

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

FATIMA BARNES

Claimant

and

STONEHILL CARE CENTER

Employer

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HEARING NUMBER: 16B-UI-06918

**EMPLOYMENT APPEAL BOARD
DECISION
(SEALED)**

NOTICE

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: 96.5-2A

DECISION

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. The Appeal Board finds it cannot affirm the administrative law judge's decision. The Employment Appeal Board **REVERSES** as set forth below.

FINDINGS OF FACT:

The Claimant, Fatima Barnes, worked for Stonehill Care Center, from September 15, 2015 through May 23, 2016 as a full-time certified nurse's assistant (CNA). (26:23-27:16; 52:33-53:10) Her duties included taking care of and cleaning residents; answering residents' calls when they've pushed the call light; reporting medication needs to the nurse; and reporting changes to the supervisor.

The Employer has a policy that sets forth 'Guidelines for Standards of Conduct, Performance and Discipline for its employees (30:22-30:34, Exhibit 1) for which the Claimant received a copy on November 18, 2015 when she received a written warning for being rude and disrespectful to a resident. (32:34-33:40) However, the Employer reassured the Claimant that this particular resident came from a mental health institution, was confused, and that the resident's own daughter acknowledged that the resident

tends to make up stories. (1:00:55-1:01:16; 1:16:50-1:17:01) To protect the Claimant, the Employer moved Ms. Barnes to another floor and she continued her employment. (1:01:17-1:01:26) The Claimant received another similar warning on March 15, 2016 for mistakenly walking into the restroom on a resident, which the Claimant was unaware was in the restroom.

Ms. Barnes responded to a resident's call light on May 19th, just before 3:00 a.m. (54:45-54:56) The resident complained about having 'an itch' in her private area "from the back to the front" and she needed her itch medication and someone to scratch her. (54:58-55:04; 1:05:22-1:05:25) The Claimant immediately went to the nurse on duty, Deanna Henry, to relay the resident's request for medication and her itching concern. (39:13-39:36; 48:23-48:32; 50:49-51:46; 54:54-55:10) The nurse became upset and rudely responded that she was not going to scratch the resident's bottom, as she was going on break. (55:11-55:19; 1:04:09-1:04:20; 1:06:55) The nurse indicated she had nothing for the resident whom the nurse also referred to as being "...mentally ill, psycho...[that she] knew her since she's been here... she'll go back to sleep..." (1:05:39-1:06:05) The nurse directed the Claimant to tell the resident she could scratch herself, as the resident had done for the on-duty nurse before. (1:04:38-1:04:59) The Claimant did not want to relay this message, but the resident overheard the nurse's comment. (1:04:21-1:04:30; 1:04:45-1:04:50) The Claimant returned to the resident's room and assisted the resident to the bathroom. (55:37-55:48) Once the resident used the restroom, Ms. Barnes washed and dried the affected area, and helped the resident back into her recliner. (56:10-56:27; 59:15-59:17; 1:06:30-1:06:51; 1:13:00-1:13:06) The resident became uncomfortable, again, with itching and renewed her request for medication. (1:05:22-1:05:42) The Claimant went to the nurse, but she was not available. (56:35-56:56)

In the meantime, Peggy Stockel (the administrator) received a call from Jerri, the house supervisor, who reported that Ms. Henry (31:55-32:05; 43:05-43:12; 1:19:19; 1:19:56) overheard the Claimant being 'rude and sassy' toward a resident and refusing to help the resident to the restroom after slamming her walker onto the floor. (28:38-29:23) When Ms. Stockel spoke to the Claimant, Ms. Barnes denied the incident (29:31-30:17; 58:16-58:45; 1:03:55-1:04:04) and relayed Ms. Henry's response to the situation. (1:07:13-1:07:31; 1:19:05-1:19:43; 1:20:23-1:20:29) The Employer indicated she would talk to the nurse (1:07:15-1:07:18; 1:10:49-1:10:54) and told Ms. Barnes to go home approximately 3:45 a.m. that she would talk to her in the morning. (54:11-54:24; 1:19:42; 1:23:20-1:23:30) The next day, the Claimant did not hear from the Employer who initiated an internal investigation. (31:03-31:27; 36:46-38:38; 46:13-46:15) Upon the conclusion of that investigation on May 23, 2016, the Employer terminated the Claimant. (40:50-40:57)

REASONING AND CONCLUSIONS OF LAW:

Iowa Code Section 96.5(2)(a) (2013) provides:

Discharge for Misconduct. If the department finds the individual has been discharged for misconduct in connection with the individual's employment:

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).

The findings of fact show how we have resolved the disputed factual issues in this case. We have carefully weighed the credibility of the witnesses and the reliability of the evidence. We attribute more weight to the Claimant's version of events. The Employer's argument that the Claimant established a pattern of rude and discourteous behavior towards residents lacks corroboration. As for the November 2015 write-up, the Claimant provided firsthand testimony that the complaint raised against her lacked credibility based on the resident's state of mind as well as the resident's immediate family member. Not only did the Employer *not* refute the Claimant's description of this incident, the Employer moved her to another floor so as to protect from other such unfounded complaints from that resident. The Claimant also provided a reasonable explanation for how she and another CNA *accidentally* walked in on a resident using the restroom, which led to her second write-up for being discourteous.

The Employer's evidence rests primarily on hearsay evidence, which we acknowledge is admissible in administrative proceedings. However, given the severity of the accusations (refusal to assist a resident in need; alleged slamming of the resident's walker; continued pattern of discourteous behavior), it would seem that the Employer would have provided Ms. Henry as a firsthand witness to corroborate the Employer's report. On the other hand, the Claimant provided firsthand testimony vehemently denying that she refused assistance to the resident. In fact, the Claimant provided a play-by-play account, which we find credible, as to how her attempt to satisfy this resident's need was met with frustration by the nurse on duty.

The Claimant's hands were tied; she couldn't administer the requested medication to the resident as that was outside the scope of her duties. Consequently, she followed protocol by immediately going to the nurse under whose authority she could obtain such medication. While the Claimant had no knowledge whether any cream/ointment for this resident existed at that time, she acted in good faith in trying to find comfort for the resident. Based on the nurse's irritated response, it is clear Ms. Barnes' efforts were, initially, thwarted. She continued performing her duties by doing the next best thing, i.e., assisting the resident by cleansing and drying the irritated area, which provided only temporary relief. What more could the Claimant do? Her attempt to get additional assistance from the nurse on duty went unanswered as the nurse was not available for further counsel. Although Ms. Barnes denied slamming the resident's walker into the floor, if she did, it was more probable than not that she did so because she became frustrated with the absent nurse, and not because she was upset with the resident. At worst, it would be an isolated instance of poor judgement that we conclude does not rise to the legal definition of misconduct. Based on this record, we conclude that the Employer has failed to satisfy their burden of proof.

DECISION:

The administrative law judge's decision dated August 5, 2016 is **REVERSED**. The Employment Appeal Board concludes that the Claimant was discharged for no disqualifying reason. Accordingly, she is allowed benefits provided she is otherwise eligible.

Kim D. Schmett

Ashley R. Koopmans

James M. Strohman

AMG/fnv