BEFORE THE
EMPLOYMENT APPEAL BOARD
Lucas State Office Building
Fourth floor
Des Moines, Iowa 50319

STEPHANIE M ZEARING

Claimant,

and

KRYSILIS INC

Employer.

HEARING NUMBER: 09B-UI-00453

EMPLOYMENT APPEAL BOARD
DECISION

N O T I C E

THIS DECISION BECOMES FINAL unless (1) a **request for a REHEARING** is filed with the Employment Appeal Board within **20 days** of the date of the Board's decision or, (2) a **PETITION TO DISTRICT COURT** IS FILED WITHIN **30 days** of the date of the Board's decision.

A REHEARING REQUEST shall state the specific grounds and relief sought. If the rehearing request is denied, a petition may be filed in **DISTRICT COURT** within **30 days** of the date of the denial.

SECTION: 96.-5-2a

D E C I S I O N

UNEMPLOYMENT BENEFITS ARE ALLOWED IF OTHERWISE ELIGIBLE

The claimant appealed this case to the Employment Appeal Board. The members of the Employment Appeal Board reviewed the entire record. A majority of the Appeal Board, one member dissenting, finds it cannot affirm the administrative law judge's decision. The majority of the Employment Appeal Board **REVERSES** as set forth below.

FINDINGS OF FACT:

Stephanie Zearing (Claimant) was employed as a direct support staff and medication aide full time beginning January 9, 2007 through December 10, 2008 when she was discharged. (Tran at p. 2-3; p. 26-27). The Claimant and others had been previously disciplined when a resident left the house unattended and was missing for approximately 30 minutes. (Tran at p. 9-10). In July of 2008 the Claimant was specifically warned that if any other incident occurred where a resident under her care was placed in jeopardy she could be discharged. (Tran at p. 8-9; p. 9-10; p. 11; p. 30).

The Claimant provided direct care to an individual in a home setting who was physically unable to care for herself. (Tran at p. 5). On December 9 the Claimant was responsible for caring for C.J. when her

coworker Judy asked her to watch resident R.A., whom Judy was responsible for caring for, while Judy

went to the restroom. (Tran at p. 3; p. 6; p. 27; p. 28-29; p. 31). The Claimant then left C.J. who was in her bedroom changing her clothes alone while she went to the living room to sit on the couch beside R.A. (Tran at p. 6; p. 27). R.A. had eloped in the past. (Tran at p. 27; p. 30; p. 32). The Claimant was with R.A. for about a minute. (Tran at p. 28; p. 31).

While the Claimant was gone C.J. left her room and went outside through the laundry room. (Tran at p. 4). C.J. was able to leave because unbeknownst to the Claimant the alarm bell on the door leading outside of the laundry room had been disabled by another staff member. (Tran at p. 6-7). When Judy returned from the bathroom the Claimant returned to C.J.'s bedroom and noticed that she was not there. (Tran at p. 6). A search was immediately instituted and C.J. was discovered outside within two minutes. (Tran at p. 6-7; p. 28).

The Employer was notified and after an investigation was conducted the Employer decided to terminate the Claimant for the stated reason of failing to provide adequate care for resident C.J. (Tran at p. 3-4; p. 16). The incident of July, 2008 was a factor in the decision to discharge. (Tran at p. 23; p. 27). Following the incident C.J. was placed on one-on-one staffing. (Tran at p. 21; p. 25).

REASONING AND CONCLUSIONS OF LAW:

Iowa Code Section 96.5(2)(a) (2009) provides:

> *Discharge for Misconduct*. If the department finds the individual has been discharged for misconduct in connection with the individual's employment:
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> The individual shall be disqualified for benefits until the individual has worked in and been paid wages for the insured work equal to ten times the individual's weekly benefit amount, provided the individual is otherwise eligible.

The Division of Job Service defines misconduct at 871 IAC 24.32(1)(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 the 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 is the meaning which has been given the term in other jurisdictions under similar statutes, and we believe it accurately reflects 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 to prove the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). The propriety of a discharge is not at issue in an unemployment insurance case. An employer may be justified in discharging an employee, but the employee's conduct may not amount to misconduct precluding the payment of unemployment compensation. The law limits disqualifying misconduct to substantial and willful wrongdoing or repeated carelessness or negligence that equals willful misconduct in culpability. Lee v. Employment Appeal Board, 616 NW2d 661 (Iowa 2000). In consonance with this, the law provides:

> *Past acts of misconduct.* While past acts and warning 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.

