

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

CASSANDRA S HARVEY
Claimant

TENCO INDUSTRIES INC
Employer

APPEAL 16A-UI-02776-NM-T
ADMINISTRATIVE LAW JUDGE
DECISION

OC: 02/07/16
Claimant: Appellant (1)

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Admin. Code r. 871-24.32(1)a – Discharge for Misconduct

STATEMENT OF THE CASE:

The claimant filed an appeal from the February 24, 2016, (reference 01) unemployment insurance decision that denied benefits based upon her discharge for misconduct. The parties were properly notified of the hearing. A telephone hearing was held on March 28, 2016. The claimant Cassandra Harvey participated and testified. The employer, Tenco Industries, participated through human resource director, Angela Lennie, residential director, Tracey Barnett, and team leader, Judy Dunning.

ISSUE:

Was the claimant discharged for disqualifying job-related misconduct?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed full time as a residential instructor from August 25, 2014, until this employment ended on January 29, 2016, when she was discharged.

The employer is in the business of providing services to individuals with physical, mental, and intellectual disabilities. On January 27, 2016, a client came in upset by some contact claimant was having with him. The client reported that claimant was having personal issues with her boyfriend, had begun texting him asking him to be her cuddle buddy, and persisted when he told her he was not interested. The client told Barnett he felt like he was being stalked by the claimant and was afraid to go home. The client showed Barnett the text messages claimant had sent him and she was able to confirm the messages came from claimant's phone. One of the messages said, "I know it's wrong, I do, I just can't help the feelings." On January 29, 2016, Barnett met with the claimant to discuss the situation. Claimant admitted the texts were from her phone. Prior to this claimant had been warned on several occasions about crossing professional boundaries with clients. The employer was not certain when these warnings occurred, but Barnett testified that claimant was warned further violations could lead to

termination. Claimant was informed by Barnett on January 29 that she was being terminated for again crossing professional boundaries. Claimant stated that she wished things were different, but she understood. Barnett testified claimant's behavior was taken seriously because it not only violates the employer's policies, but could lead to violations of state law.

Claimant admitted that the text messages in question came from her phone, but denied that she intended to send them to a client. Claimant testified she had gotten her phone wet and this led to a malfunction where it sent text messages to individuals other than the intended recipients. When asked why she had the phone number of a client who was not her client, the claimant responded that the client had gotten her phone number from one of her clients and had begun texting her. When asked why she stored the client's phone number rather than deleting it and reporting it to management, the claimant testified she saved the number in case the client ever needed anything. The claimant later testified that it was common for many clients to have phone numbers for staff members other than the ones they were working with.

Claimant testified the text messages in question were meant to go to her boyfriend. Claimant admitted that she did not explain this to the client immediately upon realizing the messages went to him, nor did she report what happened to management. Claimant did not think this would be an issue because the individual was not her client. Claimant did not immediately notify the client of the mistake because she believed she would see him again soon and would be able to explain in person. Claimant initially admitted she knew that texting clients for personal reasons was against the employer's policies, but later testified she was unaware of this policy until another employee told her about it around the time of the incident.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment due to job-related 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 Iowa Court of Appeals found substantial evidence of misconduct in testimony that the claimant worked slower than he was capable of working and would temporarily and briefly improve following oral reprimands. *Sellers v. Emp't Appeal Bd.*, 531 N.W.2d 645 (Iowa Ct. App. 1995). Misconduct must be "substantial" to warrant a denial of job insurance benefits. *Newman v. Iowa Dep't of Job Serv.*, 351 N.W.2d 806 (Iowa Ct. App. 1984). When based on carelessness, the carelessness must actually indicate a "wrongful intent" to be disqualifying in nature. *Id.* 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).

The decision in this case rest, at least in part, on the credibility of the parties. It is my duty, as the administrative law judge and 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, as the the finder of fact, 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. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996).

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 evidence you believe; 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*, 548 N.W.2d 162, 163 (Iowa App. 1996).

I assessed the credibility of the witnesses who testified during the hearing, considering the applicable factors listed above, and using my own common sense and experience. The claimant's testimony had multiple inconsistencies. Claimant's explanation for the behavior in question is doubtful given her lack of action upon allegedly learning that such personal text messages went to a client rather than to her boyfriend. I find the employer's version of events to be more credible than the claimant's.

The employer is entitled to establish reasonable work rules and expect employees to abide by them. Since others have also been warned for similar conduct, disparate application of the policy is not evident. The employer has presented substantial and credible evidence that claimant continued to cross professional boundaries with client even after having been warned. Even if claimant had not been previously warned, entering into a romantic relationship with a client not only violates the employer's policy, but possibly state law. Workers in the medical or dependent care profession, reasonably have a higher standard of care required in the performance of their job duties. The employer has a duty to protect the safety of its clients.

Claimant's romantic advances towards a client was contrary to the best interests of the employer and the security of the client. Given her position of authority over clients and the potential legal consequences for establishing such a relationship, claimant's attempts to begin a romantic relationship with a client is misconduct, even without prior warning. This is disqualifying misconduct.

DECISION:

The February 24, 2016, (reference 01) unemployment insurance decision is affirmed. The claimant was discharged from employment due to job-related misconduct. Benefits are withheld until such time as she has worked in and been paid wages for insured work equal to ten times her weekly benefit amount, provided she is otherwise eligible.

Nicole Merrill
Administrative Law Judge

Decision Dated and Mailed

nm/pjs