

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

APRIL GERBER
Claimant

APPEAL NO. 14A-UI-00643-BT

**ADMINISTRATIVE LAW JUDGE
DECISION**

MANLY SENIOR CITIZENS INC
Employer

OC: 12/15/13
Claimant: Appellant (2)

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

STATEMENT OF THE CASE:

April Gerber (claimant) appealed an unemployment insurance decision dated January 7, 2014, reference 01, which held that she was not eligible for unemployment insurance benefits because she was discharged from Manly Senior Citizens, Inc. (employer) for work-related misconduct. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on February 10, 2014. The claimant participated in the hearing with Attorney Brian Miller. The employer participated through Administrator Kimber Kleven, Licensed Practical Nurse Sarah Ward, and Employer Representative Alyce Smolsky. Employer's Exhibits One and Two were admitted into evidence.

ISSUE:

The issue is whether the claimant was discharged for work-related misconduct.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds that: The claimant was employed as a full-time certified nursing assistant (CNA) from November 8, 2013, through December 16, 2013, when she was discharged for theft of \$300.00 from a resident. On November 14, 2013, she helped a male resident go to the whirlpool bath area. The resident, who was alert and oriented, had just been admitted to one of the assisting living units that day. Another CNA was in the whirlpool bath area when the claimant and the resident arrived but she left shortly thereafter. The claimant helped the resident take off his clothes and the only time the wallet, which was in his pants pocket, was out of his sight was while he was in the whirlpool tub, when he had his back to the claimant.

After the resident got out of the bathtub, he put on his night clothes and the claimant handed him his dirty clothes. She told him that his wallet was in his pants' pocket even though she denied touching the wallet. After the resident returned to his room, he discovered that he had \$300.00 cash missing from his wallet. The claimant realized she forgot to take his vital signs so returned to his room and he reported the theft to her. The claimant reported the theft to Licensed Practical Nurse Sarah Ward, who immediately contacted the police. While Ms. Ward was on the phone with the police, the claimant went outside to meet her boyfriend to get

cigarettes. She did not have cigarettes and had earlier said that said her boyfriend could not bring her any because of car problems so Ms. Ward gave her one and said she would help her out that night.

The Administrator arrived at the facility and questioned the claimant but she denied taking the cash. The police arrived the next day and questioned the claimant. The police informed the employer on December 16, 2013, that criminal charges were being brought against the claimant and the employer discharged her at that time. On December 30, 2013, the claimant was criminally charged with fourth degree theft but the charges were subsequently dismissed on January 9, 2014, due to lack of evidence.

REASONING AND CONCLUSIONS OF LAW:

The issue is whether the employer discharged the claimant for work-connected misconduct. A claimant is not qualified to receive unemployment insurance benefits if an employer has discharged the claimant for reasons constituting work-connected misconduct. Iowa Code § 96.5-2-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. 871 IAC 24.32(1).

The employer has the burden to prove the discharged employee is disqualified for benefits for misconduct. *Sallis v. Employment Appeal Bd.*, 437 N.W.2d 895, 896 (Iowa 1989). 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). The claimant was discharged for theft on December 16, 2013. While her actions are certainly suspect, the preponderance of the evidence does not establish that she stole money from the resident on December 14, 2013. Consequently, work-connected misconduct as defined by the unemployment insurance law has not been established in this case and benefits are allowed.

DECISION:

The unemployment insurance decision dated January 7, 2014, reference 01, is reversed. The claimant was discharged. Misconduct has not been established. Benefits are allowed, provided the claimant is otherwise eligible.

Susan D. Ackerman
Administrative Law Judge

Decision Dated and Mailed

sda/css