

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

KYLIANNA M STRONG

Claimant

APPEAL NO: 14A-UI-03511-DT

**ADMINISTRATIVE LAW JUDGE
DECISION**

BETHANY LUTHERAN HOME INC

Employer

OC: 03/02/14

Claimant: Appellant (2)

Section 96.5-2-a – Discharge

STATEMENT OF THE CASE:

Kylianna M. Strong (claimant) appealed a representative's March 20, 2014 decision (reference 01) that concluded she was not qualified to receive unemployment insurance benefits after a separation from employment with Bethany Lutheran Home, Inc. (employer). After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on April 23, 2014. The claimant participated in the hearing and was represented by Joseph Basque, attorney at law. Cindy Schechinger appeared on the employer's behalf and presented testimony from one witness, Cindy Shaff. One other witness, Renee Kennedy, was available on behalf of the employer but did not testify. Based on the evidence, the arguments of the parties, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUE:

Was the claimant discharged for work-connected misconduct?

OUTCOME:

Reversed. Benefits allowed.

FINDINGS OF FACT:

The claimant started working for the employer on July 31, 2012. She worked full time as a certified nursing aide (CNA) in the employer's long-term care nursing facility. Her last day of work was February 18, 2014. The employer suspended her on that date and discharged her on February 21, 2014. The reason asserted for the discharge was the employer's conclusion that the claimant had used inappropriate language to a resident, a form of verbal abuse.

The employer provided hearsay information that on February 18 the claimant told a resident she was a "f - - - ing b - - -" and that she was "acting like a 'b - - -'," and further that she had indicated to a resident that she was going to leave the resident on the toilette "until she got nicer." The claimant acknowledged that she had been very stressed out on February 18, and acknowledged that she had stated to a coworker that a resident was "acting like a 'b - - -'."

She further acknowledged that she had told a resident who was using the toilet but was becoming upset with the claimant that she was going to leave the area so that the resident would settle down. However, the resident was not left alone; there was another aide with the resident. The claimant denied that she threatened to withhold any care unless the resident "got nicer." She further denied that she had used any vulgar language directly towards any resident, and that when she made the one reference to a coworker, there were no residents anywhere within earshot.

Because the employer believed that it was more likely that the claimant had said the things attributed to her, the employer discharged the claimant.

REASONING AND CONCLUSIONS OF LAW:

A claimant is not qualified to receive unemployment insurance benefits if an employer has discharged the claimant for reasons constituting work-connected misconduct. Iowa Code § 96.5-2-a. Before a claimant can be denied unemployment insurance benefits, the employer has the burden to establish the claimant was discharged for work-connected misconduct. *Cosper v. IDJS*, 321 N.W.2d 6 (Iowa 1982). The question is not whether the employer was right to terminate the claimant's employment, 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 is misconduct that warrants denial of unemployment insurance benefits are two separate matters. *Pierce v. IDJS*, 425 N.W.2d 679 (Iowa App. 1988).

In order to establish misconduct such as to disqualify a former employee from benefits an employer must establish the employee was responsible for a deliberate act or omission which was a material breach of the duties and obligations owed by the employee to the employer. 871 IAC 24.32(1)a; *Huntoon v. Iowa Department of Job Service*, 275 N.W.2d 445 (Iowa 1979); *Henry v. Iowa Department of Job Service*, 391 N.W.2d 731, 735 (Iowa App. 1986). The conduct must show a 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. 871 IAC 24.32(1)a; *Huntoon*, supra; *Henry*, supra. In contrast, 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. 871 IAC 24.32(1)a; *Huntoon*, supra; *Newman v. Iowa Department of Job Service*, 351 N.W.2d 806 (Iowa App. 1984).

The reason cited by the employer for discharging the claimant is the conclusion that she had used inappropriate language to a resident. The employer relies exclusively on the at least second-hand account from other employees; however, without that information being provided first-hand, the administrative law judge is unable to ascertain whether those employees might have been mistaken, whether they actually observed the entire time, whether they are credible, or whether the employer's witness might have misinterpreted or misunderstood aspects of their reports. Assessing the credibility of the witnesses and reliability of the evidence in conjunction with the applicable burden of proof, as shown in the factual conclusions reached in the above-noted findings of fact, the administrative law judge concludes that the employer has not satisfied its burden to establish by a preponderance of the evidence that the claimant in fact did use inappropriate language to a resident. The employer has not met its burden to show

disqualifying misconduct. *Cosper*, supra. Based upon the evidence provided, the claimant's actions were not misconduct within the meaning of the statute, and the claimant is not disqualified from benefits.

DECISION:

The representative's March 20, 2014 decision (reference 01) is reversed. The employer did discharge the claimant but not for disqualifying reasons. The claimant is qualified to receive unemployment insurance benefits, if she is otherwise eligible.

Lynette A. F. Donner
Administrative Law Judge

Decision Dated and Mailed

ld/pjs