IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

RUBEN G ESCOBAR
Claimant

CARE INITIATIVES
Employer

APPEAL NO. 06A-UI-09399-DT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 08/06/06 R: 03
Claimant: Respondent (1)

Section 96.5-2-a – Discharge

STATEMENT OF THE CASE:

Care Initiatives (employer) appealed a representative's September 14, 2006 decision (reference 03) that concluded Ruben G. Escobar (claimant) was qualified to receive unemployment insurance benefits after a separation from employment. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on October 9, 2006. The claimant failed to respond to the hearing notice and provide a telephone number at which he could be reached for the hearing and did not participate in the hearing. Lynn Corbeil of TALX Employer Services, f/n/a Johnson & Associates, appeared on the employer's behalf and presented testimony from two witnesses, Evon Wedemeier and Bob High. During the hearing, Employer's Exhibits One through Fifteen were entered into evidence. Based on the evidence, the arguments of the employer, 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?

FINDINGS OF FACT:

The claimant started working for the employer on October 5, 2005. He worked full time as a certified nursing aide (CNA) on the second shift (2:30 p.m. to 10:30 p.m.) at the employer's Waterloo, Iowa long-term care nursing facility. His last day of work was August 2, 2006. The employer suspended him after that day and discharged him on August 7, 2006. The stated reason for the discharge was an improper resident transfer.

Resident Milka had impaired mobility; her care plan updated on July 7, 2006 specified that she must be transferred with the assist of two people and a gait belt; her care goal was to be able to be transferred with the limited assistance of one person by September 27. The care plan was in a notebook all CNAs were to regularly review. Also, in the Milka's room was a sheet of "activities of daily living" or a "resident care guide"; the notations on that sheet also specified that any transfers, including to the toilet, were to be assisted by two persons with a gait belt. Finally, in Milka's room, in the restroom a label is posted with Milka's name with a highlighted

note saying, “Stay with me” to remind employees not to leave Milka unattended in restroom so as to be available to assist in moving her from the toilet.

On July 31 the claimant was responsible for attending to Milka. At about 8:50 p.m. the claimant and another employee transferred Milka to the toilet; however, the other employee then left the room to attend to some other work. The claimant did not wait for the other employee to return and did not summon him or anyone else when Milka was finished toileting, but went ahead and transferred Milka alone off the toilet into her chair and from the chair into her bed.

Milka was not injured as a result of the July 31 transfers without a second person. However, there was some question as to when the claimant assisted Milka into bed whether he had turned on her mobility alarm which would have alerted the staff if she was attempting to move off her bed without assistance. During that night after the claimant left work at the end of his shift, Milka did attempt to move from her bed without assistance and fell to the floor, causing some injury. However, the question regarding whether the claimant had turned on the alarm was not the reason the claimant was discharged, as the employer determined that there was an intervening issue, as another employee had been responsible for verifying that the alarm was on and failed to do so. The fact that there had been a transfer of Milka by the claimant without a second person assisting became apparent to the employer as it was investigating the circumstances of Milka’s fall.

On November 29, 2005 the employer gave the claimant a verbal warning regarding failing to give a shower to all assigned residents. On December 7 the employer gave the claimant another verbal warning for failing to weigh-in a new resident within the first three days as per policy. On January 3, 2006 the employer gave the claimant a verbal warning for failing to lock a resident’s wheelchair, resulting in a fall. On February 8 the employer gave the claimant a verbal warning for not arming a resident’s pull alarm, allowing another resident to wear an adult diaper to bed after previously having been advised the resident was not to wear one to bed, failing to remove another resident’s dentures before putting the resident to bed, and not properly disposing of another resident’s soiled adult diaper. On February 10 he was given a warning not designated as to whether it was verbal or written for insubordination for insisting he would take his break at his regular time rather than when the charge nurse directed him to take it. The claimant threatened to quit at that time, but there was ultimately no separation then; there is no record of any warnings being issued after the February 10 issue.

The claimant had attended an in-service training on March 23, 2006 in which the employer had reviewed the proper procedures for the use of a gait belt and transfers as well as following resident care plans. On May 11 he had also attended an in-service training in which the employer discussed the issue of resident falls.

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); Iowa Code § 96.5-2-a.

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.

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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. Huntoon v. Iowa Department of Job Service, 275 N.W.2d 445, 448 (Iowa 1979).

The focus of the definition of misconduct is on acts or omissions by a claimant that "rise to the level of being deliberate, intentional or culpable." Henry v. Iowa Department of Job Service, 391 N.W.2d 731, 735 (Iowa App. 1986). The acts must show:

1. Willful and wanton disregard of an employer's interest, such as found in:
   a. Deliberate violation of standards of behavior that the employer has the right to expect of its employees, or
   b. Deliberate disregard of standards of behavior the employer has the right to expect of its employees; or
2. Carelessness or negligence of such degree of recurrence as to:
   a. Manifest equal culpability, wrongful intent or evil design; or
   b. Show an intentional and substantial disregard of:
      1. The employer's interest, or
      2. The employee's duties and obligations to the employer.

Henry, supra. The reason cited by the employer for discharging the claimant is his failing to have a second person assist in the July 31, 2006 transfer of Milka from the toilet to her bed. Although given the extent of testimony provided by the employer in the appeal hearing as to the claimant's potential responsibility for some other conduct on July 31 the employer's discharge decision might have been affected by the claimant's involvement in the other conduct, that other conduct was not the employer's reason for discharging the claimant, and cannot be considered here in determining whether the claimant was discharged for misconduct. Larson v. Employment Appeal Board, 474 N.W.2d 570, 572 (Iowa 1991).

While the claimant had received prior verbal warnings for some work performance issues, none of those had been with relation to improperly transferring a resident according to the resident's care plan, none of the warnings were designated as a final warning, and there had been no warnings at all for over five months prior to the termination. Under the circumstances of this case, the claimant's failure to obtain the assistance of a second person in transferring Milka on July 31 was the result of inefficiency, unsatisfactory conduct, inadvertence, or ordinary negligence in an isolated instance, and was a good faith error in judgment or discretion. 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 September 14, 2006 decision (reference 03) is affirmed. 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

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Lynette A. F. Donner
Administrative Law Judge

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Decision Dated and Mailed

ld/pjs