IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

SONJA HILMO
Claimant

GOOD SAMARITAN SOCIETY INC
Employer

APPEAL NO: 15A-UI-03547-JE-T

ADMINISTRATIVE LAW JUDGE DECISION

OC: 02/15/15
Claimant: Respondent (1)

Section 96.5-2-a – Discharge/Misconduct

STATEMENT OF THE CASE:

The employer filed a timely appeal from the March 11, 2015, reference 01, decision that allowed benefits to the claimant. After due notice was issued, a hearing was held by telephone conference call before Administrative Law Judge Julie Elder on April 28 and continued on June 9, 2015. The claimant participated in the hearing with Attorney Garth Carlson. Paula Clarke, Director of Clinical Services; KD Kalber, Director of Human Resources; and Susan Dyer, LPN/Charge Nurse, participated in the hearing on behalf of the employer. Employer's Exhibit One was admitted into evidence.

ISSUE:

The issue is whether the employer discharged the claimant for work-connected misconduct.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed as a full-time CNA for Good Samaritan Society from April 14, 1990 to February 18, 2015. She was discharged for failing to use a gait belt on a resident who fell and was injured.

On February 15, 2015, the claimant was getting a resident up in the morning and the resident fell, causing a large bruise to her cheek and several rib fractures that were apparent after the resident was assessed and taken by ambulance to the hospital. She also fractured one of her knees but that injury was not discovered until several weeks later. The resident has osteogenesis, a bone disease that puts her at greater risk of fractures. Her care plan required that the CNA assisting her in a transfer use a gait belt to help the resident get from her bed to her wheelchair or to the chair in her room. The resident also uses crutches. On the day in question, the claimant failed to use the gait belt while transferring the resident to her wheelchair and consequently could not steady her and prevent the fall. The employer has wrapped and taped towels around the resident's gait belt to make it more comfortable for her given her bone condition. The gait belt was on the chair in the resident's room.

After the resident fell, the claimant rushed from her room and found LPN/Charge Nurse Susan Dyer and told her three times that the resident was on the floor. The claimant was very upset, excited and nervous. Ms. Dyer secured the medication cart and then went to the resident's room where she did a cursory examination. The resident was alert and oriented but in a great deal of pain. Ms. Dyer noticed the gait belt still on the chair and asked the claimant if she used the gait belt and the claimant stated she had while still upset and excited. Ms. Dyer asked her why it was in the chair and the claimant said she took it off after the resident fell to make her more comfortable. Ms. Dyer did not find the claimant's answer particularly credible but did not confront her about the gait belt as she was busy assessing the resident and making the necessary calls while waiting for an ambulance.

After the resident had been transported to the hospital Ms. Dyer was back at the medication cart approximately 30 to 45 minutes later when the claimant came up to her and said she thought she was going "to get fired." Ms. Dyer told her she did not know what the outcome would be but there would be an investigation and the claimant would be treated like anyone else. Ms. Dyer told the claimant she needed to be honest and asked her again if she used the gait belt and the claimant said she did not use it on that transfer. Ms. Dyer called Director of Clinical Services Paula Clarke at home and told her there was an incident with the resident and the claimant and the resident had been sent to the emergency room because she was in pain. She also told Ms. Clarke about the conversation she had with the claimant after the resident was transported to the hospital.

On February 16, 2015, Director of Human Resources KD Kalber became aware of the situation. She contacted the human resources consultants at the employer's central campus. They discussed the seriousness of the injury, the potential effects to the resident's longevity, the fact that the claimant was not forthcoming when first asked about the use of the gait belt by Ms. Dyer, and the potential fines the employer might be subject to by the State.

On February 17, 2015, the employer met with the claimant to discuss the incident. The claimant acknowledged she knew she was supposed to use the gait belt when transferring that resident but simply forgot to do so. The claimant had cared for this particular resident for three or four years and stayed with her, holding her hand, until the ambulance came. The employer asked the claimant why she initially told Ms. Dyer she used the gait belt and the claimant explained that because she was so upset and nervous due to the resident falling she did not know what to say.

On February 18, 2015, after considering the interview with the claimant, the seriousness of the injury to the resident, the claimant's failure to use the gait belt and not being honest when first asked by Ms. Dyer if she used the gait belt, the employer met with the claimant again and notified her it was terminating her employment. It offered the claimant the opportunity to resign rather than be discharged so she could keep her accrued benefits and the claimant did choose to resign rather than have her employment terminated.

The employer uses a progressive disciplinary policy which usually consists of three steps including a written warning, final written warning and then termination. Depending on the seriousness of the offense the employer can skip the written and final written warnings and go to termination if it believes the situation warrants it. The claimant's last disciplinary action of any kind occurred November 27, 2012, when she received a written warning for using an improper transfer technique.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the 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.

Iowa Admin. Code r. 871-24.32(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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. *Huntoon v. Iowa Dep't of Job Serv.,* 275 N.W.2d 445, 448 (Iowa 1979).

The employer has the burden of proving disqualifying misconduct. 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 N.W.2d 661, 665 (Iowa 2000).

The claimant failed to use a gait belt on a resident February 15, 2015, and the resident fell, sustaining serious, painful injuries. Obviously the claimant should have used the gait belt when transferring the resident. The question is whether her actions rise to the level of intentional, disqualifying job misconduct. The claimant said she simply forgot to use the gait belt. While not necessarily a very satisfying explanation, there is no evidence that she intentionally neglected to

use the gait belt or that she did not forget to do so as she stated. The claimant had a relationship with the resident and did not want any harm to come to her, especially any harm that resulted from something she did or failed to do. The claimant sat with the resident holding her hand until she was transported by ambulance to the hospital. The evidence does not establish that the claimant's actions were intentional misconduct but rather shows an isolated incident of misconduct in neglecting to use the gait belt. The claimant performed several transfers per day using a gait belt and had not been reprimanded for failing to do so properly for three years.

The remaining issue is the fact that the claimant initially failed to be honest when asked by Ms. Dyer if she used a gait belt on the resident. After the resident was transported to the hospital 30 to 45 minutes later, Ms. Dyer again asked her if she used the gait belt and the claimant, after having calmed down following the shock of the resident falling and being injured, admitted she did not. Again, obviously she should have told Ms. Dyer the truth when first asked but due to being scared and upset because the resident was hurt, she did not do so immediately but did tell the truth within 30 to 45 minutes of the fall during the conversation with Ms. Dyer where the claimant expressed her fear of losing her job over the incident. If the claimant was committed to lying about the event, she would have stuck to her first answer that she used a gait belt. After she had time to reflect, even though she was afraid of being terminated from her employment, she told the truth.

Under these circumstances, while the employer had the right to discharge the claimant, the administrative law judge finds the claimant's actions do not constitute disqualifying job misconduct as that term is defined by Iowa law. Therefore, benefits are allowed.

DECISION:

The March 11, 2015, reference 01, decision is affirmed. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided the claimant is otherwise eligible.

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Julie Elder
Administrative Law Judge

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Decision Dated and Mailed

je/pjs