

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

CARRIE D ALBERT
Claimant

APPEAL NO. 13A-UI-09885-NT

**ADMINISTRATIVE LAW JUDGE
DECISION**

WESLEYLIFE
Employer

OC: 07/28/13
Claimant: Appellant (2)

Section 96.5-2-a – Discharge

STATEMENT OF THE CASE:

Claimant filed a timely appeal from a representative's decision dated August 21, 2013, reference 01, which disqualified the claimant from receiving benefits finding that she was discharged for failure to follow instructions in the performance of her job. After due notice was provided, a telephone hearing was held on October 1, 2013. Claimant participated. Participating on behalf of the claimant was Mr. Terry Rutherford, Attorney at Law. The employer participated by Ms. Chris Schiebe, Hearing Representative and witness, Ms. Karen Benton, Executive Director.

ISSUE:

The issue in this matter is whether the claimant was discharged for misconduct.

FINDINGS OF FACT:

Having considered the evidence in the record, the administrative law judge finds: Carrie Albert was employed by Wesleylife from October 9, 2006 until July 29, 2013 when she was discharged from employment. Ms. Albert was employed as a full-time nursing assistant in the facility's memory support group and was paid by the hour. Her immediate supervisor was Kirsten Meyer.

Ms. Albert was discharged on July 29, 2013 when the employer concluded based upon reports of some residents in the memory support wing that Ms. Albert had been too abrupt with them while performing her duties and the claimant's abruptness had caused some memory support wing residents to be fearful of the claimant. The claimant was also observed momentarily downloading some information on her I-Phone in violation of the facilities cell phone policy. Ms. Albert was at the time downloading a book which required the claimant only to begin the process on the electronic device without remaining for the process to be completed.

In a discharge meeting that took place on July 31, 2013, Ms. Albert explained that she was not having the best day on July 29 because of some personal issues but denied intentionally violating employer rules. Based upon other warnings that had been served upon the claimant for other reasons and the conduct alleged by memory unit residents and or the charge nurse, a decision was made to terminate Ms. Albert from her employment at that time.

REASONING AND CONCLUSIONS OF LAW:

The question before the administrative law judge is whether the evidence in the record establishes misconduct sufficient to warrant the denial of unemployment insurance benefits. It does not.

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.

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 the 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. Iowa Department of Job Service, 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." Poor work performance is not misconduct in the absence of intent. Miller v. Employment Appeal Board, 423 N.W.2d 211 (Iowa 1988).

The focus is on deliberate, intentional or culpable acts by the employee. See Gimbel v. Employment Appeal Board, 489 N.W.2d 36, 39 (Iowa Ct. App. 1992).

While past acts and warnings can be used to determine the magnitude of a current act of misconduct, a discharge for misconduct cannot be based upon such past acts. The termination of employment must be based upon a current act. See 871 IAC 24.32(8).

While hearsay evidence is admissible in administrative proceedings it cannot be accorded the same weight as sworn direct testimony providing that testimony is credible and not inherently improbable. In the case at hand the employer relies primarily on hearsay evidence in support of its position that Ms. Albert acted inappropriately in dealing with residents on July 29, 2013. The claimant has provided a satisfactory explanation of her conduct indicating that two of the memory unit residents had become upset as Ms. Albert performed her regular duties. Ms. Albert also testified that she complied with the requirement to not put a resident in bed before 7:00 p.m. when she was reminded of the obligation by the charge nurse. The claimant's momentary use of an electric device to download a book was not misconduct sufficient to warrant the denial of unemployment insurance benefits in and of itself.

The administrative law judge, having considered the evidence in the record, concludes that the employer has not sustained its burden of proof in establishing intentional disqualifying misconduct sufficient to warrant the denial of unemployment insurance benefits. The claimant was working short staffed that day and attempted to the best of her ability to perform her duties in compliance with the employer's reasonable expectations. While it is the employer's prerogative to discharge Ms. Albert if they felt that she was not working up to their expectations, the evidence in the record does not establish intentional misconduct sufficient to warrant the denial of benefits. Benefits are allowed providing the claimant is otherwise eligible.

DECISION:

The representative's decision dated August 21, 2013, reference 01, is reversed. The claimant was discharged under non-disqualifying conditions. Unemployment insurance benefits are allowed, providing the claimant is otherwise eligible.

Terence P. Nice
Administrative Law Judge

Decision Dated and Mailed

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