IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

SHELLEY L MERGEN
Claimant

GOOD SAMARITAN SOCIETY INC
Employer

APPEAL NO. 15A-UI-07878-S1-T

ADMINISTRATIVE LAW JUDGE DECISION

OC: 05/17/15
Claimant: Appellant (2)

Section 96.5-2-a – Discharge for Misconduct

STATEMENT OF THE CASE:

Shelley Mergen (claimant) appealed a representative's July 2, 2015, decision (reference 01) that concluded she was not eligible to receive unemployment insurance benefits after her separation from employment with Good Samaritan Society (employer). After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was scheduled for July 31, 2015. The claimant participated personally. The employer participated by Carol Wilburn, Administrator, and Kyla Yates, Human Resources Director.

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 December 2, 2014, as a full-time dietary manager. The claimant signed for receipt of the employer's handbook on December 17, 2014. The claimant was trained in dietary matters. Many of the residents chose smaller portions because that is what they were used to eating at home. They could always elect to ask for more food at any time. Under state and federal regulations a resident may make that choice without a doctor's order. The claimant was working on and had months to complete her operating procedures for the job. She was working closely with the registered dietician.
On April 16, 2015, the employer talked to the claimant about alternate meals, state and federal policies, and sunny-side-up eggs. The employer told the claimant that she should provide alternate meals to residents if they requested them.

On April 25, 2015, the kitchen was serving hot dogs and brats. There was tuna available for those who did not like the other choices. A human resources person told the cook that a resident wanted a ham sandwich. The cook said she did not have ham available. The claimant asked if the resident wanted a hot dog. The cook informed the human resources person she had tuna. The claimant left the cook in charge of the situation and returned to assisting a resident. The employer felt the claimant limited the resident's food options.

On May 1, 2015, the employer met with the claimant to discuss the number of residents who elected smaller portion sizes. The claimant talked about how larger portions are overwhelming to some residents. The employer told the claimant that residents were losing weight. There was one resident who lost weight before the claimant started her job. The claimant told the employer the smaller portion was a request made by the resident not something the claimant decided. The claimant told the employer she had been complimented in Wisconsin where she worked previously. The employer excused herself and walked away. The claimant followed the employer to her office to continue the conversation and discuss it further. The discussion became more heated.

On May 3, 2015, the claimant was talking to the registered dietician and noticed in the employer's policies that in order to place residents on smaller portions, the employer required a doctor's order. The claimant did not know of this requirement until May 3, 2015. The employer had not mentioned the requirement on May 1, 2015. On May 5, 2015, the employer terminated the claimant.

REASONING AND CONCLUSIONS OF LAW:

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

Iowa Code § 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 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). An employer may discharge an employee for any number of reasons or no reason at all, but if it fails to meet its burden of proof to establish job related misconduct as the reason for the separation, employer incurs potential liability for unemployment insurance benefits related to that separation. Inasmuch as employer had not previously warned claimant about any of the issues leading to the separation, it has not met the burden of proof to establish that claimant acted deliberately or negligently in violation of company policy, procedure, or prior warning. The employer talked to the claimant on April 16, 2015, but did not issue a written warning stating what could happen to the claimant if she engaged in such conduct again. If an employer expects an employee to conform to certain expectations or face discharge, appropriate (preferably written), detailed, and reasonable notice should be given. The employer did not meet its burden of proof to show misconduct. Benefits are allowed.

DECISION:

The representative's July 2, 2015, decision (reference 01) is reversed. The employer has not met its proof to establish job related misconduct. Benefits are allowed.

_____
Beth A. Scheetz
Administrative Law Judge

_____
Decision Dated and Mailed

bas/pjs