IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

KATHY A VOSS-BOLDT
Claimant

GENESIS DEVELOPMENT
Employer

APPEAL NO. 11A-UI-03179-SWT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 07/04/10
Claimant: Appellant (2)

Section 96.5-2-a – Discharge

STATEMENT OF THE CASE:

The claimant appealed an unemployment insurance decision dated March 7, 2011, reference 02, that concluded she was discharged for work-connected misconduct. A telephone hearing was held on April 26, 2011. The parties were properly notified about the hearing. The claimant participated in the hearing with her attorney, Tom Murphy. Brenda Larkin participated in the hearing on behalf of the employer with a witness, Tori Bullard. Exhibits C-A, C-1 – 3, C-5 – 6, 17 – 29, 32 – 34, 36, and 38 – 40 were admitted into evidence at the hearing. Official notice is taken of the Agency's records regarding the claimant's unemployment insurance claim, which show that (1) the claimant filed a claim for benefits during the week of July 4, 2010, after her suspension; (2) an initial determination was issued on August 4, 2010, denying benefits because the claimant had been placed on disciplinary suspension for violating company rules; (3) a contested case hearing on appeal 10A-UI-11137-ET was held on October 26, 2010, in which both parties participated, and afterward an administrative law judge decision was issued on October 27, 2010. The administrative law judge found the clamant had been placed on a disciplinary suspension, the claimant's testimony was credible and outweighed the hearsay testimony from the administrator, and the claimant had not abused the resident as alleged by the employer. The administrative law judge ruled that the claimant's disciplinary suspension was not for work-connected misconduct. The employer never appealed that decision. This decision was discussed in testimony during the hearing, but official notice of the actual chronology of the procedural history is taken, as it is important in deciding this case. If a party objects to taking official notice of these matters, the objection must be submitted in writing no later than seven days after the date of this decision.

ISSUES:

Was the claimant discharged for a current act of work-connected misconduct?

Is the administrative law judge decision issued October 27, 2010, binding in this proceeding?

FINDINGS OF FACT:

The claimant worked full-time for the employer as a residential aide in the employer's residential care facility from July 1, 2009, to July 7, 2010. The residents in the facility have mental illnesses. She was informed and understood that under the employer's work rules, employees were required to treat residents with dignity and respect.

The claimant was scheduled to work from 2 to 10 p.m. on July 6, 2010. She had witnessed a resident (referred to in this decision as R1) misbehaving—including dumping water on the floor, taking food from other residents in the dining room, yelling, walking the hall with her eyes closed and running into things, and putting her tongue in another resident's mouth. The clamant was having difficulty keeping control of R1 so that she could do her work.

At around 6 p.m. the claimant decided get R1 to sit and settle down. She led R1 to a chair by pulling on her shirt sleeve. When they got to the chair, she told R1 to sit down. R1 threw herself into the chair. Shortly afterward, R1 was at a cart pouring water from a pitcher into a cup. The claimant yelled "no" and grabbed the pitcher and cup from R1. The claimant then threw the cup to the floor. She then pulled R1 back to the chair and told her to sit down.

Another resident (referred to in this decision as R2) and a residential aide, Tabitha Alvila, were in the area when the claimant was trying to get R1 to sit down and saw some of what happened on July 6. Later that day, Alvila, reported to the nursing director, Tori Bullard, that the claimant was not dealing well with the R1's behaviors and she would speak to Bullard on July 7 about this.

On July 7, R2 approached Bullard and reported that the claimant had grabbed R1's sleeve and had thrown her into the chair. She also reported that the claimant had yelled "no" when R1 tried to pour herself some water and had yanked the cup out of R1's hands and threw the cup to the floor.

Later, Bullard called Alvila to find out what had happened. Alvila reported that she had heard the claimant say "no." She saw the claimant yank the pitcher and then the cup from R1's hands. She also saw the claimant throw the cup across the room.

