

**IOWA WORKFORCE DEVELOPMENT  
Unemployment Insurance Appeals Section  
1000 East Grand—Des Moines, Iowa 50319  
DECISION OF THE ADMINISTRATIVE LAW JUDGE  
68-0157 (7-97) – 3091078 - EI**

**GABRIELA HINOJOSA  
2110 SE EVERGREEN #13  
DES MOINES IA 50320**

**AMERICAS CHILDREN OF OAKMOOR  
4731 MERLE HAY RD  
DES MOINES IA 50322**

**Appeal Number: 05A-UI-02218-CT  
OC: 01/30/05 R: 02  
Claimant: Respondent (1)**

**This Decision Shall Become Final**, unless within fifteen (15) days from the date below, you or any interested party appeal to the Employment Appeal Board by submitting either a signed letter or a signed written Notice of Appeal, directly to the **Employment Appeal Board, 4<sup>th</sup> Floor—Lucas Building, Des Moines, Iowa 50319**.

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

**STATE CLEARLY**

1. The name, address and social security number of the claimant.
2. A reference to the decision from which the appeal is taken.
3. That an appeal from such decision is being made and such appeal is signed.
4. The grounds upon which such appeal is based.

YOU MAY REPRESENT yourself in this appeal or you may obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds. It is important that you file your claim as directed, while this appeal is pending, to protect your continuing right to benefits.

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(Administrative Law Judge)

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(Decision Dated & Mailed)

Section 96.5(2)a – Discharge for Misconduct

**STATEMENT OF THE CASE:**

Americas Children of Oakmoor (Oakmoor) filed an appeal from a representative's decision dated February 24, 2005, reference 01, which held that no disqualification would be imposed regarding Gabriela Hinojosa's separation from employment. After due notice was issued, a hearing was held by telephone on March 22, 2005. Ms. Hinojosa participated personally and Exhibit A was admitted on her behalf. The employer participated by Robin Vannausdle, Director; Jackie Putz, Assistant Director; and Andrea Whitaker, a former employee.

#### FINDINGS OF FACT:

Having heard the testimony of the witnesses and having reviewed all the evidence in the record, the administrative law judge finds: Ms. Hinojosa was employed by Oakmoor from December 13, 2004 until January 29, 2005 as a full-time daycare provider. When she began the employment, she was bringing her husband with her to work because he is disabled and cannot be left alone. Although the employer told her she could not have her husband at work, the employer found odd jobs for him to do at the daycare center as well as at the fitness center with which the daycare is associated. Ms. Hinojosa did not bring her husband to work after December 24 as he found employment.

Part of the reason for Ms. Hinojosa's discharge was her personal telephone usage. The employer's policy provides that personal calls are to be made during the employee's own time. The employer discussed her personal phone calls with Ms. Hinojosa on January 27. The employer did not establish that she made personal phone calls at other than break times after the matter was discussed with her. The employer also discharged Ms. Hinojosa because of issues effecting the health and safety of the children at the center. There were occasions on which Ms. Hinojosa failed to close the bathroom door after taking children to be toileted. When the door was left open, toddlers would wander into the bathroom and either play in the toilet bowl or reach into the container used for soiled diapers.

On January 19, Ms. Hinojosa and a coworker were engaged in an argument regarding the care of Ms. Hinojosa's son, who attended the center. She heard her son crying for an extended period of time and went to the room where he was assigned. She accused the worker in that room of being mean to her son by allowing him to cry for such a long period of time. The discussion escalated into an argument in which both parties were yelling. Because of the above matters, Ms. Hinojosa was discharged during the 90-day probationary period.

#### REASONING AND CONCLUSIONS OF LAW:

At issue in this matter is whether Ms. Hinojosa was separated from employment for any disqualifying reason. An individual who was discharged from employment is disqualified from receiving job insurance benefits if the discharge was for misconduct. Iowa Code section 96.5(2)a. The employer had the burden of proving disqualifying misconduct. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). For reasons which follow, the administrative law judge concludes that disqualifying misconduct has not been established. The employer acquiesced to Ms. Hinojosa bringing her husband to work by allowing her to continue doing so and by providing her husband with odd jobs to do. The administrative law judge does not doubt that Ms. Hinojosa was using the telephone for personal calls. However, the evidence failed to establish that she continued to use the telephone at inappropriate times after the verbal warning. Ms. Hinojosa did engage in a loud argument with a coworker. This was an isolated instance of poor judgment and not an intentional disregard of the employer's standards.

The parties disagree as to whether there were incidents of toddlers playing in the toilet bowl and reaching into the diaper pail. Assuming that such incidents did occur, they would represent instances of negligence on Ms. Hinojosa's part. Negligence is only disqualifying if it is sufficiently recurrent as to manifest an intentional and substantial disregard of the employer's interests or standards. See 871 IAC 24.43(1). The evidence of record did not establish that Ms. Hinojosa was responsible for allowing the toddlers into the bathroom alone so frequently as to establish a substantial disregard for the employer's standards or interests.

The employer's evidence establishes that Ms. Hinojosa was an unsatisfactory employee but does not establish that she wantonly and willfully disregarded the employer's interests or standards. While the employer may have had good cause to discharge, conduct which might warrant a discharge from employment will not necessarily sustain a disqualification from job insurance benefits. Budding v. Iowa Department of Job Service, 337 N.W.2d 219 (Iowa App. 1983). For the reasons stated herein, benefits are allowed.

DECISION:

The representative's decision dated February 24, 2005, reference 01, is hereby affirmed. Ms. Hinojosa was discharged but disqualifying misconduct has not been established. Benefits are allowed, provided she satisfies all other conditions of eligibility.

cfc/pjs