IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

SHEILA R CONRAD
Claimant

AMERICAN BAPTIST HOMES OF MIDWEST
Employer

APPEAL NO: 12A-UI-14438-DT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 10/21/12
Claimant: Respondent (1)

Section 96.5-2-a – Discharge

STATEMENT OF THE CASE:

American Baptist Homes of Midwest (employer) appealed a representative's November 28, 2012 decision (reference 01) that concluded Sheila R. Conrad (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 February 4, 2013. The claimant participated in the hearing and was represented by James Mailander, attorney at law. Tron Dandy appeared on the employer's behalf. Based on the evidence, the arguments of the parties, and the law, 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 30, 1999. Since January 7, 2005 she worked full time as human resources director at the employer's continuing care facility in Harlan, Iowa. Her last day of work was October 18, 2012. The employer suspended her on that date and discharged her on October 23, 2012. The reason asserted for the discharge was not meeting the employer's performance expectations.

The event which triggered the employer's review of the claimant's performance was that on September 20, 2012 when the claimant erroneously informed an employee who had just added on dental coverage that her coverage would become effective October 1, when in fact under the insurer's provisions the coverage would not become effective until November 1. Further complicating the situation was that on October 2 the insurer had sent the claimant an email explaining that the employee's coverage would not become effective until November 1; the claimant failed to open and read that email at that time, and so failed to correct the information

she had given to the employee prior to the employee's planned and announced dental procedure on October 3. As a result of the employee's reliance on the claimant's incorrect information, the employer ultimately agreed to cover the portion of the employee's dental expense which would otherwise would have been covered by the insurance had the insurance been in place as of October 1 as the claimant had advised the employee; this resulted in cost to the employer of about $400.00.

The claimant informed the administrator, Dandy, of the situation involving the employee's dental coverage on October 17; as a result of his concerns, Dandy then informed the claimant on October 18 she was being suspended pending further investigation. Between October 17 and October 23 Dandy compiled other concerns regarding the claimant's job performance. In reviewing the materials on the claimant's desk he found a September 26 letter from a local hospital complaining that some costs for some workers' compensation care for the employer's employees had not yet been paid and could be set up for legal action; Dandy believed that the claimant had taken no action on the letter. However, immediately after receiving the letter on or about September 28 the claimant had scanned and emailed a copy of the letter to the employer's workers' compensation carrier, and on or about September 30 she had called and informed a hospital representative that the matter had been referred on to the workers' compensation carrier for payment.

Dandy was further concerned that he found employees' files in the claimant's office to not be up to date on filing, and that there were some materials with confidential employee information left sitting unsecured on the claimant's desk. The claimant acknowledged that she was behind on filing such things as leave requests which had already been approved or denied, noting that she had lost her clerical support who had taken care of filing in about December 2011. She acknowledged that there were some documents left on her desk which contained private information and that she did not routinely lock her door when she left it, but this had been an ongoing common practice, for which she had never been warned or reprimanded. Dandy was further concerned to find that the claimant had inserted some memoranda into her own personnel file which she had personally authored in the spring of 2012 in response to some difficulties the claimant was having with the then facility administrator.

An additional concern was that the claimant was not timely in her communications regarding the status of the hiring process for some potential employees. There was one situation where it took about three months for a candidate for hire to complete the background check process and be hired. The employer did not demonstrate any specific things that it had been the claimant's responsibility to complete or communicate which she did not which then contributed in the delay in hiring, as compared to the delay simply being due to delays in other entities reporting back to the employer on the candidate's eligibility for hire.

Dandy further cited to the fact that on September 27 he received a call for a fact-finding interview on another prior employee for which the claimant had not informed him that he should be expecting a call; the claimant acknowledged that she had received an email from the corporate office with some attachments about some upcoming fact-finding interviews, and that she had missed seeing the one for which the interview was scheduled on September 27. Despite the lack of advance notice about the fact-finding interview, the outcome was not adverse to the employer. No disciplinary action was taken at that time against the claimant.

Finally, in August or September the employer had suspended an employee who was under investigation for some potentially criminal conduct outside of the workplace. Dandy and the claimant had met with the employee, and Dandy had told the employee that if she was cleared

of the allegations that she would be reinstated "with back pay" for her time off worked. This was contrary to the provisions of the employer's policy handbook. The claimant was aware that Dandy was telling the employee something contrary to the stated policy, but did not confront Dandy about this error. When the employee was ultimately cleared of the charges and was reinstated, Dandy learned that his promise to the employee was contrary to the employer's policies; however, since he had given the assurance and the claimant had not contradicted him, a settlement resulting in payment of about $1,000.00 was made with the employee.

The claimant had not contradicted Dandy because in January 2012 she had been given a written warning and a suspension after an incident in which she confronted the then-administrator with something the then-administrator had done which was contrary to the employer's policies; she became "gun-shy" of confrontations with her superiors regarding those superior's conduct, even where she might have reason to know that the superior's conduct was incorrect.

The only corrective action the claimant had been given was the January 30, 2012 written warning and suspension. Dandy had become the new administrator of the facility on May 17, 2012, but until October 18, 2012 he had not provided the claimant with any warnings or reprimands regarding her conduct.

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 which 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 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. 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 gravity of the incident and the number of prior violations or prior warnings are factors considered when analyzing misconduct. The lack of a current warning may detract from a finding of an intentional policy violation.

The reason cited by the employer for discharging the claimant is her failure to meet the employer's performance expectations. Misconduct connotes volition. The mere fact that an employee might have various incidents of unsatisfactory job performance does not establish the necessary element of intent; misconduct connotes volition. A failure in job performance is not misconduct unless it is intentional. *Huntoon*, supra; *Lee v. Employment Appeal Board*, 616 N.W.2d 661 (Iowa 2000). There is no evidence the claimant intentionally failed to perform her work to the best of her abilities. In order to establish the necessary element of intent, the final incident must have occurred despite the claimant's knowledge that the occurrence could result in the loss of her job. *Cosper*, supra; *Higgins v. IDJS*, 350 N.W.2d 187 (Iowa 1984). The claimant had not previously been effectively warned that there were concerns regarding her performance and that further issues could result in termination. *Higgins*, supra. The employer has not met its burden to show disqualifying misconduct. *Cosper*, supra. Even if the employer had a good business reason for discharging the claimant, 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.

DECISION:

The representative's November 28, 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/pjs