Late afternoon on July 7, R1 reported to Alvila that the claimant had pinched her when she was making her sit down and showed her a bruise on her arm. R1's primary language is Spanish, so Alvila translated to Bullard and the claimant what R1 had said. R1 also showed Bullard the bruise on her arm. R1 may have been inadvertently pinched in the process of getting her to sit down.

Later that day, Bullard and the administrator, Brenda Larkin, met with the claimant and suspended the claimant without pay pending an investigation of allegations that she violated the employer's work rules by mistreating R1 on July 6.

As part of its internal investigation, the employer had Alvila prepare statements on July 7 about what she had witnessed on July 6 and what R1 had said and done on July 7 when she spoke to Alvila, Bullard, and the claimant. Bullard also prepared a statement on July 7 documenting her conversation that day with R2. The employer completed its internal investigation by July 14, 2010. No additional employment action was taken against the claimant based on its internal investigation; she remained suspended without pay. The results of the internal investigation

were shared with state authorities, and the employer decided it would take no employment action unless and until the state authorities took action.
The claimant filed a new claim for unemployment insurance benefits during the week of July 4, 2010. After a fact-finding interview, an initial determination was issued on August 4, 2010, denying benefits because the Agency determined the claimant had been placed on disciplinary suspension for violating company rules.

In September 2010, at the behest of state authorities, the employer gathered statements from employees regarding the claimant's conduct on July 6 and submitted those to the state. The employer was aware of and had copies of all the statements. No additional employment action was taken against the claimant based the statements submitted in September 2010; the claimant remained suspended without pay unless and until the state authorities took action.

A contested case hearing was before an administrative law judge was held on October 26, 2010, during which the clamant and administrator, Brenda Larkin, testified. An administrative law judge decision was issued on October 27, 2010. The administrative law judge found the clamant had been placed on a disciplinary suspension, the claimant's testimony was credible and outweighed the hearsay testimony from the administrator, and the claimant had not abused the resident as alleged by the employer. The administrative law judge ruled that the claimant's disciplinary suspension was not for work-connected misconduct. The employer never appealed that decision.

The claimant continued to remain suspended without pay until February 3, 2011, when she was discharged. She was discharged because state authorities had notified the employer on January 28, 2011, that the claimant could not continue in employment in the facility.

REASONING AND CONCLUSIONS OF LAW:

The ultimate issue in this case is whether the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law. A review of the applicable statutes and case law is appropriate here.

The unemployment insurance law disqualifies claimants discharged for work-connected misconduct. Iowa Code § 96.5-2-a. The rules define misconduct as (1) deliberate acts or omissions by a worker that materially breach the duties and obligations arising out of the contract of employment, (2) deliberate violations or disregard of standards of behavior that the employer has the right to expect of employees, or (3) carelessness or negligence of such degree of recurrence as to manifest equal culpability, wrongful intent, or evil design. 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 misconduct within the meaning of the statute. 871 IAC 24.32(1).

The unemployment insurance rules provide that when a claim is filed and the reason for the claimant's unemployment is the result of a disciplinary layoff or suspension imposed by the employer, the claimant is considered as discharged, and the issue of misconduct must be resolved. Alleged misconduct or dishonesty without corroboration is not sufficient to result in disqualification. 871 IAC 24.32(9).

Iowa Code section 96.6-3 provides that the parties shall be duly notified of the administrative law judge's decision, together with the administrative law judge's reasons for the decision, which

is the final decision of the department, unless within fifteen days after the date of notification or mailing of the decision, further appeal is initiated pursuant to this section. Furthermore, Iowa Code § 96.6-4 states that "A finding of fact or law, judgment, conclusion, or final order made pursuant to this section by an employee or representative of the department, administrative law judge, or employment appeal board is binding only upon the parties to proceeding brought under this chapter…." While the statute goes on to explain that findings and conclusions are not binding in other proceedings, the implications are clear that findings and conclusions of an administrative law judge are binding on the parties to a proceeding brought under chapter 96.

