

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

LESLIE M DURYEE
Claimant

COMPREHENSIVE SYSTEMS INC
Employer

APPEAL 18A-UI-10536-AW-T
**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 09/23/18
Claimant: Appellant (2)

Iowa Code § 96.5(2) – Discharge for Misconduct
Iowa Admin r. 871-24.32 – Discharge for Misconduct

STATEMENT OF THE CASE:

Leslie Duryee, Claimant, filed an appeal from the October 18, 2018 (reference 01) unemployment insurance decision that denied benefits because she was discharged from work with Comprehensive Systems Inc. due to wanton carelessness in performing her work. The parties were properly notified of the hearing. A telephone hearing was held on November 6, 2018 at 3:00 p.m. Claimant participated. Employer participated through Sheryl Heyenga, Human Resources Director, and Linda Herman, Manager of Overnight and Day Programs. Additional witnesses included Elaine Allison, LPN, and Frankie Bunn, Overnight Supervisor. Employer's Exhibit 1 was admitted.

ISSUE:

Whether claimant's separation was a discharge due to disqualifying job-related misconduct.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed full-time from February 19, 1996 until her employment with Comprehensive Systems Inc. ended on September 28, 2018. (Heyenga Testimony) At the time of claimant's discharge her title was Assistant Overnight Supervisor at one of employer's residential units for individuals with special needs, who are referred to as "consumers." (Heyenga Testimony) Claimant's direct supervisor was Linda Herman. (Heyenga Testimony)

Employer has a policy that consumers' briefs (i.e. adult diapers) are checked a minimum of every two hours while the consumers are asleep to ensure that they are clean and dry. (Heyenga Testimony; Herman Testimony; Claimant Testimony; Bunn Testimony) If the consumer is wet or soiled, the employee should change the consumer's brief. (Herman Testimony) Each employee is trained on this policy and has access to the individual consumer's training plan where the policy is written. (Herman Testimony; Exhibit 1)

Employees deviate from the employer's policy regarding brief checks every two hours while consumers are asleep, depending on the individual consumers and their toileting needs. (Claimant Testimony; Bunn Testimony) For example, if consumers are able to get out of bed and/or notify staff when they need their brief changed, employees will not check the consumers' briefs during bed check and only check to make sure the consumers are breathing. (Claimant Testimony; Bunn Testimony)

On September 20, 2018, claimant was covering a shift in a residential unit. (Claimant Testimony) Before claimant began her shift, she noticed the strong odor of feces and bleach. (Claimant Testimony) The smell of feces was common in the unit (Claimant Testimony; Bunn Testimony) One consumer ("Consumer A") has frequent toileting accidents and his room is carpeted; therefore, the odor of feces is normal. (Claimant Testimony; Bunn Testimony) After claimant began her shift, she attempted to locate the odor's source and found feces on the toilet. (Claimant Testimony) Claimant did bed checks of Consumer A at 2:00 a.m., at 3:00 a.m. and at 5:30 a.m. (Claimant Testimony; Herman Testimony) For each of these bed checks, claimant opened the door and made sure Consumer A was breathing. (Claimant Testimony) Claimant did not check Consumer A's brief, because Consumer A is higher functioning and usually notifies staff when his brief requires changing. (Claimant Testimony) When claimant performed her final bed check with the oncoming staff at 5:30 a.m., Consumer A was found with feces dried on his body; there was also feces dried on the walls, carpet, bedding, mattress, box spring and pillow. (Heyenga Testimony)

On September 20, 2018 claimant was removed from the schedule pending an investigation; on September 28, 2018, claimant was discharged from employment. (Heyenga Testimony) The reason given for claimant's discharge was failure to provide care to a consumer when needed. (Heyenga Testimony) Claimant had no prior warnings for failure to provide care to a consumer. (Heyenga Testimony) Employer believed termination was appropriate discipline because Consumer A was being treated for redness in his groin area and was in a feces-covered state long enough for the feces to dry. (Heyenga Testimony)

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged for no disqualifying reason. Benefits are allowed if claimant is otherwise eligible.

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 disqualification shall continue 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.

Iowa Admin. Code r. 871-24.32(1)(a) provides:

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.

This definition of misconduct has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. *Reigelsberger v. Emp't Appeal Bd.*, 500 N.W.2d 64, 66 (Iowa 1993); accord *Lee v. Emp't Appeal Bd.*, 616 N.W.2d 661, 665 (Iowa 2000).

Further, the employer has the burden of proof in establishing disqualifying job misconduct. *Cosper v. Iowa Dep't of Job Serv.*, 321 N.W.2d 6 (Iowa 1982). A determination as to whether an employee's act is misconduct does not rest solely on the interpretation or application of the employer's policy or rule. A violation is not necessarily disqualifying misconduct even if the employer was fully within its rights to impose discipline up to or including discharge for the incident under its policy. 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. Iowa Dep't of Job Serv.*, 364 N.W.2d 262 (Iowa Ct. 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 Dep't of Job Serv.*, 425 N.W.2d 679 (Iowa Ct. 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." *Newman v. Iowa Dep't of Job Serv.*, 351 N.W.2d 806 (Iowa Ct. App. 1984).

Employer has a policy regarding checking a consumer's briefs during bed checks; however, it is common practice for the employees to deviate from this policy depending on the particular consumer's toileting abilities. Also, the odor of feces in the area was common and, therefore, not an indication that a particular consumer defecated and needed his brief changed during the bed check. Claimant made a good faith effort to locate and eliminate the source of the odor. Claimant's action of not changing the consumer's brief was not a willful or wanton disregard for the employer's interests or a deliberate violation or disregard of the standards of behavior that employer has the right to expect from employees. If claimant was careless or negligent in not changing the consumer's brief, it was not to such a degree or recurrence that would indicate wrongful intent or evil design. There were no other complaints regarding claimant's care of consumers. Claimant's action can best be described as a good faith error in judgment or discretion, which is not deemed misconduct. Because employer has not met its burden of proof to establish disqualifying, job-related misconduct, benefits are allowed provided claimant is otherwise eligible.

DECISION:

The October 18, 2018 (reference 01) unemployment insurance decision is reversed. Benefits are allowed provided claimant is otherwise eligible.

Adrienne C. Williamson
Administrative Law Judge
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Decision Dated and Mailed

acw/rvs