IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

NANCY A GRIENKE
Claimant

CARE INITIATIVES
Employer

APPEAL NO: 12A-UI-11587-DT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 09/02/12
Claimant: Respondent (1)

Section 96.5-2-a – Discharge

STATEMENT OF THE CASE:

Care Initiatives (employer) appealed a representative's September 21, 2012 decision (reference 01) that concluded Nancy A. Grienke (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 25, 2012. The claimant participated in the hearing. Alyce Smolsky of Equifax Workforce Solutions appeared on the employer's behalf and presented testimony from two witnesses, Kristi Schubert and JoAnne Stodden. Based on the evidence, the arguments of the parties, a review of the law, and assessing the credibility of the witnesses and reliability of the evidence in conjunction with the applicable burden of proof, 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?

OUTCOME:

Affirmed. Benefits allowed.

FINDINGS OF FACT:

The claimant started working for the employer on April 4, 1978. She worked full-time as a certified nursing aide (CNA). Her last day of work was September 2, 2012. The employer discharged her on September 4, 2012. The reason asserted for the discharge was that the claimant had used vulgar language toward a resident.

On September 2 the employer received a complaint from a resident reporting that on September 1 the claimant had twice told him to "move his a - -," and that on September 2 she had called him a "f - - - ing baby." The employer provided second-hand testimony that a nurse had heard the claimant tell the resident to "move his a - -," on September 1 and that another CNA had heard the claimant call the resident either a "g - - d - - -" baby" or a "f - - - ing baby" on September 2. The claimant denied using any of these vulgar terms, but acknowledged that on

September 1 she had told the resident to "quit acting like a baby," and that on September 2 she had told the resident twice to "scoot your butt back in the chair." There was no record of any prior discipline toward the claimant.

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). The question is not whether the employer was right to terminate the claimant's employment, but whether the claimant is entitled to unemployment insurance benefits. *Infante v. IDJS*, 364 N.W.2d 262 (Iowa App. 1984). What constitutes misconduct justifying termination of an employee and what is misconduct that warrants denial of unemployment insurance benefits are two separate matters. *Pierce v. IDJS*, 425 N.W.2d 679 (Iowa App. 1988).

In order to establish misconduct such as to disqualify a former employee from benefits, an employer must establish the employee was responsible for a deliberate act or omission that was a material breach of the duties and obligations owed by the employee to the employer. 871 IAC 24.32(1)a; *Huntoon v. Iowa Department of Job Service*, 275 N.W.2d 445 (Iowa 1979); *Henry v. Iowa Department of Job Service*, 391 N.W.2d 731, 735 (Iowa App. 1986). The conduct must show a willful or wanton disregard of an employer's interest as is found in deliberate violation or disregard of standards of behavior that 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. 871 IAC 24.32(1)a; *Huntoon*, supra; *Henry*, supra. In contrast, 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(1)a; *Huntoon*, supra; *Newman v. Iowa Department of Job Service*, 351 N.W.2d 806 (Iowa App. 1984).

The reason cited by the employer for discharging the claimant is the alleged vulgar language toward the resident on September 1 and September 2. The employer relies exclusively on the second-hand accounts from the resident, the nurse, and the CNA; however, without that information being provided first-hand, the administrative law judge is unable to ascertain whether any of these persons might have been mistaken, whether the staff members actually observed the entire time, or whether they are credible. Assessing the credibility of the witnesses and reliability of the evidence in conjunction with the applicable burden of proof, as shown in the factual conclusions reached in the above-noted findings of fact, the administrative law judge concludes that the employer has not satisfied its burden to establish by a preponderance of the evidence that the claimant in fact used the vulgar language as asserted. Under the circumstances of this case, the claimant's acknowledged less-than-sensitive language toward the resident 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.

NOTE TO EMPLOYER:

If you wish to change your official mailing address of record on record with the Agency, including the proper designation of your third party representative, please access your account at: https://www.myiowaui.org/UITIPTaxWeb/.

Helpful information about using this site may be found at:
http://www.iowaworkforce.org/ui/uiemployers.htm and
http://www.youtube.com/watch?v=_mpCM8FGQoY

DECISION:

The representative's September 21, 2012 decision (reference 01) 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/kjw