IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

JANELLE LORING Claimant **HOPE HAVEN INC** Employer	**APPEAL 20A-UI-12965-SN-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 06/21/20** **Claimant: Respondent (1)**

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Admin. Code r. 871-24.32(1)a – Discharge for Misconduct

STATEMENT OF THE CASE:

The employer filed an appeal from the October 9, 2020, (reference 01) unemployment insurance decision that denied benefits based upon claimant being discharged based on a known rule. The parties were properly notified of the hearing. A telephone hearing was held on December 14, 2020. The claimant participated and was represented by Stuart Higgins. The employer participated through Human Resources Manager Connie Pagel and Community Living Manager Amanda Morony. Exhibits 1, 2, 3, 5, 6, A and B were admitted into evidence.

ISSUE:

Whether the claimant was discharged for disqualifying misconduct?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed in various roles at the employer from August 15, 2020, until this employment ended on June 22, 2020, when she was terminated. Prior to her termination, the claimant was employed as a full time direct support professional. The employer provided a copy of the job description for the direct support professional. (Exhibit 2) In this role, the claimant's immediate supervisor was Community Living Lead Coach Neave Ruiz.

The employer has distributes the following documents to inform employees of performance and conduct expectations: Ethical Standards (Exhibit 6), Disciplinary Policy (Exhibit 5), Employee Expectations (Exhibit 1), and Policy on Rights Health and Safety (as referenced, Exhibit 4). In addition, the employer had a practice of not wearing gloves and frequent hand washing in response to the Covid19 pandemic (referenced as the Covid 19 protocol on Exhibit 4). This protocol regarding glove use is not specifically described in any of the documents the employer provided.

On January 7, 2019, the claimant received a warning for telling coworkers and the lead worker how to do their jobs in a communication log. (Exhibit 3)

On June 12, 2020, the employer had a staff meeting in the office. Staff was asked to wash their hands, take their own temperature and to report their symptoms, if any, prior to the meeting.

The claimant attended the meeting wearing gloves. She washed her hands prior to putting the gloves on.

On June 22, 2020, Ms. Ruiz sent out a text message to all staff reminding them that gloves were not permissible unless staff was providing personal care. The claimant asked in the same text message conversation if she could wear gloves during other tasks. The claimant explained she has eczema which leads to her having open sores on her hands. The claimant also followed up by sending an email to Ms. Ruiz. The claimant assured Ms. Ruiz she would use the gloves properly. (Exhibit A)

On June 23, 2020, the claimant received a dismissal notice from the employer which outlines sixteen infractions she was accused of from May 31, 2020 to June 22, 2020. (Exhibit 4) The final incident on the termination notice describes the exchange between the claimant and Ms. Ruiz on June 22, 2020, in the following way, "[The claimant] responded that she would wear her gloves and change them as needed. [The claimant] is not following Covid19 protocol. Nurse Brenda Godberson stated that we should not be wearing gloves and should be washing hands." Only one of the incidents is of a similar nature to the final incident that occurred on June 12, 2020 and is described in the following way, "[The claimant] was asked to wash her hands when arriving at the office for a staff meeting. She stated that she would not wash her hands as she was wearing gloves. [The claimant] is not following Covid19 protocol."

After the claimant was terminated from employment, Agency Nurse Brenda Godberson wrote a note to the claimant. In the note, Godberson explained her rationale for recommending not wearing gloves to the employer's staff was to prevent the spread of germs because it discouraged hand washing. Ms. Godberson then said if she had known that the claimant had a medical excuse for wearing the gloves, then that would have changed her recommendation. (Exhibit B)

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes claimant was discharged from employment for no disqualifying reason.

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.

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 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). 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). Misconduct must be "substantial" to warrant a denial of job insurance benefits. *Newman v. Iowa Dep't of Job Serv.*, 351 N.W.2d 806 (Iowa Ct. App. 1984).

In an at-will employment environment an employer may discharge an employee for any number of reasons or no reason at all if it is not contrary to public policy, but if it fails to meet its burden of proof to establish job related misconduct as the reason for the separation, it incurs potential liability for unemployment insurance benefits related to that separation. 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.

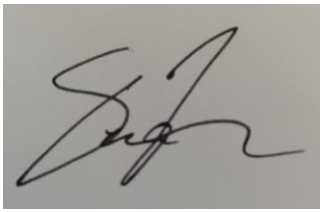
The conduct for which claimant was discharged was merely an isolated incident of poor judgment. To the extent that the circumstances surrounding each accident were not similar enough to establish a pattern of misbehavior, the employer has only shown that claimant was negligent. "[M]ere negligence is not enough to constitute misconduct." *Lee v. Employment Appeal Board*, 616 N.W.2d 661, 666 (Iowa 2000). A claimant will not be disqualified if the employer shows only "inadvertencies or ordinary negligence in isolated instances." 871 IAC 24.32(1)(a). When looking at an alleged pattern of negligence, previous incidents are considered when deciding whether a "degree of recurrence" indicates culpability. Claimant was careless, but the carelessness does not indicate "such degree of recurrence as to manifest equal culpability, wrongful intent or evil design" such that it could accurately be called misconduct. Iowa Admin. Code r. 871-24.32(1)(a); *Greenwell v. Emp't Appeal Bd.*, No. 15-0154 (Iowa Ct. App. Mar. 23, 2016).

In this case, the final incident which caused the claimant's discharge did not occur as alleged on the termination notice. The employer attempts to characterize this incident and others as part of a pattern of insubordination or her failure to follow the chain of command. This administrative law judge does not see the final incident as fitting that chain because the final link is at most an

attempt at clarification addressing a medical concern. The employer cannot reasonably expect employees to mute those concerns. Perhaps the claimant was crass and should have obtained clarification in a more discrete way that is not willful misconduct. The only similar behavior in the record occurred on June 12, 2020. This administrative law judge does not find the description of the claimant's behavior on June 12, 2020 in Exhibit 4 as credible primarily because the final incident was not accurately depicted. The employer has not met its burden to show the claimant engaged in willful misconduct.

DECISION:

The October 9, 2020, reference 01, unemployment insurance decision is affirmed. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided she is otherwise eligible. Any benefits claimed and withheld on this basis shall be paid.



_____

Sean M. Nelson
Administrative Law Judge
Unemployment Insurance Appeals Bureau
1000 East Grand Avenue
Des Moines, Iowa 50319-0209
Fax (515) 725-9067

January 15, 2021
Decision Dated and Mailed

smn/mh