The Iowa Supreme Court has ruled that appeals from unemployment insurance decisions must be filed within the time limit set by statute and become final in the absence of a timely appeal. Franklin v. IDJS, 277 N.W.2d 877, 881 (Iowa 1979).

In this case, the administrative law judge found that the claimant had been placed on disciplinary suspension and concluded the disciplinary suspension was not for work-connected misconduct. The employer did not appeal this decision and it became final. The employer had a full opportunity to litigate the issue during the contested case hearing and, if the employer disagreed with anything in the decision, the right to appeal it. Now the employer is asking that the issue of misconduct be litigated again. As of the date of the hearing, the employer had completed its internal investigation and had knowledge of all of the information gathered in October at the behest of the state. It had a full opportunity at that hearing to present witnesses and statements to prove the claimant committed work-connected misconduct. The judge hearing the case concluded that misconduct had not been proven.

The Iowa Supreme Court in Toomer v. Iowa Dept. of Job Service, 340 NW 2d 594, 598 (Iowa 1983) ruled under similar circumstances that the claimants, Toomer and Knockel, who had failed to appeal an adverse decision, were precluded by the doctrine of claim preclusion from collaterally attacking the agency's final decision in their contested cases in a subsequent action challenging a rule. The court cited the case of United States v. Utah Construction & Mining Co., 384 U.S. 394, 422, (1966), in which the United States Supreme Court declared: "When an administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate, the courts have not hesitated to apply res judicata to enforce repose."

In addition, Iowa courts have ruled that the doctrine of issue preclusion prevents parties to a prior action in which judgment has been entered from relitigating in a subsequent action issues of fact or law raised and resolved in the previous action. Hunter v. City of Des Moines, 300 N.W.2d 121, 123 (Iowa 1981); Brown v. Kossouf, 558 N.W.2d 161, 163 (Iowa 1997).

The Iowa Supreme Court in Hunter established four conditions that must be satisfied before issue preclusion is permitted. Each of these conditions has been satisfied in this case. First, the issue of misconduct concluded in 10A-UI-11137-ET is the same conduct the employer seeks to establish in this case. Second, the misconduct issue was raised and litigated in the prior appeal. Third, this issue was material and relevant to the disposition of the appeal case. Fourth, this issue was necessary and essential to the decision. Hunter, 300 N.W.2d at 125-26.

I acknowledge an argument that the suspension was not actually a "disciplinary suspension," but simply was a "suspension pending investigation" and, therefore, should be treated differently. A typical disciplinary suspension is a corrective action based on an employee's

conduct, usually for a specific time. On the other hand, when an employer suspends without pay pending investigation, logically there are two separations—a separation from work at the point of suspension and later a separation from employment at the point of discharge—with a potential disqualification at each stage dependent on quality and quantity of the evidence of misconduct the employer has to present at each stage. In this case, the judge in 10A-UI-11137-ET determined that this was a disciplinary suspension and adjudicated the misconduct issue based on the evidence of claimant's conduct on July 6. If the employer disagreed with these findings and conclusions, it should have appealed. Based on the principles discussed above, I conclude that decision is binding and should not be adjudicated again.

In the alternative, and to fully resolve the issues in this case, my findings of fact show how I resolved the disputed factual issues in this case by carefully assessing the credibility of the witnesses and the reliability of the evidence and by applying the proper standard and burden of proof. My findings consider all the Exhibits in evidence, including the Exhibits C-1 – 3, C-5 – 6. The only additional evidence that the employer had when it made its decision to discharge was the documentation received from the state. But the documentation from the state is simply evidence to be considered as part of the whole record. My findings track those of the judge in 10A-UI-11137-ET, but include an additional finding regarding the claimant's taking the water pitcher and cup from R1 and throwing the cup, which was not part of the judge's findings in 10A-UI-11137-ET. I do not know whether evidence regarding the water pitcher and cup was presented in the record of in 10A-UI-11137-ET, but there was evidence on this issue presented in my hearing, and the claimant offered no evidence to rebut that evidence.

The employer has the burden to prove the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law. 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).

