

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

LINDA J STANLEY

Claimant

APPEAL NO. 17A-UI-12536-S1-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

DSM HEALTHCARE MANAGEMENT

Employer

OC: 10/15/17

Claimant: Respondent (1)

Section 96.5-2-a – Discharge for Misconduct

Section 96.3-7 – Overpayment

STATEMENT OF THE CASE:

DSM Healthcare Management (employer) appealed a representative's November 29, 2017, decision (reference 04) that concluded Linda Stanley (claimant) was eligible to receive unemployment insurance benefits. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was scheduled for November 29, 2017. The claimant participated personally. The employer participated by Amy Rowan, Director of Nursing, and Tami Little, Administrator. Exhibit D-1 was received into evidence.

ISSUE:

The issue is whether the claimant was separated from employment for any disqualifying reason.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds that: The claimant was hired on March 8, 2017, as a full-time certified nursing assistant. The claimant signed for receipt of the employer's handbook on March 8, 2017, and August 25, 2017. The claimant heard employees talking about how the employer was trying to get rid of her.

The claimant worked with charge nurse Janet. Janet was rude, disrespectful, and yelled at the claimant. The claimant brought her concerns to the director of nursing. Nothing was done about Janet except the two worked on different sides of the facility. In mid-August 2017, the claimant was scheduled to work on Side Two and Janet was scheduled to work on Side One. When the claimant arrived at work she found the schedule changed and both were assigned to work on Side One. The claimant refused to work Side One and was told to go home. On August 17, 2017, the employer issued the claimant a written warning for failure to work on Side One as assigned. The employer notified the claimant that further infractions could result in termination from employment.

On November 3, 2017, the claimant and a co-worker were the only certified nursing assistants working in the facility with fifty residents. The employer was so understaffed that the two did not

get any breaks during their shift from 2:00 p.m. to 10:22 p.m. The employer did not have anyone to fill the shift after 1:00 a.m. The claimant and the other worker said they would work that shift if the employer would let them leave for a while. The two left in a hurry and forgot to clock out. While they were out, the employer called to say someone else could work for them. The next time the claimant worked she noticed the employer had clocked her in and she did not need to fix her time sheet.

On November 5, 2017, the claimant was working with another certified nursing assistant and charge nurse Stephanie. The claimant called the certified nursing assistant to say she was having issues with a resident. The certified nursing assistant said she would notify Stephanie. In the meantime, the claimant dressed the resident but did not put the resident's teeth in. The previous charge nurse informed the certified nursing assistants that the false teeth should not be put in the resident's mouth.

Stephanie arrived at the room and started yelling that she wanted the teeth in the resident's mouth right now. The claimant said to the other certified nursing assistant, "Her teeth are on the counter. You can put them in". Stephanie called the director of nursing and returned to the claimant. Stephanie told the claimant to pack her things and punch out.

On November 6, 2017, the administrator told the claimant she was terminated for being insubordinate to the charge nurse on November 5, 2017, and for stealing time on November 3, 2017. The other certified nursing assistants were not terminated.

The claimant filed for unemployment insurance benefits with an effective date of October 15, 2017. The employer participated personally at the fact finding interview on November 7, 2017, by Amy Rowan.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow the administrative law judge concludes the claimant was not discharged for misconduct.

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).

The employer has the burden of proof in establishing disqualifying job misconduct. *Cosper v. Iowa Department of Job Service*, 321 N.W.2d 6 (Iowa 1982). If a party has the power to produce more explicit and direct evidence than it chooses to do, it may be fairly inferred that other evidence would lay open deficiencies in that party's case. *Crosser v. Iowa Department of Public Safety*, 240 N.W.2d 682 (Iowa 1976). The employer had the power to present testimony but chose not to do so. Three employees were in the room and heard what was said but only one person testified at the appeal hearing. The employer did not provide first-hand testimony at the hearing and, therefore, did not provide sufficient eye witness evidence of job-related misconduct to rebut the claimant's denial of said conduct. The employer did not meet its burden of proof to show misconduct. Benefits are allowed, provided the claimant is otherwise eligible.

DECISION:

The representative's November 29, 2017, decision (reference 04) is affirmed. The employer has not met its burden of proof to establish job related misconduct. Benefits are allowed, provided claimant is otherwise eligible.

Beth A. Scheetz
Administrative Law Judge

Decision Dated and Mailed

bas/rvs