IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

TAMOTHY E CRYER Claimant **COMFORT CARE INC** Employer	**APPEAL 16A-UI-05400-LJ-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 04/17/16** **Claimant: Appellant (2)**

Iowa Code § 96.5(2)a – Discharge for Misconduct

STATEMENT OF THE CASE:

The claimant filed an appeal from the May 6, 2016, (reference 02) unemployment insurance decision that denied benefits based upon a determination that claimant was discharged for failure to follow instructions in the performance of her job. The parties were properly notified of the hearing. A telephone hearing was held on May 31, 2016. The claimant, Tamothy E. Cutler, participated. Witness Charles Cryer also appeared on behalf of claimant. The employer, Comfort Care, Inc., participated through Ashley Cook, activities director; and Rose Miller, office manager. During the hearing, the administrative law judge confirmed that Cook and Miller had authority to speak on behalf of both Comfort Care Medicare, Inc., and Comfort Care, Inc.

ISSUE:

Was the claimant discharged for disqualifying job-related misconduct?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed part time as an activities director and home health aide from August 11 or 12, 2015, until this employment ended on April 1, 2016, when she was discharged.

Claimant was placed on a 90-day probationary plan on or about February 26, 2016. Cook testified that the employer placed claimant on this plan because of claimant's inefficiency, claimant's failure to get approval for working extra hours, and claimant's difficulty adhering to a schedule for the activities she ran. After receiving this performance plan, claimant wore a tee-shirt with beer on it on March 15 and missed a home visit on March 22. The employer did not counsel claimant about either of these issues. Claimant denies anyone spoke with her about working too many hours. Claimant believed she was a full-time employee. Claimant admitted that activities did not always start on time, but she attributed this issue to clients' scheduling conflicts.

Claimant received performance counseling several times during her employment. On February 22, 2016, the employer counseled claimant for leaving on coffee pots, discussing paycheck issues with or in front of clients, inefficiency, failing to get approval for working

additional hours, and receiving complaints about the activities she organized. On January 12, 2016, the employer counseled claimant for errors in her documentation and for leaving a client alone, in violation of company policy. According to Cook, who was claimant's supervisor, she successfully performed the activity director position for several months before she began struggling.

REASONING AND CONCLUSIONS OF LAW:

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

When the record is composed solely of hearsay evidence, that evidence must be examined closely in light of the entire record. *Schmitz v. Iowa Dep't Human Servs.*, 461 N.W.2d 603, 607 (Iowa Ct. App. 1990). Both the quality and the quantity of the evidence must be evaluated to see whether it rises to the necessary levels of trustworthiness, credibility, and accuracy required by a reasonably prudent person in the conduct of serious affairs. See, Iowa Code § 17A.14 (1). In making the evaluation, the fact-finder should conduct a common sense evaluation of (1) the nature of the hearsay; (2) the availability of better evidence; (3) the cost of acquiring better information; (4) the need for precision; and (5) the administrative policy to be fulfilled. *Schmitz*, 461 N.W.2d at 608. The Iowa Supreme Court has ruled that if a party has the power to produce more explicit and direct evidence than it chooses to present, the administrative law judge may infer that evidence not presented would reveal deficiencies in the party's case. *Crosser v. Iowa Dep't of Pub. Safety*, 240 N.W.2d 682 (Iowa 1976). Here, both employer witnesses referred to and consulted documentation during the hearing. However, the employer did not submit any exhibits to support the testimony. It is permissible to infer that the records cited by the witnesses were not submitted because they would not have been supportive of the employer's position. See, *Crosser v. Iowa Dep't of Pub. Safety*, 240 N.W.2d 682 (Iowa 1976).

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).

Iowa Admin. Code r. 871-24.32(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.

A lapse of 11 days from the final act until discharge when claimant was notified on the fourth day that his conduct was grounds for dismissal did not make the final act a "past act." Where an employer gives seven days' notice to the employee that it will consider discharging him, the date of that notice is used to measure whether the act complained of is current. *Greene v. Emp't Appeal Bd.*, 426 N.W.2d 659 (Iowa Ct. App. 1988). An unpublished decision held informally that two calendar weeks or up to ten work days from the final incident to the discharge may be considered a current act. *Milligan v. Emp't Appeal Bd.*, No. 10-2098 (Iowa Ct. App. filed June 15, 2011). In reviewing past acts as influencing a current act of misconduct, the ALJ should look at the course of conduct in general, not whether each such past act would constitute disqualifying job misconduct in and of itself. *Attwood v. Iowa Dep't of Job Serv.*, No. _-__, (Iowa Ct. App. filed __, 1986).

The employer's witnesses testified that part of claimant's discharge was based on her timesheets, efficiency, and scheduling issues. Inasmuch as employer had warned claimant about the final incident on approximately February 26 and there were no similar incidents of alleged misconduct thereafter, it has not met the burden of proof to establish that claimant acted deliberately or negligently after the most recent warning. The employer has not established a current or final act of misconduct, and, without such, the history of other incidents need not be examined.

The employer's witnesses also testified that part of claimant's discharge was based on her inappropriate tee-shirt and her missed home visit, both of which occurred in March 2016. An employee is entitled to fair warning that the employer will no longer tolerate certain performance and conduct. Without fair warning, an employee has no reasonable way of knowing that there are changes that need be made in order to preserve the employment. If an employer expects an employee to conform to certain expectations or face discharge, appropriate (preferably written), detailed, and reasonable notice should be given. The employer admits claimant was never counseled for these issues previously. Because the employer had not previously warned claimant about the issue leading to the separation, it has not met the burden of proof to establish that claimant acted deliberately or with recurrent negligence in violation of company policy, procedure, or prior warning. Whether based on claimant's timesheet and scheduling issues or her more recent concerns in March 2016, the employer has not established disqualifying job-related misconduct. Benefits are allowed.

DECISION:

The May 6, 2016, (reference 02) unemployment insurance decision is reversed. 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.

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Elizabeth Johnson
Administrative Law Judge

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Decision Dated and Mailed

lj/pjs