

**BEFORE THE  
EMPLOYMENT APPEAL BOARD  
Lucas State Office Building, 4<sup>TH</sup> Floor  
Des Moines, Iowa 50319  
eab.iowa.gov**

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**MARTAYA R WORTHAM**

Claimant

and

**BLACK HAWK NURSING & REHAB**

Employer

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**HEARING NUMBER: 22B-UI-03404**

**EMPLOYMENT APPEAL BOARD  
DECISION**

**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: 96.5-2-A**

**DECISION**

**UNEMPLOYMENT BENEFITS ARE DENIED**

The Employer 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, Martaya Wortham, worked for Blackhawk Nursing & Rehabilitation from December 2, 2019 until December 20, 2021 as a developmental assistant on an as-needed basis. The Claimant worked with developmentally challenged individuals. Part of her responsibilities included attending to the residents' needs. The Employer provided the Claimant with a copy of its policy book, which contains the rule regarding a "Category 1 Offense-discourtesy to a resident, family or employees...or other extreme conduct not specifically listed..." Violation this policy has the potential of an immediate discharge.

On March 17, 2021, Claimant received a formal warning for being discourteous to residents, family and employees. The Employer issued a verbal counseling and reeducation on November 18, 2021 to retrain her on "how to approach and communicate with other people." The Claimant also received a verbal warning on December 8, 2021 for excessive personal cell phone usage.

On December 11, 2021, a client (CT) who has a short attention span and was known to get aggressive, earned his 'reinforcement' pop. CT requested a pop to which the Claimant responded that he had to wait as she took a personal call on her cell phone, which upset CT. The Claimant eventually got CT a Dr. Pepper, which he didn't want since he requested an orange pop. The Claimant, again, told him he had to wait, as she returned to her phone and continued taking her hair down. CT became more behaviorally challenged, which led to his 'eloping' the area. CT somehow got outside the building. The Claimant was able to catch up with him, and with the assistance of a male co-worker, was able to get CT back into the building.

The Employer placed the Claimant on disciplinary suspension on December 13, 2021 pending investigation. On December 20, 2022, terminated the Claimant based on her violation of its discourtesy to residents policy (Category I violation) by giving the client the wrong pop. The Employer also took into consideration the Claimant's prior warnings about the same type of behavior in the past.

### **REASONING AND CONCLUSIONS OF LAW:**

Iowa Code Section 96.5(2)(a) (2021) 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 record establishes the Claimant had knowledge of the Employer's policies, namely its policy prohibiting discourtesy to residents, families and employees, based on her receipt of the same. Not only did she receive a verbal warning, she also received retraining on how to, essentially, interact with the people she encountered on the job, namely the residents. It is clear the Claimant had issues with prioritizing her job responsibilities over her personal care and personal cell phone usage. This manifested itself during that final incident when her personal phone call and grooming took precedence over providing CT with his 'reinforcement' pop. The fact that CT's pop was denoted as a reinforcement is indicative that he was being rewarded for positive behavior. It was incumbent upon the Claimant to immediately provide this positive reinforcement to a client known to be aggressive and impatient. By her failing to timely do so, she undermined the type of behavior the Employer sought to mitigate, which was demonstrated by CT's getting upset and running off. CT's reaction was the direct result of the Claimant's dismissive and ultimately discourteous behavior toward a resident for which she had been previously warned. Not only was CT's safety jeopardized, the Claimant's behavior could have caused the ER serious liability. Based on this record, we conclude the Employer satisfied its burden of proof when it terminated the Claimant for a Category I violation.

Finally, since the Administrative Law Judge allowed benefits and in so doing affirmed a decision of the claims representative the Claimant falls under the double affirmance rule:

871 Rule of two affirmances. IAC 23.43(3)

a. Whenever an administrative law judge affirms a decision of the representative or the employment appeal board of the Iowa department of inspections and appeals affirms the decision of an administrative law judge, allowing payment of benefits, such benefits shall be paid regardless of any further appeal.

b. However, if the decision is subsequently reversed by higher authority:

- (1) The protesting employer involved shall have all charges removed for all payments made on such claim.
- (2) All payments to the claimant will cease as of the date of the reversed decision unless the claimant is otherwise eligible.
- (3) No overpayment shall accrue to the claimant because of payment made prior to the reversal of the decision.

Thus, the Employer's account may not be charged for any benefits paid so far to the Claimant for the weeks in question, but the Claimant will not be required to repay benefits already received.

**DECISION:**

The administrative law judge's decision dated March 28, 2022 is **REVERSED**. The Employment Appeal Board concludes that the Claimant was discharged for disqualifying misconduct. Accordingly, she is denied benefits until such time she has worked in and has been paid wages for insured work equal to ten times her weekly benefit amount, provided she is otherwise eligible. See, Iowa Code section 96.5(2)"a".

No remand for determination of overpayment need be made under the double affirmance rule, 871 IAC 23.43(3), but still the Employer's account may not be charged.

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James M. Strohman

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Ashley R. Koopmans

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Myron R. Linn

AMG/fnv