

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

DAWN GRIMM
Claimant

APPEAL NO: 16A-UI-00381-JE-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

CARE INITIATIVES
Employer

OC: 12/13/15
Claimant: Respondent (1)

Section 96.5-2-a – Discharge/Misconduct

STATEMENT OF THE CASE:

The employer filed a timely appeal from the January 5, 2016, reference 01, decision that allowed benefits to the claimant. After due notice was issued, a hearing was held by telephone conference call before Administrative Law Judge Julie Elder on February 1, 2016. The claimant participated in the hearing. Jalissa Simmons, Administrator; Phyllis Farrell, Unemployment Insurance Consultant; and Jacqueline Jones, Employer Representative; participated in the hearing on behalf of the employer. Employer's Exhibits One through Four were admitted into evidence.

ISSUE:

The issue is whether the employer discharged the claimant for work-connected misconduct.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed as a part-time licensed practical nurse for Care Initiatives from January 15, 2014 to December 15, 2015. She was discharged December 15, 2015, after a CNA reported the claimant was yelling at a resident and used profanity when exiting the room.

The claimant works the 10:00 p.m. to 6:00 a.m. shift and is usually accompanied by two CNAs. On the overnight shift December 13, 2015, the claimant and CNA were in the resident in question's room administering cares to her roommate. The resident likes to look out into the hall and became upset when the claimant and CNA closed the curtain around her roommate's bed, obscuring the resident's view of the hall. She is a fall risk and is monitored by bed pressure and motion activated monitors. The resident eventually went to bed and later got up and the claimant took her to use the restroom but she remained quite agitated and began throwing things at the claimant, such as her shoes, her walker, her lift recliner remote, and her call light remote which struck the claimant in the face and left her with a bruise. The claimant attempted to stay close enough to the resident to prevent her from falling but far enough away that she could not hit her. The CNA came into the room and the resident immediately screamed at her to get out and she left the room. Another CNA who was just starting her shift came in after hearing the yelling from the resident and asked the claimant to leave and the claimant left

on the first request because she did not want to remain in the room either but did not want the resident to fall. The first shift CNA then reported to the administrator that the claimant was yelling at the resident and that she said, "I fucking hate this place" and "I don't know why I became a fucking nurse." The claimant denies that she used any profanity. After the day shift CNA made her complaint to the administrator and she discussed the situation with the DON, the claimant was notified she was being suspended pending further investigation when she reported for work December 13, 2015.

The employer reviewed the claimant's disciplinary record and noted she received a final written warning and three-day suspension October 28, 2014, following reports she was sleeping on the job, a family report it was concerned about the claimant's lack of friendliness toward their loved one, and unprofessional nursing behavior. If an employee receives a second major type B warning in the next 24 months her employment is terminated.

The final incident was a major type B infraction and consequently the employer notified the claimant her employment was terminated December 15, 2015.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment for no disqualifying reason.

Iowa Code § 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.

Iowa Admin. Code r. 871-24.32(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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. *Huntoon v. Iowa Dep't of Job Serv.*, 275 N.W.2d 445, 448 (Iowa 1979).

The employer has the burden of proving disqualifying misconduct. 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).

While the employer alleges the claimant yelled at a resident and used profanity, the claimant denies she yelled at the resident or used profanity. The parties' testimony is contradictory but the claimant is the only first-hand witness to testify at the hearing. If a party has the power to produce more explicit and direct evidence than it chooses to do, it may be fairly inferred that other evidence would lay open deficiencies in that party's case. Crosser v. Iowa Department of Public Safety, 240 N.W.2d 682 (Iowa 1976). The employer did not present testimony from the first or third shift CNA or any of the nurses who were alleged to have heard the claimant's outburst. The claimant's testimony was credible and persuasive, especially in light of the fact the employer lacked a first-hand witness. Additionally, even if the events as presented by the employer occurred in that manner, this was an isolated incident of misconduct on the part of the claimant, and would not rise to the level of disqualifying job misconduct as that term is defined by Iowa law. Under these circumstances, the administrative law judge must conclude the employer has not met its burden of proving disqualifying job misconduct on the part of the claimant. Therefore, benefits must be allowed.

DECISION:

The January 5, 2016, reference 01, decision is affirmed. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided the claimant is otherwise eligible.

Julie Elder
Administrative Law Judge

Decision Dated and Mailed

je/pjs