871 IAC 24.32(8); accord Lee v. Employment Appeal Bd. 616 N.W.2d 661, 665 (Iowa,2000); Ringland Johnson, Inc. v EAB 585 NW2d 269, 271 (Iowa 1998); Greene v. EAB, 426 N.W.2d 659 (Iowa App. 1988); Myers v. IDJS, 373 N.W.2d 507, 510 (Iowa App. 1985). A final warning or last chance agreement may operate to reduce the protections of a claimant as compared to other employees. Warrell v. Iowa Department of Job Service, 356 N.W.2d 587 (Iowa App. 1984). At the same time, where the incidents leading to the final warning do not, even in aggregate, constitute misconduct "the impetus is not thereby provided to elevate the [subsequent] warning or the whole to the status of misconduct." Infante v. IDJS, 364 N.W.2d 262, 266 (Iowa App. 1984). In such a case the final act would have to independently constitute misconduct in order to disqualify a Claimant. Conversely, while prior incidents affect the weight of the final incident they do not dictate its character, that is, if the final incident does not involve intentional action or demonstrate negligence of equal culpability it cannot be the basis of a disqualification. Past acts of possible misconduct are taken into account when considering the "magnitude of a current act". They do not convert innocent mistakes into misconduct. Otherwise the discharge would not be for a current act of "misconduct".

Discipline History

The Employer considered the prior warning of the Claimant in making its discharged decision. In weighing the seriousness of this incident two factors weigh in favor of the Claimant. First, the responsibility for the resident in question had not been specifically assigned to the Claimant. This lessens somewhat the seriousness of the incident at least so far as the Claimant is concerned. Second, there is little information on what the Claimant actually did that day. Apparently she was cooking and apparently at some point the resident walked past her. Whether this event should have triggered a reaction from the Claimant depends on things like the layout of the kitchen, the door the resident used to leave, and whether anyone else was present in the room. The record sheds little light on these issues. (See Tran at p. 30 [got out front door]). Accordingly, while the prior discipline is still an important factor in weighing the seriousness of the final incident its weight is lessened somewhat by these factors.

Final Incident

At base the final incident in this case shows a good faith error of judgment by the Claimant. She was faced with care of two residents. The one the Claimant chose to sit next to was, based on this record, a greater risk of eloping than C.J. Indeed, the Claimant's testimony was that had she not gone in the room

with him he would have tried to leave and, again, C.J. would have been alone while she dealt with it. (Tran at p. 32). Although there was additional staff available the Claimant could not immediately find them. Perhaps she should have made Judy wait while additional staff was located or while C.J. finished dressing. The Claimant perhaps needed to show no concern for her co-worker's possible wetting of herself so that she could attend exclusively to her assigned resident. That the Claimant did not show concern was an error but we cannot find that it was willful and deliberate misconduct rather than a good faith error of judgment.

The Board understands that caring for residents and preventing elopement is extremely important to the Employer as it is to the Board and to our State in general. We do not question the decision to terminate the Claimant. But while the Employer may have compelling business reasons to terminate the claimant, conduct that might warrant a discharge from employment will not necessarily sustain a disqualification from job insurance benefits. Budding v. Iowa Department of Job Service, 337 N.W.2d 219 (Iowa App. 1983). Thus, in any case, the issue is not the importance of the job the Claimant was performing. The issue is whether the Employer has proved by a preponderance of the evidence that the Claimant committed intentional misconduct or repeated negligence of equal culpability. We conclude that it has not and benefits are therefore allowed.

DECISION:

The administrative law judge's decision dated January 29, 2009 is **REVERSED**. The Employment Appeal Board concludes that the claimant was discharged for no disqualifying reason. Accordingly, the Claimant is allowed benefits provided the Claimant is otherwise eligible.

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John A. Peno

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Elizabeth L. Seiser

RRA/ss

DISSENTING OPINION OF MONIQUE KUESTER :

I respectfully dissent from the majority decision of the Employment Appeal Board; I would affirm the decision of the administrative law judge in its entirety.

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Monique Kuester

RRA/ss