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

IRENE E BLACKFORD
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Appeal Number: 05A-UI-00978-RT
OC: 01-02-05 R: 01
Claimant: Appellant (2)

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, 4th 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.

_____
(Administrative Law Judge)

_____
(Decision Dated & Mailed)

Section 96.5-2-a – Discharge for Misconduct

STATEMENT OF THE CASE:

The claimant, Irene E. Blackford, filed a timely appeal from an unemployment insurance decision dated January 27, 2005, reference 01, denying unemployment insurance benefits to her. After due notice was issued, a telephone hearing was held on February 21, 2005, with the claimant participating. The claimant was represented by Richard Sturgeon. The employer, Harvest Community/Sioux City, did not participate in the hearing. The employer did not call in a telephone number, either before the hearing or during the hearing, where any witnesses could be reached for the hearing, as instructed in the notice of appeal and as personally instructed by the administrative law judge when the administrative law judge informed the employer of a continuance. Further, the administrative law judge received a fax from the employer on February 21, 2005, indicating that the employer was withdrawing from the hearing scheduled February 21, 2005 at 11:00 a.m. and was

signed by Chris Severson, the person with whom the administrative law judge personally spoke about the continuance. An initial hearing was scheduled in this matter for February 14, 2005 at 11:00 a.m. and rescheduled at the claimant's request because the claimant's representative was having surgery.

FINDINGS OF FACT:

Having heard the testimony of the witness and having examined all of the evidence in the record, the administrative law judge finds: The claimant was employed by the employer as a full-time certified nursing assistant from February 4, 1987 until she was suspended on December 21, 2004 and then discharged effective January 20, 2005 when she received a letter from the employer dated February 10, 2005. The claimant was discharged for allegedly abusing a resident. The claimant was in the shower room with another aide attempting to bathe Resident A. Resident A became abusive and started swinging her arms. In order to prevent this, the claimant put her hands on the wrists of the resident. The resident then began spitting on the claimant and the claimant covered her mouth. The claimant was merely trying to defend herself from the resident while giving the resident a bath or shower. The claimant had never received any warnings or disciplines for similar behavior.

REASONING AND CONCLUSIONS OF LAW:

The question presented by this appeal is whether the claimant's separation from employment was a disqualifying event. It was not.

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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. Huntoon v. Iowa Department of Job Service, 275 N.W.2d 445, 448 (Iowa 1979).

The claimant credibly testified, and the administrative law judge concludes, that the claimant was first suspended on December 21, 2004 and then discharged effective January 20, 2005. In order to be disqualified to receive unemployment insurance benefits pursuant to a discharge, the claimant must have been discharged for disqualifying misconduct. Further, whenever a claim is filed and the reason for the unemployment is the result of a disciplinary layoff or suspension imposed by the employer, the claimant is considered as discharged and the issue of misconduct again must be resolved. It is well established that the employer has the burden to prove disqualifying misconduct. See Iowa Code section 96.6(2) and Cosper v. Iowa Department of Job Service, 321 N.W.2d 6, 11 (Iowa 1982) and its progeny. The administrative law judge concludes that the employer has failed to meet its burden of proof to demonstrate by a preponderance of the evidence that the claimant was discharged for disqualifying misconduct. The employer failed to participate in the hearing and provide sufficient evidence of deliberate acts or omissions on the part of the claimant constituting a material breach of her duties and/or evincing a willful or wanton disregard of the employer's interests and/or in carelessness or negligence in such a degree of recurrence as to establish disqualifying misconduct.

The claimant credibly testified that she had been employed by the employer since February 4, 1987 and that she was suspended and discharged for one incident involving alleged abuse of a resident. The claimant credibly testified that she was in the process of working with another aide and giving the resident a bath or shower when the resident became abusive and started swinging her arms and the claimant put her hand on the resident's wrists to protect herself and to keep the claimant from swinging. The resident then spit on the claimant and the claimant covered her mouth. The claimant was attempting to prevent the resident from spitting on her. This was the only incident giving rise to the claimant's suspension and then discharge. The administrative law judge is constrained to conclude in the absence of any evidence to the contrary that the claimant's acts here were ordinary negligence in an isolated instance or a good faith error in judgment or discretion and are not disqualifying misconduct. There is no evidence of prior incidents or prior warnings or disciplines. Further, misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of unemployment insurance benefits, and misconduct to support a disqualification from unemployment insurance benefits must be substantial in nature. Fairfield Toyota, Inc. v. Bruegge, 449 N.W.2d 395, 398 (Iowa App. 1989). On the record here, the administrative law judge is constrained to conclude that there is insufficient evidence of substantial misconduct on the part of the claimant to warrant her disqualification to receive unemployment insurance benefits. Unemployment insurance benefits are allowed to the claimant, provided she is otherwise eligible.

DECISION:

The representative's decision of January 27, 2005, reference 01, is reversed. The claimant, Irene E. Blackford, is entitled to receive unemployment insurance benefits, provided she is otherwise eligible, because she was discharged but not for disqualifying misconduct.

pjs/kjf