

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

PENNY S BOGER
Claimant

BARTELS LUTHERAN HOME INC
Employer

APPEAL 18A-UI-06589-SC-T
**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 05/20/18
Claimant: Appellant (1)

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

STATEMENT OF THE CASE:

Penny S. Boger (claimant) filed an appeal from the June 8, 2018, reference 01, unemployment insurance decision that denied benefits based upon the determination Bartels Lutheran Home, Inc. (employer) discharged her for conduct not in its best interest. The parties were properly notified about the hearing. A telephone hearing was held on July 9, 2018. The claimant participated. The employer participated through Director of Nursing Melanie Moeller and Human Resource Generalist Veronica Shae. The Employer's Exhibit 1 was admitted into the record without objection.

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 Certified Nursing Assistant (CNA) beginning on June 10, 2015, and was separated from employment on May 23, 2018, when she was discharged. The employer has policies regarding the care of residents as well as discipline.

The claimant had received multiple disciplinary actions, in part, for the way she dealt with residents. She received a coaching on July 7, 2017 for failing to provide cares and being dishonest with the nurses about having completed the cares. She received another coaching on July 10, 2017 for dishonesty about completing cares and poor attitude or lack of patience when working with the residents. The claimant was sent to a mandatory EAP session to work on her issues with the residents.

On October 2, 2017, the claimant received a written warning for failing to complete her job duties and making an offensive comment about a resident to co-workers. The employer learned that when a resident had an incontinent bowel movement, the claimant told multiple co-workers that the resident was a jackass. She was told at that time any further incidents could result in discharge.

On May 22, 2018, Director of Nursing Melanie Moeller was meeting with a different staff member when she heard someone yelling to another person that he or she needed to sit down. Moeller discovered the claimant in the restroom with a resident whom she was helping with her daily toileting. The claimant was yelling at the resident to sit down in a frustrated tone and, eventually, placed her hands on the resident's shoulders which appeared to force the resident into sitting. Moeller advised the claimant during this interaction that, as the resident was hard of hearing, she should make eye contact, lower her voice, and use hand gestures. Moeller left the resident with the claimant as she did not feel the resident was in imminent danger, but she began an investigation into the incident. The employer discharged the claimant for violating its policies related to negative or unkind resident care.

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. Benefits are denied.

Iowa law disqualifies individuals who are discharged from employment for misconduct from receiving unemployment insurance benefits. Iowa Code § 96.5(2)a. They remain disqualified until such time as they requalify for benefits by working and earning insured wages ten times their weekly benefit amount. *Id.* Iowa Administrative Code rule 871-24.32(1)a provides:

“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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. *Huntoon v. Iowa Dep't of Job Serv.*, 275 N.W.2d 445, 448 (Iowa 1979).

The employer has the burden of proof in establishing disqualifying job misconduct. *Cosper v. Iowa Dep't of Job Serv.*, 321 N.W.2d 6 (Iowa 1982). 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. Iowa Dep't of Job Serv.*, 364 N.W.2d 262 (Iowa Ct. App. 1984). Misconduct must be “substantial” to warrant a denial of job insurance benefits. *Newman v. Iowa Dep't of Job Serv.*, 351 N.W.2d 806 (Iowa Ct. App. 1984). Negligence does not constitute misconduct unless recurrent in nature; a single act is not disqualifying unless indicative of a deliberate disregard of the employer's interests. *Henry v. Iowa Dep't of Job Serv.*, 391 N.W.2d 731 (Iowa Ct. App. 1986). Generally, continued refusal to follow reasonable instructions constitutes misconduct. *Gilliam v. Atlantic Bottling Co.*, 453 N.W.2d 230 (Iowa Ct. App. 1990). The Iowa Court of Appeals found substantial evidence of misconduct in testimony that the claimant worked slower than he was capable of working and would temporarily and

briefly improve following oral reprimands. *Sellers v. Emp't Appeal Bd.*, 531 N.W.2d 645 (Iowa Ct. App. 1995).

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.*

The findings of fact show how the disputed factual issues were resolved. After assessing the credibility of the witnesses who testified during the hearing, the reliability of the evidence submitted, considering the applicable factors listed above, and using her own common sense and experience, the administrative law judge attributes more weight to the employer's version of events. The employer provided supporting documentation that was created during the normal course of business. The claimant issued a blanket denial that she had never been warned or talked to about her attitude, which is not credible in light of the documentation.

The employer has an interest in having a safe and healthy environment for its residents. The employer has presented substantial and credible evidence that the claimant continued to have attitude issues and violate its policies regarding resident care after having been warned. This is disqualifying misconduct. Benefits are denied.

DECISION:

The June 8, 2018, 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.

Stephanie R. Callahan
Administrative Law Judge

Decision Dated and Mailed

src/scn