

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

TONYA M STEWART
Claimant

APPEAL NO: 12A-UI-10636-ST

**ADMINISTRATIVE LAW JUDGE
DECISION**

SCENIC LIVING COMMUNITIES INC
Employer

**OC: 08/05/12
Claimant: Respondent (1)**

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

STATEMENT OF THE CASE:

The employer appealed a department decision dated August 24, 2012, reference 01, that held the claimant was not discharged for misconduct on July 30, 2012, and benefits are allowed. A telephone hearing was held on October 10, 2012. The claimant participated. Laura Juhl, Executive Director, Lisa Hoodjer, Administrator, and Mary Jo Potkonak, Dietary Supervisor, participated for the employer. Employer Exhibit One was received as evidence.

ISSUE:

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

FINDINGS OF FACT:

The administrative law judge having heard the testimony of the witnesses, and having considered the evidence in the record, finds: The claimant began employment on July 30, 2009, and last worked for the employer as a full-time dietary cook on July 30, 2012. The employer issued multiple disciplinary actions to claimant during the last seven months of employment.

Claimant was issued a written warning on December 31, 2011 for an unexcused late to work. Claimant was issued written warnings on January 23, 2012 for arguing with staff and work performance issues. She was issued a written warning with a three-day suspension on February 7 for unsatisfactory work and argumentative behavior. She was issued a final warning on May 15 for unsatisfactory work and failure to follow instructions. She refused to sign it.

The dietary supervisor received staff reports that claimant argued with a resident to the point of making her cry on July 26, 2012. The employer called claimant to say the matter was under investigation. When claimant reported to work on July 30, she was discharged by the employer for the July 26 incident in light of the prior discipline.

Claimant denies she argued with the resident and made her cry. Claimant had received a menu form for the resident that could not be prepared in that manner due to a diet change. Claimant

went to the resident and explained the food preparation issue. Prior to discharge, claimant was not given an opportunity to explain her conduct with the resident and she was not given an opportunity to review the staff report information.

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 a current act of misconduct in connection with employment on July 30, 2012.

The employer failed to produce the staff persons who reported claimant argued with the resident on July 26 as witnesses and/or submit any written statement as to what they observed. Claimant denies she argued with the resident, and the employer gave her no opportunity to explain her conduct.

While the seven-month claimant disciplinary record does show a pattern of misconduct, this does not relieve the employer of the obligation to establish a current act leading to discharge. The second-hand hearsay of the employer witnesses in this matter is not sufficient to establish claimant misconduct in the July 26 incident.

DECISION:

The department decision dated August 24, 2012, reference 01, is affirmed. The claimant was not discharged for a current act of misconduct on July 30, 2012. Benefits are allowed, provided the claimant is otherwise eligible.

Randy L. Stephenson
Administrative Law Judge

Decision Dated and Mailed

rls/pjs