

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

KATHRYN A SCHLUETER
Claimant

APPEAL NO: 13A-UI-11168-ST

**ADMINISTRATIVE LAW JUDGE
DECISION**

BICKFORD SENIOR LIVING GROUP LLC
Employer

**OC: 05/19/13
Claimant: Appellant (2)**

Section 96.5-2-a – Discharge
871 IAC 24.32(1) – Definition of Misconduct
871 UI IAC 24.32(8) – Current Act

STATEMENT OF THE CASE:

The claimant appealed a department decision dated September 30, 2013, reference 02, that held she was discharged for dishonesty misconduct on September 5, 2013, and benefits are denied. A telephone hearing was held on November 5, 2013. The claimant participated. Lisa Colbert, Division Director, participated for the employer.

ISSUE:

Whether the claimant was discharged for misconduct in connection with employment.

FINDINGS OF FACT:

The administrative law judge having heard the witness testimony and having considered the evidence in the record finds: The claimant was hired on September 7, 2009, and last worked for the employer as a full-time medication aide on September 5, 2013. She submitted to a pre-employment physical and employment application process.

Claimant made a disclosure at hire she had a 35-pound permanent lifting restriction. She was wearing a back brace at the interview. The employer said it could work with claimant given the restriction.

The claimant suffered a job-related thumb injury in March or April. She was on FMLA from May 15 thru July 30 due to some behavior issues. She was issued a disciplinary warning on July 31 for behavior.

The employer insurance provider advised the employer it believed claimant had failed to disclose her permanent lifting restriction at hire. The employer had received some employee complaints about claimant's lack of cooperation and behavior. The employer terminated claimant for falsification of her pre-employment health information as to a disclosure of her permanent lifting restriction and continuing behavior issues.

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.

The administrative law judge concludes the employer has failed to establish that the claimant was discharged for any current act of misconduct in connection with employment on September 5, 2013. The employer witness was not an employee at the time of hire and could not refute claimant about the application process.

Claimant offered credible testimony she did disclose her 35-pound lifting restriction at hire, the employer could see her wearing a back brace and she was told it would work around it. If there was any issue with this restriction, the employer had four years to observe it. In addition, the employer failed to offer any document claimant allegedly falsified or failed to disclose the restriction.

The employer was unable to identify any current incident, complaint date or written employee statements to establish a current behavior issue after the July 31 warning. There is no current act of misconduct on this issue, and job disqualifying misconduct is not established.

DECISION:

The department decision dated September 30, 2013, reference 02, is reversed. The claimant was not discharged for a current act of misconduct on September 5, 2013. Benefits are allowed, provided the claimant is otherwise eligible.

Randy L. Stephenson
Administrative Law Judge

Decision Dated and Mailed

rls/pjs