

**BEFORE THE
EMPLOYMENT APPEAL BOARD
Lucas State Office Building
Fourth floor
Des Moines, Iowa 50319**

ANN M BUFFINGTON

Claimant,

and

**SIGNATURE PROPERTIES OF
COUNCIL BLUFFS**

Employer.

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HEARING NUMBER: 10B-UI-14826

**EMPLOYMENT APPEAL BOARD
DECISION**

NOTICE

THIS DECISION BECOMES FINAL unless (1) a **request for a REHEARING** is filed with the Employment Appeal Board within **20 days** of the date of the Board's decision or, (2) a **PETITION TO DISTRICT COURT IS FILED WITHIN 30 days** of the date of the Board's decision.

A **REHEARING REQUEST** shall state the specific grounds and relief sought. If the rehearing request is denied, a petition may be filed in **DISTRICT COURT** within **30 days** of the date of the denial.

SECTION: 96.5-2A

DECISION

UNEMPLOYMENT BENEFITS ARE ALLOWED IF OTHERWISE ELIGIBLE

The claimant appealed this case to the Employment Appeal Board. The members of the Employment Appeal Board reviewed the entire record. A majority of the Appeal Board, one member dissenting, finds it cannot affirm the administrative law judge's decision. The majority of the Employment Appeal Board **REVERSES** as set forth below.

FINDINGS OF FACT:

Ann Buffington (Claimant) was employed by Woodlands Rehab (Employer) as a full-time Licensed Practical Nurse from June 2005 until she was fired on September 5, 2009. (Tran at p. 30; p. 153-154). The Employer is a skilled nursing facility. (Tran at p. 29). Larry Kronick, Administrator, discharged the Claimant because the Employer believed that the Claimant committed theft from a resident. (Tran at p. 30-32). This was the sole determining cause of the termination. (Tran at p. 32). The evidence showed that on the day in question, during the time frame when the earrings came up missing, the Claimant did approach the resident's desk and remove something from it. (Ex. H & I). The evidence fails to establish what this item was. (Ex. H & I). The evidence shows that other employees also had access to the earrings during the relevant time period. (Tran at p. 35-36; p. 43-45; p. 73 [roommate needs assistance]; p. 81; p. 90 [roommate needs assistance]; p. 162; p. 170; p. 173; Ex. D; Ex. E).

denied being in the room, and the Claimant denied taking the earrings. (Tran at p. 172; Ex. E). The resident corroborated that the Claimant had a legitimate reason for being in the room. (Tran at p. 121; p. 147; p. 151; p. 154-55). Other thefts have occurred after the Claimant was discharged. (Tran at p. 33; p. 66-67; p. 79-81; Ex. L). The evidence fails to show that the culprit was more likely the Claimant rather than some other employee of the Employer who also had access to the resident's room during the relevant time period.

The Employer has failed to prove by a preponderance of the evidence that the Claimant in fact stole from the resident in question.

REASONING AND CONCLUSIONS OF LAW:

Legal Standards: Iowa Code Section 96.5(2)(a) (2009) provides:

Discharge for Misconduct. If the department finds the individual has been discharged for misconduct in connection with the individual's employment:

The individual shall be disqualified for benefits until the individual has worked in and been paid wages for the insured work equal to ten times the individual's weekly benefit amount, provided the individual is otherwise eligible.

The Division of Job Service defines misconduct at 871 IAC 24.32(1)(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 the 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 is the meaning which has been given the term in other jurisdictions under similar statutes, and we believe it accurately reflects the intent of the legislature." *Huntoon v. Iowa Department of Job Service*, 275 N.W.2d, 445, 448 (Iowa 1979).

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 substantial and willful wrongdoing or repeated carelessness or negligence that equals willful misconduct in culpability. *Lee v. Employment Appeal Board*, 616 NW2d 661 (Iowa 2000).

A caregiver of a dependent adult may not financially exploit that adult. “Exploitation of a dependent adult ... means the act or process of taking unfair advantage of ... the adult's ... financial resources for one's own personal or pecuniary profit, without the informed consent of the dependent adult, including theft, by the use of undue influence, harassment, duress, deception, false representation, or false pretenses.” Iowa Code §235B.2(5)(a)(1)(c); 441 I.A.C. 176.1(3). Such exploitation is defined by law to be an act of adult abuse. *Id.* Obviously if the Claimant, an LPN, did in fact steal from a resident of a skilled nursing facility she committed misconduct of the worse sort. The issue in this case, however, is whether the Employer has carried its burden of proving that the Claimant did steal.

