IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

LEE A HOGG Claimant **COUNTRY MEADOWS PLACE LLC** Employer	**APPEAL 19A-UI-07337-S1-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 08/04/19** **Claimant: Respondent (1)**

Iowa Code § 96.5-2-a – Discharge for Misconduct
Iowa Code § 96.3-7 – Overpayment

STATEMENT OF THE CASE:

Country Meadows Place, LLC (employer) appealed a representative's September 6, 2019 decision (reference 01) that concluded Lee Hogg (claimant) was discharged and there was no evidence of willful or deliberate misconduct. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was scheduled for October 8, 2019. The claimant participated personally. The employer participated by Cassidy Schmidt, Registered Nurse/Clinical Quality Manager with Senior Housing Management, and Tony Buhr, Manager.

The employer offered and Exhibit One was received into evidence. The administrative law judge took official notice of the administrative file.

ISSUE:

The issue is whether the claimant was separated from employment for any disqualifying reason.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds that: The claimant was hired on September 1, 2016, as a full-time health care coordinator. She was the nurse in charge of an assisted living community of senior citizens. The claimant was on-call twenty-four hours per day, seven days per week. Her supervisor was the manager. She signed for receipt of the employer's handbook on September 1, 2016. She signed for the Elopement Policy on February 23, 2018. The claimant signed for the Drug/Alcohol Free Workplace Policy on September 1, 2019.

The employer's Current Employee Substance Abuse Testing Program was part of the employer's policies. The policy indicated that the employer could test under a reasonable suspicion, unannounced testing of current employees, and workplace accidents. In the category of unannounced testing, the policy had two categories.

One category was the entire employee population, except for the workers not scheduled. The second category was employees in a safety-sensitive position, except for the workers not

scheduled. The employer decided to disregard the handbook and the two categories. The registered nurse/clinical quality manager with senior housing management told the claimant to test every employee. If they were not at work, they were to be called in to work and be tested. The claimant was given different testing kits to use during her employment. She was not trained in administering the test for the last kit but she followed the instructions.

The claimant's staff was not toileting resident's properly. She asked her employees to sit on dampened Tucks during her staff meeting so they could experience the feeling of sitting in wet clothing. Employees could refuse. On September 14, 2018, the employer verbally counseled the claimant about her teaching technique. The counseling documentation form did not warn the claimant of future infractions.

On Sunday, June 23, 2019, a client exited a door that was not functioning correctly and was seen on the grounds by a staff member. The employee approached the client on the employer's property. The elopement policy states, "Elopement is defined as leaving the Community without supervision and posing a risk to self. Elopement differs from a walk in that a resident is purposefully leaving and putting them at risk for falls, hyperthermia, hypothermia, traffic accident, assaults, etc."

When the client exited and returned, the claimant was not working. Staff told her about it when she arrived at work. Staff did not consider it an elopement because the client did not leave the grounds. On June 24, 25, and 26, 2019, the matter was discussed in meetings with Manager Tony Buhr.

In 2016, there were issues with counting narcotics on premises. The senior manager at the time and the claimant came up with a system that was approved by the State of Iowa. The two senior managers also approved the policy. On July 23, 2019, the employer verbally counseled the claimant about her system of counting narcotics. The counseling documentation form did not warn the claimant of future infractions.

On July 25, 2019, the employer drug tested everyone at work and found that three employees tested positive for an unknown substance in the "rapid read cup". The employer alleged that the employees admitted to drug testing positive. The workers told the employer that the claimant falsely recorded their results as negative when tested earlier. They said she threw away their samples. On July 26, 2019, the employer suspended the claimant. The claimant denied the allegations regarding testing. On August 2, 2019, the employer sent the claimant a written termination. She was terminated for failing to follow elopement procedures and falsifying drug testing results.

The claimant filed for unemployment insurance benefits with an effective date of August 4, 2019. She received $4,329.00 in benefits after the separation from employment. The employer participated personally at the fact finding interview on September 4, 2019, by Cassidy Schmidt and Tony Buhr.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow the administrative law judge concludes the claimant was not discharged for misconduct.

Iowa Code section 96.5(2)a provides:

> An individual shall be disqualified for benefits, regardless of the source of the individual's wage credits:
>
> 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 disqualification shall continue 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.
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> 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.

The employer has the burden of proof in establishing disqualifying job misconduct. *Cosper v. Iowa Department of Job Service*, 321 N.W.2d 6 (Iowa 1982). The employer must establish not only misconduct but that there was a final incident of misconduct which precipitated the discharge. The employer was not able to provide any evidence of a final incident of misconduct.

The first situation the employer puts forth is the alleged elopement. This occurred on or about June 23, 2019. The claimant's manager was told about the incident on June 24, 25, and 26, 2019. While the manager was at the meetings, he does not recall the discussion of the alleged elopement. The employer knew about the incident more than a month before the termination. The incident and the termination are too remote in time. The alleged elopement cannot be the final incident leading to the discharge.

The second situation the employer brought to the forefront relates to drug testing. State law allows for unannounced drug or alcohol testing in Iowa Code Section 730.5(1)(l). That section applies to random testing where "the selection of employees to be tested from the pool of employees subject to testing shall be done based on a neutral and objective selection process by an entity independent from the employer and shall be made by a computer-based identification numbers, or other comparable identifying numbers in which each member of the employee population subject to testing has an equal chance of selection for initial random selection process shall be conducted through a computer program that records each selection attempt by date, time, and employee number."

The Iowa Code does not provide for testing of every employee, whether they are at work or away. The employer's policy does not comport with State law. The Iowa Supreme Court has held that an employer may not "benefit from an unauthorized drug test by relying on it as a basis to disqualify an employee from unemployment compensation benefits." *Eaton v. Iowa Employment Appeal Board*, 602 N.W.2d at 558. The employer told the claimant to follow a policy that tested all employees. It did not follow the employer's policy or state law.

The employer alleges that on an unknown date, the claimant recorded a false negative on a drug test for unknown employees. If a party has the power to produce more explicit and direct evidence than it chooses to do, it may be fairly inferred that other evidence would lay open deficiencies in that party's case. *Crosser v. Iowa Department of Public Safety*, 240 N.W.2d 682 (Iowa 1976). The employer had no evidence of the false negatives. The employer did not provide any documentation or proof and, therefore, did not provide sufficient evidence of job-related misconduct to rebut the claimant's denial of said conduct. The employer did not meet its burden of proof to show misconduct. Benefits are allowed, provided the claimant is otherwise eligible.

DECISION:

The representative's September 6, 2019, decision (reference 01) is affirmed. The employer has not met its burden of proof to establish job related misconduct. Benefits are allowed, provided the claimant is otherwise eligible.

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Beth A. Scheetz
Administrative Law Judge

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Decision Dated and Mailed

bas/scn