

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

ASHLEY B DELL
Claimant

BEACON OF HOPE HOSPICE INC
Employer

APPEAL 19A-UI-08286-DB-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

**OC: 03/10/19
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 filed an appeal from the October 18, 2019 (reference 03) unemployment insurance decision that allowed unemployment insurance benefits to the claimant based upon her discharge from employment. The parties were properly notified of the hearing. A telephone hearing was held on November 13, 2019. The claimant, Ashley B. Dell, participated personally. The employer, Beacon of Hope Hospice Inc., was represented by Sam Krauss and participated through witnesses Sarah Paschal and Bonnie Davidson. Michael Saad and Jennifer Romano observed on behalf of the employer. Employer's Exhibit 1 was admitted. The administrative law judge took official notice of the claimant's administrative records.

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: Claimant was employed as a full-time registered nurse case manager. Claimant began her employment on April 1, 2019 and her employment ended on September 18, 2019. Claimant's job duties included providing direct care and managing coordinated care with others including social workers, chaplains, physicians and nurses for patients in hospice. Ms. Davidson was claimant's immediate supervisor.

On September 10, 2019, claimant received a written warning for two incidents that occurred on September 9, 2019. One incident involved the claimant receiving a message from a patient's family member requesting a prescription refill and diuretics in which the claimant failed to respond to. The other incident involved a patient who had a change in condition that claimant was required to attend to immediately. Claimant's patient load had increased in August from approximately 12 patients to 22 patients. Claimant asked if an LPN could make the visit instead due to her increased patient load. Claimant received no response to her question from

Ms. Davidson. Claimant had been previously instructed to prioritize patients who had a change in condition over other patients. The warning told her that any future violations would result in further disciplinary action, up to and including termination. See Exhibit 1.

On September 12, 2019, claimant reported to the death of a patient. She asked another nurse the time of death of the patient and completed her telephone calls to the coroner, the police department, and the funeral home. She asked how the patient passed to ensure that the proper medications had been in place and she completed her medical charting. Claimant gave condolences to the family along with two hugs while she was there. She was never told that any of her interactions with the Director of Nursing or the family members was inappropriate.

The Director of Nursing telephoned Ms. Davidson and reported that the family felt like the claimant showed no emotions and was not compassionate. See Exhibit 1. Ms. Davidson learned that the claimant did not also pronounce the patient as deceased upon arrival. Claimant did not pronounce the patient as deceased upon arrival because another nurse had already done so approximately thirty minutes prior. Claimant was not trained to again pronounce a patient deceased after another nurse had already done so. Claimant also believed it would be disrespectful to move the body for that purpose since the other nurse had already pronounced the death of the patient. The incident report completed by the employer does not state that the claimant's failure to pronounce the patient deceased was considered in discharging the claimant from employment. See Exhibit 1. Claimant was placed on suspension after the Director of Nursing's complaint to Ms. Davidson and was discharged on September 18, 2019 for the September 12, 2019 incident.

Claimant has received benefits of \$3,169.00 for the seven weeks between September 22, 2019 and November 9, 2019 following her separation from this employer. The employer participated in the fact-finding interview by providing information and documentation in its statement of protest that included the reason and date of discharge, and a copy of the disciplinary action provided to claimant.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged for no disqualifying reason. Benefits are allowed, provided the claimant is otherwise eligible.

As a preliminary matter, I find that the Claimant did not quit. Claimant was discharged from employment.

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:

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.

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 Department of Job Service*, 275 N.W.2d 445, 448 (Iowa 1979).

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

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.

Iowa Admin. Code r. 871-24.32(8) provides:

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.

Iowa Admin. Code r. 871-24.32(5) provides:

Trial period. A dismissal, because of being physically unable to do the work, being not capable of doing the work assigned, not meeting the employer's standards, or having been hired on a trial period of employment and not being able to do the work shall not be issues of misconduct.

The employer has the burden of proof in establishing disqualifying job misconduct. Iowa Code § 96.6(2); *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). What constitutes misconduct justifying termination of an employee and what misconduct warrants denial of unemployment insurance benefits are two separate decisions. *Pierce v. Iowa Dep't of Job Serv.*, 425 N.W.2d 679 (Iowa Ct. App. 1988). The misconduct must be "substantial." *Lee v. Employment Appeal Bd.*, 616 N.W.2d 661, 665 (Iowa 2000) (citation omitted). Misconduct serious enough to warrant discharge is not necessarily serious enough to warrant a denial of job insurance benefits. *Id.* (citation omitted). Mere negligence is not sufficient. *Id.* at 666.

When the conduct is based on carelessness, the carelessness must actually indicate a "wrongful intent" to be disqualifying in nature. *Newman v. Iowa Dep't of Job Serv.*, 351 N.W.2d

806 (Iowa Ct. App. 1984). Negligence does not constitute misconduct unless recurrent in nature; a single act is not disqualifying unless indicative of a deliberate disregard of the employer's interests. *Henry v. Iowa Dep't of Job Serv.*, 391 N.W.2d 731 (Iowa Ct. App. 1986). Further, poor work performance is not misconduct in the absence of evidence of intent. *Miller v. Emp't Appeal Bd.*, 423 N.W.2d 211 (Iowa Ct. App. 1988). The law limits disqualifying misconduct to substantial and willful wrongdoing or repeated 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." *Greenwell v. Emp't Appeal Bd.*, 879 N.W.2d 222, 228 (Iowa Ct.App. 2016)(citing Iowa Admin. Code r. 871-24.32(1)a).

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.* After assessing the credibility of the witnesses who testified during the hearing, considering the applicable factors listed above, and using her own common sense and experience, the administrative law judge finds the claimant's testimony regarding her interactions with the family and Director of Nursing on September 12, 2019 is more credible than the Director of Nursing's non-descriptive and non-specific reports to Ms. Davidson in Exhibit 1.

In this case, the claimant's interactions with the family and Director of Nursing on September 12, 2019 were not misconduct. The employer has failed to meet its burden of proof in establishing a final incident of disqualifying job-related misconduct. As such, benefits are allowed, provided the claimant is otherwise eligible. Because benefits are allowed, the issue of overpayment is moot. The employer's account may be charged for benefits paid.

DECISION:

The October 18, 2019 (reference 03) unemployment insurance decision is affirmed. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided she is otherwise eligible. The claimant is not overpaid benefits due to this separation from employment. The employer's account may be charged for benefits paid.

Dawn Boucher
Administrative Law Judge

Decision Dated and Mailed

db/scn