

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

TEODULFO CHACON
Claimant

APPEAL NO. 09A-UI-10677-VST

**ADMINISTRATIVE LAW JUDGE
DECISION**

TRI-STATE NURSING ENTERPRISES INC
Employer

OC: 06/07/09
Claimant: Appellant (2)

Section 96.5-2-a – Misconduct

STATEMENT OF THE CASE:

Claimant filed an appeal from a decision of a representative dated July 20, 2009, reference 01, which held claimant ineligible for unemployment insurance benefits. After due notice, a telephone conference hearing was scheduled for and held on August 11, 2009. Claimant participated. Employer participated by Janelle Townsend, staffing operations, and Robin Petrick, staffing specialist. The record consists of the testimony of Janelle Townsend; the testimony of Robin Petrick; and the testimony of Teodulfo Chacon. Ike Rocha served as Spanish interpreter for the claimant.

ISSUE:

Whether the claimant was discharged for misconduct.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony of the witnesses and having considered all of the evidence in the record, makes the following findings of fact:

The employer in this case is a medical supplemental staffing service. The claimant was hired on October 23, 2007, as a certified nursing assistant. He would then be assigned to facilities of the employer's clients. On January 15, 2009, the employer met with the claimant to inform him that work was no longer available with the employer. The reason was that the employer's clients would no longer accept the claimant at their facilities.

The complaints that the employer received from its clients were varied to include poor work performance; an inability to follow instructions; following a female employee home; and inappropriate touching and comments to another certified nursing assistant who worked for one of the employer's clients. The employer had several counseling sessions with the claimant in an effort to address these issues. The claimant denied that he made improper statements and made inappropriate touching. He did admit to following an employee home although he said he did so because they had talked about riding together if they were assigned to the same facility. He only recalled one instance of poor work performance.

REASONING AND CONCLUSIONS OF LAW:

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.

Misconduct that warrants termination of employment is not necessarily misconduct that disqualifies an individual from receiving unemployment insurance benefits. Misconduct occurs when there are deliberate acts or omissions that constitute a material breach of the worker's duty to the employer or when there are repeated acts of carelessness or negligence. Poor performance due to inability is not considered misconduct. The employer has the burden of proof on misconduct.

The greater weight of the evidence established that the claimant was discharged because the employer had no facilities to which the claimant could be assigned. The employer's clients had made a number of complaints concerning the claimant and these clients requested that the claimant no longer work at their facilities. The complaints covered a broad range. For example, some clients said that the claimant worked too slowly or could not follow directions or that it's residents could not understand him. There were also problems with other employees, such as what the employer termed "personal space" issues.

After carefully considering all of the evidence in this case, the administrative law judge concludes that the claimant's discharge was primarily due to his inability to perform the job to the satisfaction of the employer's clients. The employer had good grounds for no longer employing the claimant. Some of the claimant's actions showed poor judgment. The employer

did not, however, prove misconduct. Benefits will be allowed if the claimant is otherwise eligible. The employer indicated that the claimant had another job at the time of his termination. That issue was not before the administrative law judge in this hearing and cannot be decided at this time.

DECISION:

The decision of the representative dated July 20, 2009, reference 01, is reversed. Unemployment insurance benefits are allowed provided claimant is otherwise eligible.

Vicki L. Seeck
Administrative Law Judge

Decision Dated and Mailed

vls/pjs