

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

CLAUDETTE J CUBBAGE
Claimant

APPEAL NO. 09O-UI-07766-E2T

**ADMINISTRATIVE LAW JUDGE
DECISION**

GENESIS HEALTH SYSTEM
Employer

OC: 01/25/09
Claimant: Appellant (2)

Section 96.5-2-a – Discharge for Misconduct

STATEMENT OF THE CASE:

Claimant filed an appeal from a decision of a representative dated February 17, 2009, reference 01, which held claimant ineligible for unemployment insurance benefits. A hearing was held and a decision was issued adverse to the claimant. The claimant appealed to the Employment Appeal Board. The Employment Appeal Board remanded the claim for a new hearing as the recording of the prior hearing could not be located. After due notice, a telephone conference hearing was scheduled for and held on June 15, 2009. Claimant participated personally. Employer participated by Brandy Tiesman.

ISSUE:

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

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds: Claimant last worked for employer on April 17, 2009. Claimant was discharged on April 22, 2009 by employer because of allegations' the claimant did not meet professional standards, violated the standards of behavior of staff and committed misconduct. The claimant received three prior warnings about her conduct. In July 2008, she was asleep at work. In November of 2008, she gave another staff member "the finger" behind her back. In January 2009, the claimant lifted two patients without the assistance of another staff member. The claimant admitted to these incidents at the hearing. The employer stated on January 16, 2009 the claimant allowed a resident to go to bed with her clothes on. The resident was in bed before the claimant's shift started. On January 17, 2009, the employer received a number of complaints about the claimant's conduct. One of the residents the claimant was in charge of went to bed with her clothes on. The employer acknowledges the resident was difficult about this issue. The resident was confused as to what she wanted to do about her clothing. The claimant allowed her to keep her clothes on. Another resident under the care of the claimant was found sleeping without any clothes on. The claimant put her "PJs" on and the resident took them off after she went to bed. The claimant was talking to a Hospice nurse on January 17. When she was told to tend to her residents, the claimant glared at the charge nurse and went back to her residents.

REASONING AND CONCLUSIONS OF LAW:

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.

871 IAC 24.32(8) provides:

(8) Past acts of misconduct. 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 on such past act or acts. The termination of employment must be based on a current act.

The gravity of the incident, number of policy violations and prior warnings are factors considered when analyzing misconduct. The lack of a current warning may detract from a finding of an intentional policy violation.

A claimant is not qualified to receive unemployment insurance benefits if an employer discharges her for reasons constituting work-connected misconduct. Iowa Code section 96.5-2-a. The employer has the burden to prove the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law. 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 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).

For unemployment insurance purposes, misconduct amounts to a deliberate act and a material breach of the duties and obligations arising out of a worker's contract of employment. Misconduct is a deliberate violation or disregard of the standard of behavior the employer has a right to expect from employees or is an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to the employer. Inefficiency, unsatisfactory conduct, unsatisfactory performance due to inability or incapacity, inadvertence or ordinary negligence in isolated incidents, or good-faith errors in judgment or discretion are not deemed to constitute work-connected misconduct. 871 IAC 24.32(1)(a).

Findings must be based upon the kind of evidence on which reasonably prudent persons are accustomed to rely for the conduct of their serious affairs. Iowa Code section 17A.14(1). The hearsay evidence is imprecise and conclusory. Because of the nature of the evidence produced at hearing, the employer is unable to show misconduct. The claimant's statement and employer's statement must give detailed facts as to the specific reasons for the claimant's discharge.

Allegations of misconduct or dishonesty without additional evidence shall not be sufficient to result in disqualification. If the employer is unwilling to furnish available evidence to corroborate the allegation, misconduct cannot be established. See 871 IAC 24.32(4). When it is in a party's power to produce more direct and satisfactory evidence than is actually produced, it may fairly be inferred that the more direct evidence will expose deficiencies in that party's case. See Crosser v. Iowa Dept. of Public Safety, 240 N.W.2d 682 (Iowa 1976).

The claimant testified under oath she did not speak poorly of other staff, properly dressed a resident in night clothes and tried to work with the resident who did not want to be put in her night clothes. The employer provided no first-hand (non hearsay) testimony of the claimant's conduct. While hearsay is admissible it is in the case less persuasive than the claimant's testimony. The claimant's conduct on January 16 and 17 does not rise to the level of misconduct. The employer was not satisfied with the claimant's work attitude and her work skills. The employer has not proven a last act of misconduct and therefore has not shown misconduct which would disqualify the claimant from unemployment.

DECISION:

The decision of the representative dated February 17, 2009, reference 01, is reversed. Claimant is eligible to receive unemployment insurance benefits, provided claimant meets all other eligibility requirements.

James Elliott
Administrative Law Judge

Decision Dated and Mailed

jfe/css

