

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

ROBERT W TUBBS

Claimant

**LUTHERAN HOME FOR THE AGED
ASSOCIATION - EAST**

Employer

APPEAL NO. 12A-UI-04664-VS

**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 05/29/11

Claimant: Appellant (2)

Section 96.5-2-A – Discharge for Misconduct

STATEMENT OF THE CASE:

The claimant filed an appeal from a decision of a representative dated April 13, 2012, reference 04, which held that the claimant was ineligible for unemployment insurance benefits. After due notice, a hearing was scheduled for and held on September 5, 2012, in Davenport, Iowa. The claimant participated personally. The employer participated by Shelly Hopp, Administrator. The record consists of the testimony of Shelly Hopp; the testimony of Robert Tubbs; and Employer's Exhibits 1-15.

ISSUE:

Whether the claimant was discharged for misconduct.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony of the witnesses and having considered all of the evidence in the record, makes the following findings of fact:

The employer owns and operates a long-term care facility in Davenport, Iowa, called Davenport Lutheran Home. The claimant was hired on July 14, 2011. He was a certified nursing assistant. He worked both full-time and part-time hours during the time he was employed. His last day of work was February 8, 2012. He was placed on unpaid suspension on February 9, 2012. He was terminated on March 29, 2012.

The incident that led to the claimant's termination occurred on February 8, 2012. The claimant was assigned to care for a resident who had certain protocols in place to prevent falls. This resident required a floor mat; a body pillow; a soft touch call light in reach; and a low bed position. The claimant put the resident in bed but he did not put the fall interventions in place. He thought the resident was going to work on her nails. The claimant provided his services sometime between 7:30 p.m. and 8:00 p.m.

At 9:00 p.m. the resident was found on the floor near her roommate's bed. She appeared to have struck her head on her roommate's wheelchair. The employer called 911 and the resident

was taken to the hospital. She died the next day. Her cause of death is not known by the employer.

The claimant was placed on unpaid suspension pending an investigation on February 9, 2012. He was terminated on March 29, 2012. The claimant had not been disciplined before due to failure to provide required care for a resident.

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.

871 IAC 24.32(8) provides:

(8) Past acts of misconduct. 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.

Misconduct that leads to termination is not necessarily misconduct that disqualifies an individual from receiving unemployment insurance benefits. Misconduct occurs when there are deliberate acts or omissions that constitute a material breach of the worker's duty to the employer. The law excludes errors of judgment or discretion in isolated instances. The employer has the burden of proof to show misconduct.

There is insufficient evidence in this record to conclude that the claimant was discharged for disqualifying misconduct. The administrative law judge is extremely mindful that the error made by the claimant may have led to a fall by the resident. The claimant admitted that he did not put the fall intervention procedures into effect when he helped the claimant get into bed on the evening of February 8, 2012. That being said, the law on disqualification for misconduct puts the emphasis on deliberate or volitional acts. There is insufficient evidence in this record that the claimant's failure was deliberate or volitional on his part. He had not been disciplined in the past for failing to follow care protocols. He testified that he thought the resident was going to do her nails and was not ready for bed. Given this testimony, the administrative law judge concludes that the evidence shows an error of judgment or discretion on the part of the claimant as opposed to deliberate or volitional acts or omissions. Benefits are therefore allowed if the claimant is otherwise eligible.

DECISION:

The decision of the representative dated April 13, 2012, reference 04, is reversed. Unemployment insurance benefits are allowed, provided claimant is otherwise eligible.

Vicki L. Seeck
Administrative Law Judge

Decision Dated and Mailed

vls/css