

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

HEATHER L LONG
Claimant

APPEAL NO. 08A-UI-08366-SWT

**ADMINISTRATIVE LAW JUDGE
DECISION**

CARE INITIATIVES
Employer

**OC: 08/17/08 R: 02
Claimant: Respondent (1)**

Section 96.5-2-a – Discharge

STATEMENT OF THE CASE:

The employer appealed an unemployment insurance decision dated September 9, 2008, reference 01, that concluded the claimant's discharge was not for work-connected misconduct. A telephone hearing was held on October 6, 2008. The parties were properly notified about the hearing. The claimant participated in the hearing. Gordon Peterson participated in the hearing on behalf of the employer with witnesses, Melanie Grubb and Sherri Reinier.

ISSUE:

Was the claimant discharged for work-connected misconduct?

FINDINGS OF FACT:

The claimant worked full time as a certified nursing assistant from November 8, 2007, to August 17, 2008. She was informed and understood that under the employer's work rules, employees who commit conduct detrimental to company operations that causes serious negative publicity or poor customer service were subject to immediate discharge.

On August 16, 2008, the claimant responded a resident's call light. The resident asked if the claimant would empty her bedside commode. The claimant jokingly said "no" and then proceeded to empty the commode as instructed.

Later, the resident untruthfully reported to another CNA that the claimant had threatened to dump the commode on her. That CNA in turn reported the matter to the acting director of nursing, Sherri Reinier.

The claimant had been suspended in June 2008 while the employer determined whether the claimant could continue to work after an off-duty incident. After she returned to work, the claimant learned from other employees that the resident who had complained about her on August 16 knew about her suspension and was questioning why the claimant had not been discharged. The claimant overheard the resident say to an employee that she wondered why the claimant was still working at the facility and that she should have been fired. After she returned from her suspension, the resident acted unfriendly toward the claimant. The claimant

had complained to management about the disclosure of information to the residents regarding her suspension.

On August 17 and 18, 2008, Reinier and the administrator, Melanie Grubb, each interviewed the resident and the claimant about what had happened. The resident said to each that the claimant had threatened to dump the commode on her. The claimant admitted to each that she had said "no" when the resident asked her to empty the commode, but insisted she said it jokingly. She denied saying she would dump the commode on her.

The employer discharged the claimant on August 19, 2008, for making the comment to the resident about dumping the commode on the resident, which was considered a violation of the work rule against conduct detrimental to company operations that causes serious negative publicity or poor customer service.

REASONING AND CONCLUSIONS OF LAW:

The issue in this case is whether the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law.

The unemployment insurance law disqualifies claimants discharged for work-connected misconduct. Iowa Code § 96.5-2-a. The rules define misconduct as (1) deliberate acts or omissions by a worker that materially breach the duties and obligations arising out of the contract of employment, (2) deliberate violations or disregard of standards of behavior that the employer has the right to expect of employees, or (3) carelessness or negligence of such degree of recurrence as to manifest equal culpability, wrongful intent or evil design. 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 misconduct within the meaning of the statute. 871 IAC 24.32(1).

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 N.W.2d 661, 665 (Iowa 2000).

The findings of fact show how I resolved the disputed factual issues in this case by carefully assessing the credibility of the witnesses and reliability of the evidence and by applying the proper standard and burden of proof. The employer's evidence hinges on hearsay evidence from the resident who did not appear at the hearing. The Iowa Court of Appeals has established standards for determining whether hearsay evidence "rises to the necessary levels of trustworthiness, credibility, and accuracy required by a reasonably prudent person in the conduct of serious affairs." Schmitz v. Iowa Department of Human Services, 461 N.W.2d 603 (Iowa App. 1990). These standards involve a common sense evaluation of: (1) the nature of the hearsay; (2) the availability of better evidence; (3) the cost of acquiring better information; (4) the need for precision; and (5) the administrative policy to be upheld. Id. at 608.

The hearsay in this case is ordinary hearsay not subject to any known exception to the hearsay rule that would buttress its reliability. Non-hearsay evidence was easily available as the employer could have had the resident testify with no great burden or cost to the employer since

the hearing was conducted by telephone conference. Since the hearing involves resolving disputed facts based on credibility and the end result of the hearing grants or denies benefits to an unemployed person, the need for accurate information is essential. Finally, there is no policy that would favor presenting hearsay statements over live witnesses in this case.

The claimant testified credibly and consistently. She presented evidence providing a motive for the resident to make an untruthful report. Her firsthand testimony outweighs the employer's hearsay evidence. The employer failed to meet its burden of proving the claimant was discharged for work-connected misconduct.

DECISION:

The unemployment insurance decision dated September 9, 2008, reference 01, is affirmed. The claimant is qualified to receive unemployment insurance benefits, if she is otherwise eligible.

Steven A. Wise
Administrative Law Judge

Decision Dated and Mailed

saw/css