While the employer may have been justified in discharging the claimant (in fact, it was required to, since the claimant could no longer be employed there), no current act of work-connected misconduct as defined by the unemployment insurance law has been established by a preponderance of the evidence.

The unemployment rules provide: "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." 871 IAC 24.32(8).

Viewed simplistically, one could conclude that any act occurring about seven months before a discharge cannot be a current act. Using this analysis, a dishonest employee who successfully conceals an act from management would not be subject to disqualification if management later discovers the dishonesty several months later. The only logical interpretation of the rule is that it prevents an employer from using past acts of misconduct of which the employer was aware as the grounds for a discharge some time later.

This view is supported by the Iowa Court of Appeals' interpretation of this rule in Greene v. Employment Appeal Board, 426 N.W.2d 659 (Iowa App. 1988). In Greene, the court ruled that to determine whether conduct prompting the discharge constitutes a disqualifying current act, the decision maker must consider the date on which the conduct came to the employer's attention and the date on which the employer notified the employee that the conduct provided grounds for dismissal. Any delay in taking action must have a reasonable basis. The court decided that the three-day delay between final act and notice of possible dismissal was not unreasonable. *Id*. at 662.

The act in this case occurred on July 6 and the employer was immediately aware of the conduct and completed its internal investigation about a week later. The statements gathered in September contain no information about the claimant's conduct on July 6. The employer could have made a decision regarding the claimant's continued employment at that time based on its own assessment of the claimant's conduct. Instead, the employer chose to suspend the claimant and waited almost seven months to make the decision regarding the claimant's employment, deferring to the state to make a decision. I cannot conclude the discharge was based on a current act under the circumstances present here. An argument could be made that the suspension tolls the current act question since the claimant knew as of July 7 that her job was in jeopardy. I conclude that the inordinate delay in making the decision to discharge was unreasonable and the discharge was not for a current act.

Finally, I conclude the employer has not proven willful and substantial misconduct in this case. The employer's evidence about what happened between the claimant and R1 consisted of hearsay statements from persons who were not under oath or subject to cross-examination. The Iowa Court of Appeals has established standards for determining whether hearsay evidence "rises to the necessary levels of trustworthiness, credibility, and accuracy required by a reasonably prudent person in the conduct of serious affairs." Schmitz v. Iowa Department of Human Services, 461 N.W.2d 603 (Iowa App. 1990). These standards involve a common sense evaluation of: (1) the nature of the hearsay; (2) the availability of better evidence; (3) the cost of acquiring better information; (4) the need for precision; and (5) the administrative policy to be upheld. Id. at 608.

The hearsay in this case is ordinary hearsay not subject to any known exception to the hearsay rule that would buttress its reliability. Two persons provided statements that the claimant threw R1 into a chair. Neither one was available to describe what she saw. The claimant said R1 threw herself into the chair. I have no way to know whether Alvila or R2 were in a position to perceive this event accurately. As the hearing was by telephone, non-hearsay evidence was easily available at no cost and with no burden to the employer. Since the hearing involves resolving disputed facts based on credibility and the end result of the hearing grants or denies benefits to an unemployed person, the need for accurate information is essential. Finally, there is no policy that would favor presenting hearsay statements over live witnesses in this case.

I cannot conclude that the claimant's actions in taking the resident by the sleeve and trying to get her to sit down was misconduct. If in the process the claimant inadvertently pinched the claimant, it would not be deliberate misconduct. I found that the claimant did not throw the resident into the chair as alleged. Under my findings, the most culpable act committed was the throwing of the cup to the floor. The claimant testified about R1's prior conduct, which included dumping water on the floor. In light of this, I would conclude the claimant exercised poor judgment in losing her temper but it was not an act of disqualifying misconduct.

DECISION:

The unemployment insurance decision dated March 7, 2011, reference 02, is reversed. The claimant is qualified to receive unemployment insurance benefits, if she is otherwise eligible.

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Steven A. Wise
Administrative Law Judge

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Decision Dated and Mailed

saw/kjw