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

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

**LINDSEY A BRUINEKOOL**
Claimant

**A & B CHILDCARE INC**
Employer

**APPEAL NO: 14A-UI-01843-DWT**

**ADMINISTRATIVE LAW JUDGE DECISION**

**OC: 01/05/14**
**Claimant: Appellant (2)**

Iowa Code § 96.5(2)a - Discharge

**PROCEDURAL STATEMENT OF THE CASE:**

The claimant appealed a representative's February 10, 2014 determination (reference 02) that disqualified her from receiving benefits and held the employer's account exempt from charge because she had been discharged for disqualifying reasons. The claimant participated at the April 24 hearing with her attorney, E. J. Flynn. The witness the claimant subpoenaed was not called to testify at the hearing. Gary Fischer, attorney at law, appeared on the employer's behalf. Nancy Fuller, the co-director, Rachel Settle and Kiera Musquiz testified on the employer's behalf. Kristina Raygoza was available to testify but did not. Bridgette Ehlemann observed the hearing.

During the hearing, the attorneys stipulated the following exhibits could be admitted as evidence: Employer Exhibits A through L and Claimant Exhibits One and Two. Based on the evidence, the arguments of the parties, and the law, the administrative law judge concludes the claimant is qualified to receive benefits.

**ISSUE:**

Did the employer discharge the claimant for reasons constituting a current act of work-connected misconduct?

**FINDINGS OF FACT:**

The employer hired the claimant to work as a childcare provider in May 2013. The employer hired the claimant to work as a floater. When she was hired, the claimant received a copy of the employer's written policy. The employer's primary purpose is to provide a safe, clean, healthy, and loving learning environment to children 6 weeks to 12 years of age. (Employer Exhibits A, B and C.)

On August 27, 2013, the claimant was outside with children. She picked up a child. While the child was in her arm, the claimant tripped and fell to the ground with the child. The employer gave the claimant a verbal warning for this incident. (Employer Exhibits K and L).

On November 18, the employer gave the claimant a written warning after employees complained about the claimant being unable to place toddlers on a flat surface. During the November 18 warning, management learned about some of the claimant's limitations. The claimant told her co-workers about some limitations, but management did not understand her limitations until mid-November. After November 18, the employer usually did not assign the claimant to work with toddlers or babies that needed diapers changed. (Employer Exhibit J.)

January 7, 2014, was the first time the claimant went into Toddler A room for quite a while. She went into this room to complete some of her laundry tasks. As the claimant was going to the washer and dryer in this room, she did not see a young child sitting on the floor. She felt her foot bump the child and then she lost her balance and fell to the floor. The child's face was bruised when the claimant fell on top of the child. While the child was startled and needed ice and soothing, the child was not seriously injured. Three employees in Toddler A reported the incident to the employer. The employees in the room were Settles, Musquiz and Raygoza. After the employer talked to the three co-workers, the employer discharged the claimant on January 7, 2014, for again falling on a child. (Employer Exhibits G, H and I.)

**REASONING AND CONCLUSIONS OF LAW:**

A claimant is not qualified to receive unemployment insurance benefits if an employer discharges her for reasons constituting work-connected misconduct. Iowa Code § 96.5(2)a. 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 willful wrongdoing or repeated carelessness or negligence that equals willful misconduct in culpability. *Lee v. Employment Appeal Board*, 616 N.W.2d 661, 665 (Iowa 2000).

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).

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. Iowa Admin. Code r. 871-24.32(8).

The employer established justifiable business reasons for discharging the claimant. January 7, 2014, was the second time the claimant inadvertently fell either with a child in her arm and on top of a child. The employer attempted to make accommodations for the claimant after giving her the November 18, 2013 written waning. The issues the employer addressed in the November 18 written warning were resolved by assigning the claimant different jobs.

On January 7, it does not make any difference if the incident took place at 2 or 3 p.m. or if the claimant had a small dress in her hands or she was carrying a small laundry basket. The claimant went into Toddler A room for the first time in quite a while. She may have been focused on getting her laundry tasks completed and did think to look at the floor to see if any child was present. The claimant could have been more careful when she walked toward the laundry facilities in the room, but she did not intentionally trip and fall over a small child.

Parts of the claimant's testimony are not as credible as Settles and Musquiz. But, it is also difficult to understand why neither Settles nor Musquiz warned the claimant about the child's presence since at least one of them testified they saw the whole incident. This administrative law judge does not believe any one in Toddler A would intentionally harm any child. Just like the claimant, Settles and Musquiz did not see the young child on the floor until the claimant tripped and fell. The claimant did not commit work-connected misconduct. As of January 5, 2014, the claimant is qualified to receive benefits.

**DECISION:**

The representative's February 10, 2014 determination (reference 02) is reversed. The employer discharged the claimant for businesses reasons, but the claimant did not commit work-connected misconduct. She inadvertently tripped on a young child, which resulted in her falling to the floor and on top of the child. As of January 5, 2014, the claimant is qualified to receive benefits, provided she meets all other eligibility requirements. The employer's account is subject to charge.

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Debra L. Wise
Administrative Law Judge

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Decision Dated and Mailed

dlw/pjs