment call was reasonable. Furthermore, inasmuch as employer had not previously warned claimant about the issue leading to the separation, it has not met the burden of proof to establish that claimant acted deliberately or with recurrent negligence in violation of company policy, procedure, or prior warning. An employee is entitled to fair warning that the employer will no longer tolerate certain performance and conduct. Without fair warning, an employee has no reasonable way of knowing that there are changes that need be made in order to preserve the employment. If an employer expects an employee to conform to certain expectations or face discharge, appropriate (preferably written), detailed, and reasonable notice should be given. Training or general notice to staff about a policy is not considered a disciplinary warning.

**DECISION:**

The July 28, 2016, (reference 01) unemployment insurance decision is reversed. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided she is otherwise eligible. Any benefits claimed and withheld on this basis shall be paid.

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Dévon M. Lewis
Administrative Law Judge

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Decision Dated and Mailed

dml/pjs