

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

ALANDRIA N DAVISON
Claimant

APPEAL NO. 10A-UI-04470-SWT

**ADMINISTRATIVE LAW JUDGE
DECISION**

GENESIS DEVELOPMENT
Employer

**OC: 2/21/10
Claimant: Appellant (2)**

Section 96.5-2-a – Discharge

STATEMENT OF THE CASE:

The claimant appealed an unemployment insurance decision dated March 16, 2010, reference 01, that concluded she was discharged for work-connected misconduct. A telephone hearing was held on May 6, 2010. The parties were properly notified about the hearing. The claimant participated in the hearing. Lou Ellen Brown participated in the hearing on behalf of the employer.

ISSUE:

Was the claimant discharged for work-connected misconduct?

FINDINGS OF FACT:

The claimant worked as a resident manager for the employer from August 24, 2009, to February 19, 2010. The claimant is a licensed practical nurse. Lou Ellen Brown is the administrator of the facility. Brown had warned the claimant in the past about her negative attitude and problems with getting along with staff and vendors.

On February 4, an elderly resident with serious medical problems died. The woman had been treated by doctors and in the emergency room earlier in the week and was given antibiotics for pneumonia, but released back to the facility. By February 3, she had showed substantial improvement. During the morning and early afternoon on February 4, she was able to walk to meals with minimal assistance. When the claimant left work at about 3:30 p.m., she was unaware of any immediate medical concerns with the resident.

A short time after the claimant left the facility, the resident's condition worsened quickly—she was short of breath and appeared fatigued. A medication aide at the facility called the claimant at about 3:45 p.m. and described the resident's condition. The claimant instructed the medication aide to take her vital signs and call her back immediately. The aide called back with vital signs. In the claimant's nursing judgment, the vital signs—including pulse oximeter reading, blood pressure, pulse, and respiration—were not outside of normal range for resident and did not warrant calling an ambulance. The claimant attributed the shortness of breath to the humidity in the shower room since the resident had just taken a shower. The aide asked the

claimant what they should do. The claimant instructed her to get the resident to bed, keep her on oxygen, and call the claimant in a half hour, unless her condition got worse. A short time later, the resident's condition worsened and the aide called 911 for an ambulance. She then called the claimant and informed her about what had happened. The claimant complimented the aide on her actions.

After the death of the resident on February 4, Brown never said anything to her about mishandling the call from the aide. The claimant worked in the facility on February 6, February 9 through 12, and February 15 through 19.

Aides were supposed to contact the claimant if they were unable to work or find a replacement. On February 11, 2010, an aide who was scheduled to work from 6:00 a.m. to 2:00 p.m. tried texting the claimant to report that she was sick. She ended up contacting Brown's superior. The texts never went through, but Brown was convinced that the claimant was not available or ignoring the calls, which was not true. The claimant did not know the aide was sick and trying to contact her until she reported to work at 8:45 a.m. She sent the aide home and replaced her for the rest of her shift. The claimant worked until 9:00 p.m. that day.

On February 19, 2010, Brown discharged the claimant because she believed the claimant should have had the aide call for an ambulance right away on February 4, she believed the claimant was not available to take calls from staff when she was not in the facility, and because of her history of conflicts with staff and vendors.

REASONING AND CONCLUSIONS OF LAW:

The issue in this case is whether the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law.

The unemployment insurance law disqualifies claimants discharged for work-connected misconduct. Iowa Code section 96.5-2-a. The rules define misconduct as (1) deliberate acts or omissions by a worker that materially breach the duties and obligations arising out of the contract of employment, (2) deliberate violations or disregard of standards of behavior that the employer has the right to expect of employees, or (3) carelessness or negligence of such degree of recurrence as to manifest equal culpability, wrongful intent or evil design. 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 misconduct within the meaning of the statute. 871 IAC 24.32(1).

The employer has the burden to prove the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law. 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).

871 IAC 24.32(8) provides that 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.

The employer has failed to meet its burden of proving any current act of work-connected misconduct. The findings of fact show how I resolved the disputed factual issues in this case by carefully assessing the credibility of the witnesses and reliability of the evidence and by applying the proper standard and burden of proof. I do not believe the claimant told the aide not to call an ambulance even though the resident had no vital signs as the employer alleges. The claimant used her best nursing judgment in responding to the call from the aide on February 4. In hindsight, calling for ambulance right away would have brought emergency medical attendance more quickly and may have changed the outcome, but the claimant did not commit any disqualifying misconduct in regard to the incident on February 4. And the employer not taking any action for over two weeks after February 4 undercuts its claim of it being misconduct. The only other conduct cited by the employer as occurring in February, was the situation with the sick aide on February 11. The claimant did nothing wrong that day, as she can't be faulted for the aide's phone not transmitting text messages to her.

DECISION:

The unemployment insurance decision dated March 16, 2010, reference 01, is reversed. The claimant is qualified to receive unemployment insurance benefits, if she is otherwise eligible.

Steven A. Wise
Administrative Law Judge

Decision Dated and Mailed

saw/pjs