IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

ANNETTE ALEXANDER
Claimant

ROBERT BYRUM DDS PC
Employer

APPEAL NO: 11A-UI-13675-ET

ADMINISTRATIVE LAW JUDGE DECISION

OC: 09-18-11
Claimant: Appellant (2)

Section 96.5-2-a – Discharge/Misconduct

STATEMENT OF THE CASE:

The claimant filed a timely appeal from the October 6, 2011, reference 01, decision that denied benefits. After due notice was issued, a hearing was held by telephone conference call before Administrative Law Judge Julie Elder on November 14, 2011 and continued November 18, 2011. The claimant participated in the hearing with Attorney Mark Fowler. Bonnie Byrum, office manager; Dr. Mindy Hochgesang, associate dentist; Dr. Robert Byrum, owner; and Mikkie Schiltz, attorney at law, participated in the hearing on behalf of the employer. Employer's Exhibits One through Eight were admitted into evidence.

ISSUE:

The issue is whether the employer discharged the claimant for work-connected misconduct.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed as a full-time dental hygienist for Dr. Robert Byrum from June 16, 1997 to September 14, 2011. She was discharged for switching patients from the other hygienist to herself and for an after-hours discussion held with Dr. Mindy Hochgesang May 19, 2011. On July 29, 2010, Dr. Byrum met with the claimant to discuss her practice of moving patients from the other hygienist's schedule to her own without the permission of Dr. Byrum (Employer's Exhibit One). The claimant refused to sign the document and argued she was helping the practice because the patients preferred to see her rather than the other hygienist and continued to switch patients to her schedule. In November 2010 the employer put in place a "No Gossip Policy" that the claimant and another employee refused to sign without changes made to the document (Employer's Exhibit Seven). The memo stated "Gossip always involves a person who is not present" (Employer's Exhibit Seven).

On May 19, 2011, several office staff members and Dr. Hochgesang went to a local sports bar after work and Dr. Byrum gave them $20.00. After others went home, the claimant, Dental Assistant Kim Galloway and her daughter, and Dr. Hochgesang remained and continued talking. Dr. Hochgesang asked how things were going in the office, how she personally was doing, and whether they thought she would be successful if she bought Dr. Byrum's dental practice as

planned. The claimant and Ms. Galloway were very direct and gave Dr. Hochgesang their honest opinions regarding her treatment planning, stating she did not "exude confidence and certainty with patients when treatment planning; would not be as statistically productive as Dr. Byrum because she would give too much away for free; she did not appear money driven and the practice would suffer as a result; stated that driving an older car, wearing clothes bought on consignment and a broken runner's watch she repaired with a rubber band for awhile had a negative impact on the way patients viewed her, as they expected her to look a certain way, drive a nicer vehicle, and wear nicer jewelry in order to appear successful and patients would be deterred from going to her if they did not feel she was thriving or lucrative; they made suggestions about how to cultivate a happy staff that respects the doctor including high pay, good benefits, vacation and incentives and when Dr. Hochgesang stated they had that with Dr. Byrum but still did not respect him, they indicated that was because he trained them to be concerned about money because that is the way he was (Employer's Exhibit Four). The claimant commented that she would say more if she drank more alcohol and Dr. Hochgesang felt that meant she had many more negative comments to make about her that she had not stated.

Dr. Hochgesang was very upset by the claimant and Ms. Galloway's comments but did not cry in front of them or tell Dr. Byrum about the conversation. She became depressed and her statistics went down, as she lost her confidence and questioned her decision to become a dentist and especially her planned purchase of Dr. Byrum's practice. She found herself changing her treatment plans to accommodate what the claimant and Ms. Galloway said about her treatment planning May 19, 2011, and had looked at the claimant's computer at least twice and learned the claimant had not included the crowns she recommended to patients in the treatment plans. She decided to begin to look for another practice to join or buy and spoke to a friend about becoming his partner. She wrote Dr. Byrum a note July 12, 2011, stating she was starting to look at other practices but did not tell him why she felt she had to leave. At the end of August 2011, the claimant was talking to Dr. Byrum's practice consultant and confided in her about what happened May 19, 2011. The practice consultant convinced Dr. Hochgesang to tell Dr. Byrum everything that had happened and how she felt about it and how that was influencing her statistics, demeanor, and decisions about buying his practice. She spoke to Dr. Byrum August 31, 2011, and he asked for some time to do his own fact-finding investigation. On September 9, 2011, Dr. Byrum, Dr. Hochgesang, and Office Manager Bonnie Byrum held a conference call and decided to discharge the claimant and Ms. Galloway September 12, 2011. The claimant's son had a football injury and was in the hospital September 12, 2011, so the employer decided to wait until September 14, 2011, to terminate the claimant's employment.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the 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:
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> 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.
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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.

871 IAC 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 proving disqualifying misconduct. 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 N.W.2d 661, 665 (Iowa 2000). The claimant's practice of switching patients from the other hygienist to herself was unprofessional, dishonest, and underhanded, and continued despite Dr. Byrum telling her to stop doing it. While the claimant stated her actions were done for the good of the patients and the practice, she also profited from her actions, as she made more money by having more patients. Additionally, she refused to stop switching or sign the reasonable memo presented by Dr. Byrum July 29, 2010. The main reason for her termination and the last straw for the employer, however, was the claimant's conversation with Dr. Hochgesang May 19, 2011. During that outing, Dr. Hochgesang asked for the claimant and Ms. Galloway's opinion on how the practice, and, more specifically, how she was doing and they proceeded to be brutally honest with her. Their opinions deeply hurt Dr. Hochgesang and caused her to question whether she should even be a dentist, let alone buy Dr. Byrum's practice. Although Dr. Hochgesang solicited their advice, she was not prepared for their responses and those answers affected her personally as well as professionally. While it would have been advisable for the claimant and Ms. Galloway to be more tactful and kind when giving Dr. Hochgesang, a relatively new dentist, their opinions on the way she practiced dentistry and whether she would be successful in taking over Dr. Byrum's practice, she did ask what they thought about those items; and although the employer had every right to terminate the claimant's employment, the claimant should not be denied unemployment benefits for voicing her thoughts on the question, even though her comments were hurtful.

Additionally, this incident occurred in May 2011, and the employer did not act until September 14, 2011. Dr. Byrum was not aware of the claimant's statements until August 31, 2011, but Dr. Hochgesang was and, as a member of management buying into the practice, she was effectively an employer who did not take any action against the claimant by going to Dr. Byrum at the time the incident occurred. In order for a claimant to be disqualified from receiving benefits, it must be for a current act of misconduct. In this case, Dr. Hochgesang knew of the claimant's comments in May 2011 but chose not to tell Dr. Byrum until the end of August 2011. The claimant's behavior was not a current act of misconduct. Consequently, while not condoning the claimant's actions, the manner in which she spoke to Dr. Hochgesang May 19, 2011, or her attitude and behavior in general, the administrative law judge must conclude her actions do not rise to the level of disqualifying job misconduct or a current act of misconduct as those terms are defined by Iowa law. Therefore, benefits must be allowed.

DECISION:

The October 6, 2011, reference 01, decision is reversed. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided the claimant is otherwise eligible.

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Julie Elder
Administrative Law Judge

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Decision Dated and Mailed

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