BEFORE THE
EMPLOYMENT APPEAL BOARD
Lucas State Office Building
Fourth floor
Des Moines, Iowa 50319

JOAN M MACIAS Claimant, and MCCORKLE INVESTMENTS LTD Employer.	:	HEARING NUMBER: 09B-UI-05604 EMPLOYMENT APPEAL BOARD DECISION

N O T I C E

THIS DECISION BECOMES FINAL unless (1) a **request for a REHEARING** is filed with the Employment Appeal Board within **20 days** of the date of the Board's decision or, (2) a **PETITION TO DISTRICT COURT** IS FILED WITHIN **30 days** of the date of the Board's decision.

A REHEARING REQUEST shall state the specific grounds and relief sought. If the rehearing request is denied, a petition may be filed in **DISTRICT COURT** within **30 days** of the date of the denial.

SECTION: 96.5-2-a

D E C I S I O N

UNEMPLOYMENT BENEFITS ARE ALLOWED IF OTHERWISE ELIGIBLE

The claimant appealed this case to the Employment Appeal Board. The members of the Employment Appeal Board reviewed the entire record. A majority of the Appeal Board, one member dissenting, finds it cannot affirm the administrative law judge's decision. The Employment Appeal Board **REVERSES** as set forth below.

FINDINGS OF FACT:

The claimant, Joan M. Macias, worked for McCorkle Investments, Ltd./Carroll Health Center, from September 19, 2007 through March 17, 2009 as a full-time certified nursing assistant (CNA). (Tr. 3, 16) At the start of her hire, the employer assigned a gait belt to her as was done with all CNA's. (Tr. 10) Gait belts are used for transfers of patients so as to prevent falls. The employer issued employee packets containing the policies and procedures for which Ms. Macias signed in acknowledgement of receipt when she was hired. (Tr. 5, 14, Exhibit B) The claimant's immediate supervisor was Linda King, the Director of Nursing (DON). (Tr. 4)

In September of 2007, Ms. Macias suffered an injury that required her to have light duty restrictions ever since. (Tr. 6, 12) Ms. King worked with the claimant as far as what accommodations and modifications of the claimant's duties she could perform. (Tr. 13) Ms. Macias took patients off a particular list to ensure that she wouldn't have to push anyone or anything over 150 pounds; she also had a weight restriction of not lifting over 20 pounds. (Tr. 12, 18)

Toward the end of November of 2007, the claimant was issued numerous warnings regarding her work performance, including a couple of safety violations. (Tr. 5, 11, 18, Exhibit D)

On the morning of March 17th, 2009, Ms. Macias was authorized to assist in the care and perform toilet transfers for LB, a resident. (Tr. 9, 12, 14) Another CNA had placed LB on the toilet and requested the claimant's assistance to watch the resident who was on central alarm. The other CNA left the room taking her gait belt with her as she answered other lights. (Tr. 17) Ms. Macias did not have her gait belt with her as she had left it in her car. (Tr. 18) When LB was finished, the claimant noticed that the other CNA's gait belt was not in the room. Ms. Macias then switched on the light to signal her need for assistance. (Tr. 17) No one came and LB became impatient, wanting to transfer herself from the toilet without assistance. However, the resident's knee began to give out. Ms. Macias used her training by "… [placing] her knees behind her, under her butt and … lowered her down to the ground, so she would not fall…" (Tr. 17, 22) The claimant kept the assistance light on, but no one came to her aid before she had to leave to get assistance from Susan Klatvin (another CNA) who was in the hall. Ms. Klatvin had observed what she believed was Ms. Macias trying to lift a resident off the floor without the use of a gait belt. (Tr. 9) It appeared the resident had fallen and Ms. Macias did not follow proper protocol (obtaining an assessment of injuries) before attempting to lift the patient off the floor. It took several nurses to get LB who weighed over 100 pounds (Tr. 20) off the floor. Ms. Klatvin was called to report the incident (Tr. 9) for which the employer terminated Ms. Macias for violating safety procedures (Tr. 3, 13, Exhibit A) without getting any explanation for the incident. (Tr. 16)

REASONING AND CONCLUSIONS OF LAW:

Iowa Code Section 96.5(2)(a) (2009) provides:

> *Discharge for Misconduct*. If the department finds the individual has been discharged for misconduct in connection with the individual's employment:
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> The individual shall be disqualified for benefits until the individual has worked in and been paid wages for the insured work equal to ten times the individual's weekly benefit amount, provided the individual is otherwise eligible.

The Division of Job Service defines misconduct at 871 IAC 24.32(1)(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 the 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.

The Iowa Supreme court has accepted this definition as reflecting the intent of the legislature. Lee v. Employment Appeal Board, 616 N.W.2d 661, 665, (Iowa 2000) (quoting Reigelsberger v. Employment Appeal Board, 500 N.W.2d 64, 66 (Iowa 1993).

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 NW2d 661 (Iowa 2000).

There is no dispute that the claimant received several warnings with regard to the work performance throughout her brief employment history, several of which involved her performing work outside of her restrictions after being placed on light duty. (Exhibit D) The record establishes that Ms. Macias' light duty restrictions included pushing no more than 150 pounds and lifting restriction of no more than 20 pounds. (Tr. 12, 18) Yet, the final incident involved her being authorized to work with an over 100-pound resident (Tr. 20) who required assistance to be transferred from the toilet after the original CNA left the room. (Tr. 17) This act would have caused her to go beyond her restrictions, yet she complied with the best of her ability in light of the difficult circumstances before her. Although it is unclear whether she required the use of a gait belt, the fact remains that the claimant was being forced to work outside her restrictions. Ms. Macias handled the matter in the way she was trained given her restrictions. While the employer may have compelling business reasons to terminate the claimant in light of her past warnings, conduct that 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).

The claimant provided credible testimony that LB did not fall; rather, the claimant assisted the resident by lowering her to floor, albeit still in an uncomfortable position. Her manner of assistance was not wholly inappropriate considering she had no assistance and considering LB was impatient. The employer failed to provide Ms. Klatvin, the CNA who reported the matter, to refute any of the claimant's testimony regarding this final incident. For this reason, we attribute more weight to Ms. Macias' version of events. Lastly, the record contains no documentation to support that the claimant had ever been cited for a prior violation with gait belt. In conclusion, the employer failed to satisfy their burden of proof.

DECISION:

The administrative law judge's decision dated May 8, 2009 is **REVERSED**. The claimant was discharged for no disqualifying reason. Accordingly, she is allowed benefits provided she is otherwise eligible.

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John A. Peno

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Elizabeth L. Seiser

AMG/fnv

DISSENTING OPINION OF MONIQUE F. KUESTER:

I respectfully dissent from the majority decision of the Employment Appeal Board; I would affirm the decision of the administrative law judge in its entirety.

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Monique F. Kuester

AMG/fnv