

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**DOREEN K BURMEISTER**  
Claimant

**APPEAL NO. 11A-UI-16327-VST**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**GOOD SAMARITAN SOCIETY INC**  
Employer

**OC: 11/20/11**  
**Claimant: Respondent (1)**

Section 96.5-2-a – Discharge for Misconduct

**STATEMENT OF THE CASE:**

The employer filed an appeal from a representative's decision dated December 13, 2011, reference 01, which held the claimant ineligible for unemployment insurance benefits. After due notice, a telephone conference hearing was scheduled for and held on January 24, 2012. The claimant participated. The employer participated by Ashley Smith, administrator; Denise Leal, human resources director; Jamie Pain, cook; and Megan Huntly, director of dietary services. The record consists of the testimony of Denise Leal; the testimony of Megan Huntley; the testimony of Jamie Pain; the testimony of Doreen Burmeister; and Employer's Exhibits 1 through 23. Ashley Smith did not testify.

**ISSUE:**

Whether the claimant was discharged for misconduct.

**FINDINGS OF FACT:**

The administrative law judge, having heard the testimony of the witnesses and having considered all of the evidence in the record, makes the following findings of fact:

The employer is a nursing home located in Estherville, Iowa. The claimant was hired on January 14, 2005, as a full-time cook. The claimant's last day of work was November 6, 2011. The claimant was terminated on November 7, 2011.

The incident that led to the claimant's termination occurred on October 22, 2011. The claimant and another employee named Nicole had a conversation. During that conversation, the claimant said to Nicole: "Why would I want to get along with someone who is trying to get me fired." (Exhibit 1) The employer became aware of the conversation on October 25, 2011. The claimant turned in a written Suggestion and Concern form on October 29, 2011. The claimant was then interviewed by the employer on November 1, 2011. The claimant continued to work. The employer continued the investigation.

The claimant had been previously warned about inconsiderate treatment of others and disruption of routine on September 16, 2011. She was given a written warning, which was

deemed a final warning. The incident that led to this warning occurred on August 29, 2011. The claimant was specifically cited for rarely speaking to co-workers and not communicating necessary work information. (Exhibit 3) The claimant was told that any further violations would lead to termination. (Exhibit 3)

The employer concluded that the claimant had committed the same type of offense on October 22, 2011, that she had committed on August 29, 2011. The claimant was terminated. The employer believed that the claimant had caused disruption in the department and did not promote a supportive work environment.

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

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.

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.

Misconduct that leads to termination is not necessarily misconduct that disqualifies an individual from receiving unemployment insurance benefits. Misconduct occurs when there are deliberate

acts or omissions that constitute a material breach of the worker's duty to the employer. In order to justify disqualification, the evidence must establish that the final incident leading to the decision to discharge was a current act of misconduct. See 871 IAC 24.32(8). See also Greene v. EAB, 426 N.W.2d 659 (Iowa App. 1988). The employer has the burden of proof to establish misconduct.

The difficult issue in this case is whether the claimant was discharged for a current act of misconduct. Iowa law required that termination of employment must be based on a current act. The incident with Nicole happened on October 22, 2011. The employer did not find out about the incident until October 25, 2011. The claimant then filed a suggestion and concern form on October 29, 2011. That appears to be when the investigation started. The employer was specifically asked if the claimant was told there was an investigation and/or whether her job was in jeopardy. The employer's answer was that the claimant knew that there was always an investigation when a suggestion and concern form is filed. The claimant, however, is the one that filed the form, not Nicole. Even after the claimant filed the form, the employer still waited until November 7, 2011, to terminate the claimant.

The employer attributed its delay to the need to investigate thoroughly. Certainly, employers have a reasonable period of time to conduct an investigation. The greater weight of the evidence is that the employer had information about a possible violation of its policies by the claimant on October 25, 2011, and waited until November 7, 2011 to terminate the claimant. There is no conclusive evidence that the claimant was told she was being investigated or that her job was in jeopardy. In addition, the claimant was permitted to keep working. The administrative law judge concludes that the 14-day delay between notification and termination was unreasonable. The claimant was not discharged for a current act of misconduct. Benefits are therefore allowed, if the claimant is otherwise eligible.

**DECISION:**

The representative's decision dated December 13, 2011, reference 01, is affirmed. Unemployment insurance benefits are allowed, provided the claimant is otherwise eligible.

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Vicki L. Seeck  
Administrative Law Judge

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Decision Dated and Mailed

vls/kjw