

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

ZACKARY Q CREGEEN
Claimant

IA DEPT OF HUMAN SVCS/WOODWARD
Employer

APPEAL 15A-UI-11469-CL-T
**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 09/20/15
Claimant: Respondent (2)

Iowa Code § 96.5(2)a – Discharge for Misconduct

STATEMENT OF THE CASE:

The employer filed an appeal from the October 8, 2015, (reference 01) unemployment insurance decision that allowed benefits. The parties were properly notified about the hearing. A telephone hearing was held on November 3, 2015. Claimant participated personally and was represented by attorney Megan Flynn. Employer participated through assistant superintendent Diane Stout and was represented by Pamela Drake. Employer's Exhibits 1 through 5 were received. Claimant's Exhibit A was received.

ISSUES:

Was the claimant discharged for disqualifying job-related misconduct?
Has the claimant been overpaid unemployment insurance benefits, and if so, can the repayment of those benefits to the agency be waived?
Can charges to the employer's account be waived?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed full-time as a resident treatment worker from October 11, 2002, and was separated from employment on September 21, 2015, when he was terminated.

Employer has a "Levels of Supervision" policy which requires employees supervising individuals under "general supervision" to visually view the individual a minimum of every 15 minutes. Employer also has an "Accountability" policy that states, "Ensuring the care and safety of those individuals residing at this facility is the primary responsibility of the staff employed at the Woodward Resource Center (WRC)." Claimant was aware of both policies.

On Sunday, August 2, 2015, claimant was working and was accountable for four individuals. At approximately 6:15 a.m., claimant observed Resident A get up from bed and use the restroom. Claimant observed Resident A walk back to his bedroom. This was not unusual as Resident A often slept in on Sunday mornings. From 6:15 a.m. until 8:22 a.m., claimant was dealing with Resident S, who was being disruptive. Resident S was entering his peers' rooms and attempting to steal magazines and books. Resident S continually attempted to enter a restroom

that was being remodeled and was hazardous. Claimant also attempted to assist Resident S in making his bed. Resident S was being very challenging and claimant believed he might become aggressive with his peers. Claimant felt the situation was a "crisis."

Claimant was working with another employee. The other employee was also responsible for overseeing three or four different individuals. The other employee spent at least part of the time in question overseeing those individuals' showers. Showers require one-on-one supervision. Claimant did not ask the other employee for help observing the individuals to which he was assigned as she was busy with her work. Claimant could have used a paging system to seek help from a covering supervisor. Claimant did not do so. Claimant could have also hit a button that would have alerted staff campus-wide that assistance was needed. Claimant did not do so.

At 8:22 a.m., claimant checked on Resident A. Resident A was lying on the floor. Resident A passed away sometime between 6:15 a.m. and 8:22 a.m. It is believed Resident A died of a heart attack.

Employer suspended claimant with pay on August 4, 2015. After conducting an investigation, employer terminated claimant on September 21, 2015, for violating its Levels of Supervision and Accountability policies.

Claimant had never been previously warned about similar conduct.

Claimant has received no payments of unemployment benefits since filing his claim with an effective date of September 20, 2015.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment due to job-related misconduct.

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 to prove the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law. *Cosper v. Iowa Dep't of Job Serv.*, 321 N.W.2d 6 (Iowa 1982). The issue is not whether the employer made a correct decision in separating claimant, but whether the claimant is entitled to unemployment insurance benefits. *Infante v. Iowa Dep't of Job Serv.*, 364 N.W.2d 262 (Iowa Ct. App. 1984). What constitutes misconduct justifying termination of an employee and what misconduct warrants denial of unemployment insurance benefits are two separate decisions. *Pierce v. Iowa Dep't of Job Serv.*, 425 N.W.2d 679 (Iowa Ct. App. 1988). The law limits disqualifying misconduct to substantial and willful wrongdoing or repeated carelessness or negligence that equals willful misconduct in culpability. *Lee v. Emp't Appeal Bd.*, 616 N.W.2d 661 (Iowa 2000).

Misconduct must be "substantial" to warrant a denial of job insurance benefits. *Newman v. Iowa Dep't of Job Serv.*, 351 N.W.2d 806 (Iowa Ct. App. 1984). When based on carelessness, the carelessness must actually indicate a "wrongful intent" to be disqualifying in nature. *Id.* Negligence does not constitute misconduct unless recurrent in nature; a single act is not disqualifying unless indicative of a deliberate disregard of the employer's interests. *Henry v. Iowa Dep't of Job Serv.*, 391 N.W.2d 731 (Iowa Ct. App. 1986). Poor work performance is not misconduct in the absence of evidence of intent. *Miller v. Emp't Appeal Bd.*, 423 N.W.2d 211 (Iowa Ct. App. 1988).

Claimant's main objective as an employee of employer was to keep the individuals served safe. The Levels of Supervision policy is a means to that end. Claimant did not just violate the Levels of Supervision policy on August 3, 2015, when he failed to perform 15-minute checks on Resident A. Claimant did not perform a visual check on Resident A for over two hours. Although claimant had not been previously warned about similar behavior, his conduct on August 3 was in deliberate disregard of employer's interests.

The fact that Resident S was being disruptive does not mitigate claimant's conduct. Claimant had several different avenues of help available to him that he did not use. Although it may be true that claimant's co-worker was not able to supervise all seven other individuals while claimant dealt with Resident S, claimant did not satisfactorily explain why he did not page a covering supervisor or activate the campus-wide alert system. Common sense dictates that either claimant or his co-worker would have been able to take one minute to do one of those things during a two-hour period.

Employer has established claimant was terminated for misconduct.

Claimant has not been overpaid benefits, as he has received no benefit payments for his claim with an effective date of September 20, 2015.

DECISION:

The October 8, 2015, (reference 01) unemployment insurance decision is reversed. The claimant was discharged from employment due to job-related misconduct. Benefits are withheld until such time as he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible. The claimant has been paid no benefits. Thus, claimant has not been overpaid benefits and the employer's account shall not be charged.

Christine A. Louis
Administrative Law Judge
Unemployment Insurance Appeals Bureau
1000 East Grand Avenue
Des Moines, Iowa 50319-0209
Fax (515)478-3528

Decision Dated and Mailed

cal/pjs