

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

MELISSA M SCHWIERJOHANN
Claimant

CARE INITIATIVES
Employer

APPEAL NO. 20R-UI-12290-B2T

**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 05/03/20
Claimant: Appellant (2)

Iowa Code § 96.5-2-a – Discharge for Misconduct

STATEMENT OF THE CASE:

Claimant filed an appeal from a decision of a representative dated July 1, 2020, reference 01, which held claimant ineligible for unemployment insurance benefits. After due notice, a hearing was scheduled for and held on December 3, 2020. Claimant participated personally. Employer participated by hearing representative Jennifer Groenwald and witnesses Nick Jedlicka and Jordan Drake. Claimant's Exhibit B was admitted into evidence in addition to previously submitted Employer's Exhibits 1-6.

ISSUE:

Whether claimant was discharged for misconduct?

FINDINGS OF FACT:

The previous findings of fact are incorporated herein. In addition to those findings, the administrative law judge adds additional findings ascertained through additional testimony received.

A CNA, Ms. Drake, heard of an unwitnessed fall that had occurred on or around April 16, 2020. She told the Assistant Director of Nursing of the fall on that date, and again the next day. When she found out that no tests had taken place on the client within three days of the fall – as she believed procedures to require – she searched out the Director of Nursing. The CNA stated that she was unable to locate the DON for two days, and after this time, she went to the Administrator to report that there was an unwitnessed fall which had occurred a few days ago and to the best of her knowledge, nothing had been done.

The administrator immediately contacted the DON (claimant). The administrator said that he believed claimant knew about the fall and did nothing. The Administrator offered no facts in support of this allegation. The claimant stated the first she learned about the fall was through her discussion with the administrator. During this discussion, the Administrator shared that he'd received the information from Ms. Drake.

Later that day, claimant confronted Ms. Drake near other coworkers and clients. Claimant told employer that she felt disrespected in that Ms. Drake would not have followed proper protocol and come to her before going to the Administrator. Ms. Drake stated that she didn't know why she never tried to text claimant with her concerns prior to going to the Administrator. Claimant stated that if she were to go outside the chain of command again in the future, this could put her job in jeopardy.

Claimant stated that she did not document this conversation with Ms. Drake, and further stated that although she'd threatened claimant's job, that she did not consider this to be a warning. Claimant could not designate a specific violation of company policy done by Ms. Drake going to the administrator.

REASONING AND CONCLUSIONS OF LAW:

For the reason stated below, the administrative law judge concludes that claimant was not discharged for job-related misconduct. Benefits are allowed.

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.

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).

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. Iowa Department of Job Service*, 321 N.W.2d 6 (Iowa 1982), Iowa Code § 96.5-2-a.

The employer bears the burden of proving that a claimant is disqualified from receiving benefits because of substantial misconduct within the meaning of Iowa Code section 96.5(2). *Myers*, 462 N.W.2d at 737. 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. Because our unemployment compensation law is designed to protect workers from financial hardships when they become unemployed through no fault of their own, we construe the provisions "liberally to carry out its humane and beneficial purpose." *Bridgestone/Firestone, Inc. v. Emp't Appeal Bd.*, 570 N.W.2d 85, 96 (Iowa 1997). "[C]ode provisions which operate to work a forfeiture of benefits are strongly construed in favor of the claimant." *Diggs v. Emp't Appeal Bd.*, 478 N.W.2d 432, 434 (Iowa Ct. App. 1991).

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 Ct. 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. *State v. Holtz*, 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. *State v. Holtz*, Id. In this matter, there are two main points of credibility to be determined.

First, whether the CNA did attempt for two days to find the claimant before going to the administrator. It is not credible to believe that Ms. Drake put forth a good effort to follow proper chain of command as she was working the same hours of the claimant and had her text number. But, this lack of following the proper chain should certainly not, in and of itself, result in a threat of job loss.

Second, whether the claimant knew of the injury. Although the Administrator argues that claimant had to know of the injury, no documentation or testimony was offered to prove when or how the claimant knew of the injury prior to being told by the Administrator telling claimant of the injury. Curiously, when the claimant met with Ms. Drake later in the day, little to none of the conversation surrounded the client and the information Ms. Drake had concerning the fall. Instead, the focus was on following the chain of command and repercussions should the CNA not do so in the future.

The gravity of the incident, number of policy violations and prior warnings are factors considered when analyzing misconduct. The lack of a current warning may detract from a finding of an intentional policy violation. Excessive absences are not misconduct unless unexcused. Absences due to properly reported illness can never constitute job misconduct since they are not volitional. The employer has the burden of proof in establishing disqualifying job misconduct. *Cosper v. Iowa Dep't of Job Serv.*, 321 N.W.2d 6 (Iowa 1982).

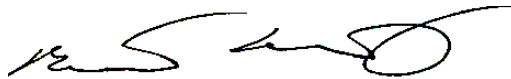
In this matter, the evidence fails to establish that claimant was discharged for an act of misconduct when claimant violated employer's policy concerning threatening a worker's job for not following the proper chain of command. Claimant was not warned concerning this policy.

The last incident, which brought about the discharge, fails to constitute misconduct because the job loss seems to be mainly predicated on the Administrator's belief that claimant had hidden the fall from him and had not properly reported the fall, even though she knew that had happened. If employer had shown this to be the case, this would have been a compelling reason for termination. But, employer never showed that claimant knew of and hid the fall. Claimant's statement that 'the first she heard of the fall was in her conversation with the Administrator' was not refuted by any other evidence.

Absent this reason for termination being proven, claimant was then terminated for threatening a CNA with job loss should she not follow the chain of command in the future. The claimant had never been warned by the Administrator that this type of conversation with an underling would lead to immediate termination. Absent a warning as to the action leading to termination, it is not seen as misconduct. The administrative law judge holds that claimant was not discharged for an act of misconduct and, as such, is not disqualified for the receipt of unemployment insurance benefits.

DECISION:

The decision of the representative dated July 1, 2020, reference 01, is reversed. Claimant is eligible to receive unemployment insurance benefits, provided claimant meets all other eligibility requirements.



Blair A. Bennett
Administrative Law Judge

December 10, 2020
Decision Dated and Mailed

bab/scn