Weight of Evidence: The findings of fact show how we have resolved the disputed factual issues in this case. We have carefully weighed the credibility of the witnesses and the reliability of the evidence. We have found credible the Claimant's denials of theft. More importantly we have found the Employer's evidence of theft to be unconvincing. Unlike the Administrative Law Judge, we do not find the Claimant's testimony does anything to aid the Employer in carrying its burden of proof.

It is true that the Claimant had the opportunity to steal the earrings, and that she did, during the time frame in question, take something from the resident's desk. Unfortunately the only footage is extremely limited, and the full footage has not been seen by anyone who could provide useful testimony. The limited footage is such that all we know is that the Claimant did take some unidentified something from the desk during the time frame in question. Based on this, and the other evidence, it is entirely *possible* that what the Claimant took was the earrings. Yet, the Claimant gives a perfectly reasonable alternative explanation for what she took, a medicine cup or similar item. What we needed from the Employer, and never got, was evidence that made theft the better of the two explanations.

If the video gave a good view of the item the Claimant took we could resolve the issue in the Employer's favor. It does not. (Ex. H; Ex. I; *see also* Tran at p. 50-51; p. 58-59; p. 144). If the video showed the total time that anyone could have had access to the desk, and thus accounts for all other possible suspects, we could find for the Employer. The video does not. If someone had viewed the entire video and could testify that the Claimant was the only person to have approached the desk in the time frame (other than the resident) then we could find for the Employer. No one so testified. (Tran at p. 48-49; p. 55-56; Ex. J). If we could eliminate others as possible suspects based on alibi, lack of motive, etc. we could find for the Employer. No evidence attempts to do this. If the Claimant had confessed to someone, if the Claimant had bragged about it, if someone had seen the Claimant with the earrings, if the Claimant was seen secreting something small out of the facility – all such evidence would have helped us to find for the Employer. But no such evidence was presented. Thus all we have is motive (gain) and opportunity for the Claimant, and the same motive and equal opportunity for many other workers at the facility. This just is not enough to convince us that the Claimant's testimony was a lie. In addition, the evidence shows other thefts occurring after the Claimant was discharged. (Tran at p. 33; p. 66-67; p. 79-81; Ex. L). In short, the Claimant tells a perfectly plausible story, and the Employer has a plausible theory. But the Employer has failed to show that its story is *more* plausible – that more likely than not the Claimant took the earrings. The evidence at best is balanced, and when this is the case the party with the burden loses.

We do not question the honesty of the resident, nor of the detective, nor any witness called by the employer. The witnesses were reliable reporters of the facts known to them. The problem is those facts do not do more than *suggest* that the Claimant is a likely suspect. So she is. It is reasonable to *suspect* that she *may* be involved. But the character of the evidence is not sufficiently probative to get beyond suspicion to likelihood. The Employer has not proven by a preponderance of the evidence that the Claimant in fact committed the act for which she was discharged and therefore we cannot disqualify the Claimant.

DECISION:

The administrative law judge's decision dated March 16, 2010 is **REVERSED**. The Employment Appeal Board concludes that the Claimant was discharged for no disqualifying reason. Accordingly, the Claimant is allowed benefits provided the Claimant is otherwise eligible.

John A. Peno

Elizabeth L. Seiser

RRA/ss

DISSENTING OPINION OF MONIQUE KUESTER :

I respectfully dissent from the majority decision of the Employment Appeal Board; I would affirm the decision of the administrative law judge in its entirety.

Monique F, Kuester

RRA/ss

ORDER REGARDING RECORD : The Employment Appeal Board orders that any mention of the names of residents of the Employer found in the evidence is hereby redacted with the exception of the resident whose earrings were stolen. That resident testified, was competent, and waived any confidentiality. In general, patients enjoy a privilege for medical records and communications. Iowa Code §622.10; See Iowa Code §22.7(2)(medical records of public health provider are not open records). More specifically residents of a SNF are guaranteed confidentiality of their medical information. Iowa Admin. Code 481 IAC 58.44; 42 CFR 483.10(e)(resident rights) see also 45 CFR Parts 160 and 164 (HIPPA regulations). Exhibit K & L contain the names of a residents. Neither the residents in question nor any legal representative, participated in the hearing and, so far as we can tell, there is no waiver of any objection to the disclosure of the names. We conclude that redaction of the last names of the residents in the exhibits is warranted. This redaction does not materially affect the record evidence.

RRA/ss