

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

SHEILA J WHEELER
Claimant

CRESTVIEW ACRES INC
Employer

APPEAL 19A-UI-07758-JC-T
**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 09/01/19
Claimant: Respondent (1)

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Code § 96.3(7) – Recovery of Benefit Overpayment
Iowa Admin. Code r. 871-24.10 – Employer/Representative Participation Fact-finding Interview

STATEMENT OF THE CASE:

The employer/appellant, Crestview Acres Inc., filed an appeal from the September 27, 2019 (reference 03) Iowa Workforce Development (“IWD”) unemployment insurance decision which allowed benefits. The parties were properly notified about the hearing. A telephone hearing was held on October 24, 2019. The claimant did not respond to the notice of hearing to furnish a phone number with the Appeals Bureau and did not participate in the hearing. The employer participated through Emily Hammond.

The administrative law judge took official notice of the administrative records including the fact-finding documents. Employer Exhibit 1 was admitted. Based on the evidence, the arguments presented, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUES:

Was the claimant discharged for disqualifying job-related misconduct?
Has the claimant been overpaid any unemployment insurance benefits, and if so, can the repayment of those benefits to the agency be waived?
Can any charges to the employer’s account be waived?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed full-time as a licensed practical nurse (LPN) and was separated from employment on August 20, 2019, when she was discharged.

The employer provides care and services to a population including dependent adults. The claimant was trained at the time of hire about the employer’s rules, procedures and definition of abuse and neglect. The employer did not provide a written policy for the hearing as it related to the discharge.

The claimant was discharged based upon a single report of her using profanity at a resident when she reportedly said to a resident on August 15, 2019 that "I'm not here to kiss your ass." The employer initiated an internal investigation of the comment by interviewing staff, multiple residents and the claimant (Employer Exhibit 1). The comment was allegedly made at the nurses' station and the claimant denied making the comment to the resident but said "get off your ass and work" to a co-worker (Employer Exhibit 1). Based upon the employer's findings, it concluded that no staff member had direct knowledge of the incident, or of the claimant using profanity at any residents, and the resident, who has full mental faculties, did not feel he suffered from verbal abuse (Employer Exhibit 1). The employer then also concluded that "an inappropriate conversation took place" (Employer Exhibit 1). She was subsequently discharged.

The administrative record reflects that claimant has received unemployment benefits in the amount of \$2,165.00, since filing a claim with an effective date of September 1, 2019. The administrative record also establishes that the employer did participate in the fact-finding interview or make a witness with direct knowledge available for rebuttal. Emily Hammond attended.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant did not quit but was discharged from employment for no disqualifying reason.

Iowa unemployment insurance law disqualifies individuals who are discharged from employment for misconduct from receiving unemployment insurance benefits. Iowa Code § 96.5(2)a. They remain disqualified until such time as they requalify for benefits by working and earning insured wages ten times their weekly benefit amount. *Id.*

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).

The employer has the burden of proof in establishing disqualifying job related 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 serious enough to warrant discharge is not necessarily serious enough to warrant a denial of job insurance benefits. Such misconduct must be "substantial." *Newman v. Iowa Dep't of Job Serv.*, 351 N.W.2d 806 (Iowa Ct. App. 1984).

It is the duty of the administrative law judge as the trier of fact in this case, to determine the credibility of witnesses, weigh the evidence and decide the facts in issue. *Arndt v. City of LeClaire*, 728 N.W.2d 389, 394-395 (Iowa 2007). The administrative law judge may believe all, part or none of any witness's testimony. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996). In assessing the credibility of witnesses, the administrative law judge should consider the evidence using his or her own observations, common sense and experience. *Id.* In determining the facts, and deciding what testimony to believe, the fact finder may consider the following factors: whether the testimony is reasonable and consistent with other believable evidence; whether a witness has made inconsistent statements; the witness's appearance, conduct, age, intelligence, memory and knowledge of the facts; and the witness's interest in the trial, their motive, candor, bias and prejudice. *Id.* Assessing the credibility of the witness 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 was discharged for work-connected misconduct as defined by the unemployment insurance law.

Iowa Admin. Code r. 871-24.32(4) provides:

(4) Report required. The claimant's statement and employer's statement must give detailed facts as to the specific reason for the claimant's discharge. Allegations of misconduct or dishonesty without additional evidence shall not be sufficient to result in disqualification. If the employer is unwilling to furnish available evidence to corroborate the allegation, misconduct cannot be established. In cases where a suspension or disciplinary layoff exists, the claimant is considered as discharged, and the issue of misconduct shall be resolved.

It is true that "[t]he use of profanity or offensive language in a confrontational, disrespectful, or name-calling context may be recognized as misconduct, even in the case of isolated incidents or situations in which the target of abusive name-calling is not present when the vulgar statements are initially made." *Myers v. Emp't Appeal Bd.*, 462 N.W.2d 734 (Iowa Ct. App. 1990). However, the claimant's use of one instance of profanity, when not used in front of customers, accompanied by threats or in a confrontational manner does not rise to the level of misconduct. See *Nolan v. Emp't Appeal Bd.*, 797 N.W.2d 623 (Iowa Ct. App. 2011), distinguishing *Myers* (Mansfield, J., dissenting) (finding the matter to be an issue of fact "entrusted to the agency.").

Cognizant of the employer's duty to protect the safety and well-being of residents entrusted in its care, as well as the serious implications of abuse or neglect, the credible evidence presented does not prove beyond a preponderance of the evidence that the claimant violated the employer's abuse policy by using the word "ass" in the presence of a resident.

The evidence presented was based upon hearsay evidence, collected by an investigator, who did not attend the hearing. The findings contained within the investigator's report are conflicting as to whether the claimant said to a resident, "I'm not here to kiss your ass" versus a resident overhearing the claimant saying to a staff member, "get off your ass." If the claimant made the

comment to the staff member, it was blatantly unprofessional. However, unprofessionalism is not the same as possible verbal abuse against a resident. No evidence was presented that a resident hearing a curse word (even indirectly or in passing) would constitute abuse. In the absence of a first-hand witness (including the claimant) and in light of conflicting accounts provided by the investigator, the administrative law judge does not condone profanity, but is not persuaded the claimant violated the employer's verbal abuse policy as alleged.

Based on the evidence presented, the administrative law judge concludes the conduct for which the claimant was discharged was an isolated incident of poor judgment and inasmuch as the employer had not previously warned the claimant about the issue leading to the separation, it has not met the burden of proof to establish that the claimant acted deliberately or with recurrent negligence in violation of company policy, procedure, or prior warning. 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. Training or general notice to staff about a policy is not considered a disciplinary warning. 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 question before the administrative law judge in this case is not whether the employer has the right to discharge this employee, but whether the claimant's discharge is disqualifying under the provisions of the Iowa Employment Security Law. While the decision to terminate the claimant may have been a sound decision from a management viewpoint, for the above stated reasons, the administrative law judge concludes that the employer has not sustained its burden of proof in establishing that the claimant's discharge was due to a final or current act of job related misconduct. Accordingly, benefits are allowed provided the claimant is otherwise eligible.

Because the claimant is eligible for benefits, the issues of overpayment and relief of charges are moot.

DECISION:

The September 27, 2019 (Reference 03) initial decision is affirmed. The claimant was discharged for no disqualifying reason. Benefits are allowed, provided she is otherwise eligible.

Jennifer L. Beckman
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Decision Dated and Mailed

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