

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

AMBER L ACKERMAN
Claimant

APPEAL NO. 07A-UI-08724-LT

**ADMINISTRATIVE LAW JUDGE
DECISION**

USA HEALTHCARE – MASON CITY LLC
Employer

**OC: 07/29/07 R: 02
Claimant: Respondent (1)**

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

STATEMENT OF THE CASE:

The employer filed a timely appeal from the September 4, 2007, reference 01, decision that allowed benefits. After due notice was issued, a telephone conference hearing was held on September 26, 2007. Claimant participated. Employer participated through Cindy Genez.

ISSUE:

The issue is whether claimant was discharged for reasons related to job misconduct sufficient to warrant a denial of unemployment benefits.

FINDINGS OF FACT:

Having heard the testimony and having reviewed the evidence in the record, the administrative law judge finds: Claimant was employed as a full-time CNA from September 15, 2004 until August 8, 2007, when she was discharged. On July 23, 2007, employer accused claimant of inappropriate conduct with a resident. An investigation began July 30 and concluded on August 7, 2007 and claimant was placed on leave August 3 pending results of the investigation. She had no prior warnings her job was in jeopardy for any reason. None of the other five people in the room were fired because of the incident. On July 23, just before noon, the resident in question toileted herself. About 1:30 p.m., the resident was obviously incontinent and needed to be cleaned up. Claimant went to help her stand to go to the bathroom multiple times later in the shift and the resident refused help and said she wanted an ambulance driver. Claimant expressed her concern that the resident would get a rash if her skin were not cleaned soon and told the resident she was not authorized to call an ambulance but she reported the resident's request to the nurse on duty several times. In addition, other CNAs, the charge nurse and occupational therapist were in the resident's room at various times and the resident continued to refuse assistance to the bathroom. Claimant was off duty at 2 p.m., but the charge nurse asked for assistance again to help resident stand and clean her from incontinent episode. Claimant and others assisted and the resident cooperated. Claimant left, since her shift was over, and later that day the resident was sent to hospital. No one reported to claimant any concerns about her behavior at any time before she was fired.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes claimant was discharged from employment for no disqualifying reason.

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.

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.

The employer has the burden of proof in establishing disqualifying job misconduct. *Cosper v. Iowa Department of Job Service*, 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. IDJS*, 364 N.W.2d 262 (Iowa 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. IDJS*, 425 N.W.2d 679 (Iowa App. 1988). Misconduct serious enough to warrant discharge is not necessarily serious enough to warrant a denial of job insurance benefits. Such misconduct must be "substantial." When based on carelessness, the carelessness must actually indicate a "wrongful intent" to be disqualifying in nature. *Newman v. Iowa Department of Job Service*, 351 N.W.2d 806 (Iowa App. 1984). Poor work performance is not misconduct in the absence of evidence of intent. *Miller v. Employment Appeal Board*, 423 N.W.2d 211 (Iowa App. 1988).

An employer may discharge an employee for any number of reasons or no reason at all if it is not contrary to public policy, but if it fails to meet its burden of proof to establish job-related misconduct as the reason for the separation, employer incurs potential liability for

unemployment insurance benefits related to that separation. Employer has not met the burden of proof to establish that claimant acted deliberately or with recurrent negligence in violation of company policy, procedure, or prior warning, and did not establish any form or level of misconduct. Generally an employee is entitled to fair warning that the employer was no longer going to tolerate her performance and conduct. Without fair warning, an employee has no certain way of knowing that there were changes she needed to make in order to preserve the employment. If an employer expects an employee to conform to certain expectations or face discharge, appropriate (preferably written), detailed, and reasonable notice should be given. Benefits are allowed.

DECISION:

The September 4, 2007, reference 01, decision is affirmed. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided claimant is otherwise eligible.

Dévon M. Lewis
Administrative Law Judge

Decision Dated and Mailed

dml/kjw