

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

BRISA Y HERNANDEZ GOMEZ
Claimant

ECA RIVERVIEW LC
Employer

APPEAL 16A-UI-05718-JCT
**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 04/24/16
Claimant: Appellant (1)

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

STATEMENT OF THE CASE:

The claimant filed an appeal from the May 16, 2016, (reference 01) unemployment insurance decision that denied benefits based upon separation. The parties were properly notified about the hearing. A telephone hearing was held on June 7, 2016. The claimant participated personally. The employer participated through Jeff Wollum, administrator. Claimant exhibit A was admitted into evidence. Based on the evidence, the arguments of the parties, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

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: The claimant was employed full-time as a CNA and was separated from employment on April 28, 2016 for inconsiderate and unkind care of a resident (Claimant exhibit A).

The employer has a policy which requires kind and considerate care of the residents for which it serves. The claimant was aware of the employer's policy and previously was issued a written warning on August 26, 2015, when she failed to utilize a second person when using a mechanical lift. Failure to use a second person could have resulted in the resident being injured.

The final incident occurred on April 23, 2016, when the claimant was helping transport a resident near the dining room with another CNA named Mel. The resident dropped his foot or feet in the wheelchair which caused him to slide out of the wheelchair and fall. The resident fell in the presence of co-workers, residents and family members of residents who were in the dining hall. The employer reported at least four people, including a dietary aide, resident, family member of a resident and nurse witnessed the claimant and her co-worker laughing after the resident fell. The individuals who saw or heard the claimant laugh did not attend the hearing. The claimant then left the resident rather than tend to him with the nurse that was called over.

There is disputed evidence as to whether the claimant notified the nurse of her plans or just walked away. Mel became insubordinate to management immediately in response to the incident and was discharged. The claimant went to the union steward in the kitchen and began questioning whether a nurse had the authority to fire the CNA, even though there was food to be served for the meal and residents needing assistance. The claimant was directed to return to work. She was subsequently discharged. The employer reported that it was not the fall itself but rather the claimant's response to the fall which led to her discharge.

The claimant denied laughing at the resident and indicated that she was naturally soft-spoken so no one could have heard her laugh. The claimant also reported that the resident would become aggressive when surrounded by people so she left him with the nurse and informed the nurse she was going to help other residents. The claimant admitted she went to the union steward in the kitchen and was upset about the firing.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment due to job-related misconduct.

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.

The law defines misconduct as:

1. A deliberate act and a material breach of the duties and obligations arising out of a worker's contract of employment.
2. A deliberate violation or disregard of the standard of behavior the employer has a right to expect from employees. Or
3. An intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to the employer.

Inefficiency, unsatisfactory conduct, unsatisfactory performance due to inability or incapacity, inadvertence or ordinary negligence in isolated incidents, or good faith errors in judgment or discretion do not amount to work-connected misconduct. 871 IAC 24.32(1)(a).

It is the duty of the administrative law judge as the trier of fact in this case, to determine the credibility of witnesses, weigh the evidence and decide the facts in issue. *Arndt v. City of LeClaire*, 728 N.W.2d 389, 394-395 (Iowa 2007). The administrative law judge may believe all, part or none of any witness's testimony. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996). In assessing the credibility of witnesses, the administrative law judge should consider the evidence using his or her own observations, common sense and experience. *Id.* In determining the facts, and deciding what testimony to believe, the fact finder may consider the following factors: whether the testimony is reasonable and consistent with other believable evidence; whether a witness has made inconsistent statements; the witness's appearance,

conduct, age, intelligence, memory and knowledge of the facts; and the witness's interest in the trial, their motive, candor, bias and prejudice. *Id.* After assessing the credibility of the witnesses who testified during the hearing, considering the applicable factors listed above, and using her own common sense and experience, the administrative law judge finds the employer's testimony, when compared to claimant's recollection of the event, as more credible.

The employer has a reasonable policy requiring kind and considerate care towards its residents, and the claimant had been previously warned related to resident care. In this case, the final incident occurred when the claimant was observed laughing at a fallen resident by four different people, including a resident, a resident's family member, a dietary aide and nurse. The administrative law judge is persuaded that the multiple reports from different people in different roles related to the employer outweigh the denial of the claimant. Further, the claimant admitted to leaving the resident after the fall for the nurse to tend to and for delaying a return to care so that she could discuss the firing of her co-worker with the union steward, despite it being meal time. The claimant knew or should have known her conduct was in disregard of the employer's interests and reasonable standards of behavior that the employer has a right to expect of its employees. Benefits are withheld.

DECISION:

The May 16, 2016, (reference 01) unemployment insurance decision is affirmed. The claimant was discharged from employment due to job-related misconduct. Benefits are withheld until such time as she has worked in and been paid wages for insured work equal to ten times her weekly benefit amount, provided she is otherwise eligible.

Jennifer L. Beckman
Administrative Law Judge

Decision Dated and Mailed

jlb/pjs